JURIES, MISCARRIAGES OF JUSTICE AND THE BILL C-75 REFORMS

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Gerald Stanley's use of five peremptory challenges to exclude all visibly Indigenous people from the jury that acquitted him of murder and manslaughter in the killing of a 22-year-old Cree man, Colten Boushie, was not the only flaw in jury selection that requires reform. This article suggests that the R v Stanley case is part of a long line of miscarriages of justice involving Indigenous people with no Indigenous representation on the jury. It argues that Bill C-75, enacted in 2019, was justified in abolishing peremptory challenges and that this reform does not violate the Charter. Unfortunately, however, Bill C-75 pursued only superficial reforms with respect to juror qualifications, and challenges for cause, and failed to provide for substantive equality challenges to panels of prospective jurors. Comprehensive jury reform is still necessary, including provincial reforms with respect to jury lists, local juries and volunteer jurors. Thought should also be given to reviving and adapting mixed juries that would require equal numbers of Indigenous people and non-Indigenous people in cases involving Indigenous people.

Le recours, par Gerald Stanley, à cinq récusations péremptoires afin d'exclure toutes les personnes visiblement autochtones du jury qui l'a acquitté des accusations de meurtre et d'homicide involontaire liées au décès de Colten Boushie, un Cri de 22 ans, n'était pas le seul défaut dans le processus de sélection des jurés qui nécessite une réforme. L'auteur de cet article suggère que l'affaire R v Stanley s'insère dans une longue lignée d'erreurs judiciaires impliquant des Autochtones jugés par des jurys dont était absente toute représentation autochtone. L'auteur y fait valoir que le projet de loi C-75, promulgué en 2019, abolissait à bon droit les récusations péremptoires et que cette réforme n'enfreint pas la Charte. Malheureusement, le projet de loi C-75 ne visait que des changements superficiels concernant les qualités des jurés et les récusations motivées. Il ne permet aucune récusation fondée

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sur l'égalité réelle concernant les groupes de jurés potentiels. Une réforme approfondie des jurys demeure de mise, y compris à l'échelle provinciale s'agissant des listes de jurés, des jurys locaux et des jurés bénévoles. Il faudrait en outre réfléchir à remettre en vigueur et à adapter des jurys mixtes dans lesquels une parité de membres autochtones et non autochtones serait requise dans des affaires impliquant des Autochtones.

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Introduction

As retired Supreme Court of Canada Justice Frank Iacobucci suggested in his 2013 report, the underrepresentation of Indigenous people on juries is merely a symptom of a greater disease: Canada's colonial relations with Indigenous peoples.[1] Justice Iacobucci urged governments to work with Indigenous peoples in a more respectful and nation-to-nation way to respond to systemic and colonial discrimination in the criminal justice system. In the meantime, however, he recognized that Indigenous peoples' underrepresentation on juries cannot be ignored. He recommended a range of jury specific reforms, including expanding the pool of prospective jurors, the use of volunteer jurors from Indigenous communities, prohibiting discriminatory uses of peremptory challenges and meaningful consultations with Indigenous peoples on a broad range of justice issues.[2]

Gerald Stanley's use of five peremptory challenges to exclude all visibly Indigenous persons from the jury that acquitted the white farmer on February 9, 2018, of both murder and manslaughter for killing Colten Boushie, a 22-year-old Cree man, was the most glaring injustice of the case. Yet, this article will suggest that the discriminatory use of peremptory challenges in the *R v Stanley* case was far from the only problem in how the *Stanley* jury was selected. There was no challenge to the likely underrepresentation of Indigenous people in the jury panel assembled in Battleford, Saskatchewan in January 2018. Any such challenge would likely

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1 The Supreme Court of Canada's decisions in *R v Ipeelee*, [2012] 1 SCR 433 at para 77 and *R v Barton*, 2019 SCC 33 at para 198 [*Barton SCC*], remain the only decisions where the Court itself has taken note of colonialism in terms of citing the landmark reports of the *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group Publishing, 1996), the *Truth and Reconciliation Commission Findings on Indian Residential Schools* (Ottawa: Truth and Reconciliation Commission of Canada, 2015) and *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (Ottawa: National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019). In *Barton SCC*, the Court recognized that "trials do not take place in a historical, cultural, or social vacuum. Indigenous persons have suffered a long history of colonialism, the effects of which continue to be felt. There is no denying that Indigenous peoples—and in particular Indigenous women, girls, and sex workers—have endured serious injustices, including high rates of sexual violence against women."

2 Ontario, Ministry of the Attorney General, *First Nations Representation on Ontario Juries* (Toronto: Ministry of the Attorney General, 2013) (The Honourable Frank Iacobucci) at 26, online: <www.attorneygeneral.jus.gov.on.ca> [*Iacobucci Report*].

have failed under current law, which is based on archaic requirements of proof of intentional discrimination. There were also no challenges for cause of prospective jurors. This shocking omission happened even in the face of intense and prejudicial pre-trial publicity that had resulted in then-Premier Brad Wall asking his fellow citizens to stop their "racist and hate-filled comments on social media."[3]

Within two months of Stanley's acquittal, the federal government added jury reform to its controversial omnibus Bill C-75, which became law in June 2019.[4] The late inclusion of jury reform in Bill C-75 may reflect that 59% of adults polled shortly after Stanley's acquittal agreed that jury selection procedures should be reformed.[5] This article will focus on the treatment of Indigenous accused and victim/complainants.[6] It will more briefly and tentatively consider the treatment of other groups who may be vulnerable to discrimination in the jury selection process and ultimately by jurors. Such an expanded focus is necessary to respond to the frequent refrain from Canadian courts that increased concerns about whether panels of prospective jurors and juries are more representative of Indigenous peoples will lead to a futile search for juries that are perfectly proportionate of Canadians' varied personal characteristics.[7] The focus of the Bill C-75 reforms was on increasing the representation of Indigenous people and other groups such as Black people who are overrepresented in the criminal justice system.

This article will argue that Bill C-75's abolition of peremptory challenges and the new powers it gives trial judges—to determine whether jurors are impartial and to stand aside jurors in order to maintain public confidence in the administration of justice—are justified, but that more comprehensive jury reform is still required. Substantive-equality-based challenges that examine the results, and not simply the process used by the provinces, to assemble panels of prospective jurors should be the

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3 Joe Friesen, "Trial begins in the death of Colten Boushie, a killing that exposed a racial divide in Saskatchewan" *The Globe and Mail* (29 January 2018) A1; see also: <www.theglobeandmail.com/news/>. The full text of Premier Wall's posting is found in Kent Roach, *Canadian Justice Indigenous Injustice: The Gerald Stanley and Colten Boushie Case* (Montreal: McGill-Queen's University Press, 2019) at 77.

4 An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, SC 2019, c 25.

5 "The Colten Boushie Case" (26 Feb 2018), online (pdf): *Angus Reid Institute* <http://angusreid.org/boushie-verdict/>.

6 For arguments about the multiple justifications, all stemming from colonialism, see Brian Manarin, *Canadian Indigenous Peoples and Criminal Jury Trials: Remediating Inequities* (Toronto: LexisNexis Canada, 2019).

7 *R v Kokopenace*, 2015 SCC 28 at para 39, *per* Moldaver J; at para 155, *per* Karakatsansis J; at para 227, *per* Cromwell J (dissenting) [*Kokopenace*].

subject of additional *Criminal Code* reform. Enhanced questioning at challenges for cause that can better reveal racist stereotypes is especially necessary. Such additional questions can assist judges in exercising their new responsibilities under Bill C-75 in determining whether jurors are impartial.

With the exception of its abolition of peremptory challenges, this paper will argue that Bill C-75 enacted likely ineffective reforms with respect to increasing Indigenous representation on panels of prospective jurors and ensuring that jurors are effectively screened for prejudice that could discriminate against Indigenous accused or complainants/victims of crime. To be sure, effective reforms to increase Indigenous representation on panels of prospective jurors will be difficult. It will require provincial, territorial, and federal action, as well as respectful engagement and better relations with Indigenous peoples, even though these relationships have been harmed by the *Stanley* case and other similar miscarriages of justice.

Outline

Part 1 of this article will suggest that the *Stanley* case is part of a long line of miscarriages of justice in Canada that Indigenous people have suffered at the hands of juries with no Indigenous representation. This part will be uncomfortable for many judges and lawyers who are loathe to criticize citizens who are conscripted to perform the difficult task of being triers of fact in our most serious criminal cases, and who are legally prohibited from justifying or explaining their verdicts. Nevertheless, the legal community should confront the reality that our jury system is not immune to colonialism and discrimination.

Part 2 of this article will examine legal barriers to increased Indigenous representation on juries. Although some may see Saskatchewan as the villain in the *Stanley* case, that province has been more attentive to these issues than many other provinces. Saskatchewan takes its list of prospective jurors from provincial health care information, which is more inclusive of Indigenous people than voting or property tax lists that are still used in some provinces. Saskatchewan's *The Jury Act, 1998*[8] is more forgiving than Bill C-75 (though still superseded by federal paramountcy in criminal trials) because it only excludes citizens from being jurors if they are actually imprisoned. Bill C-75 tinkered with permanent disqualifications from jury service in section 638 of the *Criminal Code* by excluding all people who have been sentenced to two years imprisonment

[8] SS 1998, c J-4.2, s 6(h).

or more and who have not received a pardon or a record suspension, as opposed to the previous one-year imprisonment cut-off.[9]

Saskatchewan summonsed 750 people to serve on the *Stanley* jury, but the trial transcript reveals that in reality, only 178 people came to Battleford on January 29, 2018. Those who were summonsed but did not attend likely did so for a variety of reasons such as the distance that they had to travel to Battleford, language issues, poverty, child-care expenses, and alienation from the criminal justice system. All of these issues disproportionately affect Indigenous people.[10]

My review of the transcript and media reports of jury selection suggests that at least 20 of the 178 jurors who were available to serve on the *Stanley* jury may have been Indigenous.[11] Although this underrepresented the Indigenous adult population in the district (30%),[12] a challenge to the underrepresentation of Indigenous people would have certainly failed under the Supreme Court's majority decision in *R. v. Kokopenace*.[13] Bill C-75 was a missed opportunity for federal leadership on reconciliation by amending Section 629 of the *Criminal Code* to allow the representativeness of panels of prospective jurors to be challenged on results-oriented substantive equality grounds as opposed to intentional exclusion and discrimination. This would have placed pressure on the provinces and territories to use more inclusive jury lists and to make accommodations for Indigenous jurors. A coroner's jury composed of three Indigenous and three non-Indigenous people could still be held in Saskatchewan[14] to examine ways to prevent future deaths, such as Colten Boushie's, but such

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9 *Criminal Code*, RSC 1985, c C-46, s 638(1)(c), as amended by SC 2019, c 25, s 271 [*Criminal Code*].

10 Smaller judicial districts or local trials may facilitate more participation of Indigenous peoples who live in the north or in remote regions. The Supreme Court of Canada held that the need to facilitate minority representation was a justified reason for allowing electoral districts in the northern part of Saskatchewan that diverged up to 50% from equal population standards. See *Reference re Provincial Electoral Boundaries*, [1991] 2 SCR 158 at paras 188–90. For arguments that such an approach was consistent with substantive equality values that focuses of the effects of state conduct on groups such as Indigenous peoples and that accepts affirmative action to improve the conditions of disadvantaged groups, see Kent Roach, "Chartering the Electoral Map into the Future" in John Courtney, Peter Mackinnon and David Smith, eds, *Drawing Boundaries: Legislatures, Court, and Electoral Values* (Saskatoon: Fifth House, 1992) at 207–08.

11 Roach, *supra* note 3 at 96–97.

12 Christian A Miller, "Peremptory Challenges During Jury Selection as Institutional Racism: An Investigation Within the Context of the Gerald Stanley Trial" (2019) 67 Crim LQ 215 at 228.

13 *Supra* note 7.

14 *The Coroner's Act, 1999*, SS 1999, c C-38, s 29(3). No such inquest or public inquiry has, however, been called and the representative of the Attorney General of

juries are not available in criminal trials. Although mixed juries would be radical reform, they have a long history in the English common law in cases involving non-citizens. In addition, mixed juries of equal numbers of Anglophones and Francophones were used in Canadian criminal law in Quebec and Manitoba.[15] Alas, a Saskatchewan court rejected an argument that mixed juries of six Indigenous and six non-Indigenous people were required under the mutual aid and assistance clauses of the numbered Treaties, something that would have constitutionalized their existence.[16] Mixed juries, or judicial use of stand asides to increase the representativeness of juries, should not be viewed as invites for partiality and identity politics given the availability of challenges for cause and the need for unanimous jury verdicts.

Part 3 of this article will examine and defend Bill C-75's controversial reform of abolishing peremptory challenges. Some have criticized this proposed reform as a knee-jerk reaction to the acquittal in the *Stanley* case, but it belatedly implements the 1991 recommendations of the Manitoba Aboriginal Justice Inquiry.[17] At the same time, the objections that defence lawyers have raised that abolition of peremptory challenges could lead to less diverse juries, and perhaps jurors who are not competent or may be partial, should be taken seriously. In my view, such concerns can best be accommodated not by the retention of peremptory challenges—even combined with American-style attempts to control their discriminatory use—but by more direct reforms to ensure representative juries. It will also be suggested that the Ontario Court of Appeal was correct to conclude that the abolition of peremptory challenges did not violate the *Charter* rights

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Saskatchewan defended the justice system when announcing the decision not to appeal the *Stanley* acquittal. See Roach, *supra* note 3 at 189–91.

15 *Revised Statutes of Canada, Proclaimed and Published under the Authority of the Act 49 Vict., Chap. 4, A.D. 1886* (Ottawa: Brown Chamberlin, Law Printer to the Queen, 1886), ss 166–67. Peremptory challenges could not be used to negate the character of the mixed jury. Separate lists of Anglophone and Francophone juries were kept in Quebec and Manitoba with a Quebec court explaining in 1899 that, "like in the case of the alien, where the privilege existed on account of a personal characteristic … so in the Province of Quebec the right to a mixed jury depends upon a characteristic of the accused person, and that is the fact that the language which he habitually speaks is either English or French." See *R v Yancey*, 1899 CanLII 95 at 323 (QC CQ). It will be suggested *infra* that attention to section 15 of the *Charter* and the dangers of systemic discrimination could justify extending the concern in some cases to complainants.

16 *R v Cyr*, 2014 SKQB 61 [*Cyr*].

17 Manitoba Aboriginal Justice Inquiry, *The Justice System and Aboriginal People* (Winnipeg: Queens Printer, 1991) at 385 [Manitoba Aboriginal Justice Inquiry]. See also Debwewin Jury Review Implementation Committee, *Final Report* (Toronto: Ministry of Attorney General, 2018) [Debwewin *Final Report*] at recommendation 15, where all of the committee except one member recommended repeal of peremptory challenges.

of the accused but that it, unfortunately, failed to relate this abolition to Parliament's objective of addressing discrimination in jury selection.[18]

Part 4 of this article will examine the need to reform and expand the challenge for cause process. In the *Stanley* case, the jury was selected in one day and there was no questioning of prospective jurors as part of a challenge for cause process to determine whether they could be impartial in light of the pre-trial and social media publicity that caused then Saskatchewan Premier Brad Wall to observe that "there have been racist and hate-filled comments on social media and other forums. This must stop."[19] A single question about whether prospective jurors could be impartial because the victim was Indigenous was asked in the Peter Khill and Jon Styres case in Hamilton, Ontario. This was a case with similar racial dynamics and polarization as the *Stanley* case that also resulted in a white man being acquitted of both murder and manslaughter of an Indigenous man.[20] The question asked in the *Khill* case was not unprecedented. Similar questions about racial bias towards the accused have been allowed in Ontario since 1993,[21] and allowed with respect to Indigenous accused since the Supreme Court's 1998 decision in *R v Williams*.[22] Questions about racial prejudice towards Indigenous victims have also been allowed in the past, including in Saskatchewan.[23]

At the same time, the single and blunt, "Are you a racist?" question that invites simplistic yes or no answers may now fall into the category of a superficial and ineffective reform. Reforms informed by recent research on implicit bias are necessary to reveal deep-seated racism and racist

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18 *R v Chouhan*, 2020 ONCA 40, leave to appeal to SCC granted, 39062 (07 May 2020).

19 Friesen, *supra* note 3. The full text of Premier Wall's posting is found in Roach *Canadian Justice Indigenous Injustice* supra at 77.

20 *R. v. Khill* [SCJ decision *unpublished*]. Self-defence was successfully argued in the *Khill* case, but the acquittal was appealed to the Ontario Court of Appeal by the Crown, see *R v Khill*, 2020 ONCA 151, leave to appeal to SCC granted, 39112 (06 August 2020). The appeal was allowed on the basis that the jury should have been instructed to consider the accused's role in the incident but did not err in instructing the jury to consider the accused's military experience when determining whether his actions were reasonable. For an argument that Stanley made a phantom self-defence claim based on rural crime concerns and racial fear even though the *Stanley* jury was never instructed about self-defence see Roach *Canadian Justice, Indigenous Injustice* supra at 198–205.

21 *R v Parks*, (1993) 84 CCC (3d) 353 (Ont CA) [*Parks*].

22 [1998] 1 SCR 1128, 159 DLR (4th) 493 [*Williams*]. I represented Aboriginal Legal Services of Toronto in this case that intervened in support of such a question about racial bias.

23 *R v Munson*, 2001 SKQB 410, aff'd 2003 SKCA 28 [*Munson*]. See also *R v Rogers*, (2000) 38 CR (5th) 331 at para 6 (Ont SC).

stereotypes.[24] If trial judges are not willing to reconsider the primary weight they have placed on efficiency and juror privacy, such reforms may have to come from Parliament. Hopefully, however, trial judges will find, under Bill C-75, that they need more information from prospective jurors to properly exercise their new responsibilities to determine if prospective jurors can be impartial,[25] and to stand aside jurors when necessary to increase public confidence in the administration of justice.[26]

In short, comprehensive reform of Canadian jury selection is still necessary even if it is not sufficient to address colonial and systemic discrimination. With the important exception of the abolition of peremptory challenges, Bill C-75 falls short. More reform, including meaningful engagement with Indigenous peoples on a wide range of justice issues, is still necessary.

1. Juries and Miscarriages of Justice

To comment on the racial composition of a jury is a sensitive subject. The Saskatchewan Court of Appeal decided that a trial judge was justified in removing an Indigenous accused from the courtroom because he was going to complain that he was being tried by "an all-white jury": "To suggest the jury was tainted by bias, simply by virtue of racial composition, was a direct challenge to the legitimacy of the court as constituted."[27] This statement may be true, but it disregards the controversy that has surrounded the verdicts of all-white juries in cases with an Indigenous accused or victims.

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[24] See Regina Schuller, Veronica Kazoleas & Kerry Kawakami, "The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom" (2009) 33 Law & Hum Behav 320, finding that the one blunt question was not effective in screening for racial bias but finding more open-ended or reflective questions made people more aware about how racial bias may affect their judgment). See also Mike Morrison, Amanda DeVaul-Fetters & Betram Gawronski, "Stacking the Deck: Legal Professionals' Peremptory Challenges Reflect Jurors' Levels of Implicit Racial Bias" (2016) 42 Personality and Social Psychology Bulletin 1129; Justin Levinson, "Forgotten Racial Equality: Implicit Bias, Decisionmaking and Misremembering" (2007) 57 Duke LJ 345; Jennifer Hunt, "Race, Ethnicity and Culture in Jury Decision-Making" (2015) 11 Annual Rev L & Soc Science 269.

[25] *Criminal Code*, *supra* note 9, s 640, as amended by SC 2019, c 25, s 272.

[26] *Ibid*, s 633, as amended by SC 2019, c 25, s 629.

[27] *R v Bitternose*, 2009 SKCA 54 at para 69. On the widespread acceptance of all-white juries in cases dealing with Indigenous accused in Australia, Canada and the United States, see Thalia Anthony and Craig Longman, "Blinded by the White: A Comparative Analysis of Jury Challenges on Racial Grounds" (2017) 6 Intl J Crime, Justice & Soc Democracy 25.

A) Wrongful Convictions By All-White Juries In 1885

Consider the trials of Louis Riel and various First Nations and Métis men in Saskatchewan after the 1885 uprising, where almost 5,000 Canadian troops defeated a provisional government formed by the Métis. The jurors who convicted Riel of treason but acquitted two white men charged with assisting Riel were composed of six white Protestant men. Father André, who observed the trials, complained in a letter to a colleague that the jurors were "all Protestants, enemies of the Métis and the Indians, against whom they hold bitter prejudices."[28]

Louis Riel might have been eligible to have a jury of six Francophones and six Anglophones had he had been tried in Manitoba, as opposed to Saskatchewan.[29] As an American citizen, he might also have been eligible for a mixed jury composed of equal numbers of British and American citizens.[30] Political scientist Thomas Flanagan has questioned whether a mixed jury would have made a difference, arguing: "those who criticize the composition of the jury seem to assume that a fair trial is impossible unless the jurors are some microcosm of the larger population. This principle is highly dubious and has never been enshrined in Canadian law, except for the existence of bilingual juries in Quebec and Manitoba."[31] His comments deny the long usage of mixed juries from 1189 to 1870 in cases involving non-citizens in the English common law.[32] Mixed juries of six Indigenous and six non-Indigenous persons were also used in the 18th and 19th centuries in some North American colonies, New Zealand and Hawaii.[33] Professor Flanagan's approach also avoids the question of whether a differently constituted jury might have increased public acceptance of the verdict and have decreased the controversy over the *Riel* trial that continues to this day.

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28 As quoted in Bob Beal & Rod Macleod, *Prairie Fire* (Edmonton: Hurtig Publishers, 1984) at 321.

29 RSC 1886, c 174, s 167.

30 The courts upheld Parliamentary supremacy in holding that Riel could be tried by a six-person jury. *R v Riel*, [1885] UKPC 3.

31 Thomas Flanagan & Neil Watson, "The Riel Trial Revisited: Criminal Procedure and Law in 1885" (1981) 34 Saskatchewan History 57 at 69.

32 Marianne Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law and Knowledge* (Chicago: University of Chicago Press, 1994); Deborah Ramirez, "The Mixed Jury and the Ancient Custom of Trial by Jury de Mediete Linguae" (1994) 74 BUL Rev 777. In 1862, New Zealand abolished the mixed jury of equal numbers of Māori and European jurors in cases involving Māori accused.

33 Katherine Hermes, "Jurisdiction in the Colonial Northeast: Algonquin, English and French Governance" (1999) 34 Am J Leg Hist 52; Michael Powles, "A Legal History of New Zealand Jury Service" (1999) 29 VUWLR 283; Samuel King, "The American Courts and the Annexation of Hawaii" (1989) 2 Western Leg Hist 1.

The Sioux Chief, White Cap, was the only Indigenous person acquitted in the 1885 trials. This occurred only after his counsel urged the jury to acquit to demonstrate "that we really are superior to the unhappy race to which he belongs."[34] An appeal to racism also appears to have played a role in the acquittal of Tom Scott, a white man charged with assisting Riel. His defence lawyer argued that Scott was subject to "political prosecution" because the government feared it "must convict a white man or we are gone at the next elections." The gallery cheered Scott's acquittal.[35] The 1885 cases, including the conviction and hanging of the Battleford Eight,[36] should not be dismissed as ancient history to the *Stanley* case.

B) Donald Marshall's Wrongful Conviction by an All-White Jury

Even if the 1885 cases are dismissed as "ancient history", one need look no further than the wrongful conviction of Donald Marshall Jr. in 1971, when the late Mi'kmaq leader was only 17 years old. The Royal Commission on the Donald Marshall Jr. Prosecution found that no Indigenous person had ever sat on a jury in Nova Scotia in 1971.[37] Due to the restrictions on jurors disclosing their deliberations, *per* section 649 of the *Criminal Code* (except in obstruction of justice investigations), the Commission did not attempt to question any of the *Marshall* jurors, even though one of them explained the verdict to a reporter as follows: "With one redskin and one Negro involved, it was like two dogs in the field—you knew one of them was going to kill another. I would expect more from a white person. We are more civilized."[38] At the same time, the Commission concluded in words that could well apply to the *Stanley* case: "Native concerns are not unreasonable: Would a White person facing a Native prosecutor, defence

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34 *R v White Cap* in *Trials in Connection with the North-west Rebellion* (Ottawa: Maclean & Roger, 1886) at 27.

35 Beal & Macleod, *supra* note 28 at 321.

36 For additional discussion of these miscarriages of justice, see Roach, *supra* note 3 at 29–35, from which this part is drawn.

37 *Royal Commission on the Donald Marshall Jr. Prosecution* (Halifax: Queens Printer, 1989) at p. 176 [*Commission*].

38 Alan Story, "The tangled trial of Donald Marshall: Racial prejudice and perjury helped put him behind bars" Toronto Star 9 June 1986 A8. On the social context in Sydney and prejudice towards Indigenous persons see James (Sakej) Youngblood Henderson "The Marshall Inquiry: A View of Legal Consciousness" in Joy Manette ed *Elusive Justice* (Halifax: Fernwood Press, 1992) at 42. The Supreme Court in *R v Pan; R v Sawyer*, 2001 SCC 42 at para 1 held that it would not inquire when a juror complained about that another juror had used racial slurs during deliberations. For a contrary approach by the US Supreme Court see *Peña-Rodríguez v Colorado*, 137 S Ct 855 (2017). But for a case ordering a new trial after a juror made homophobic remarks during radio interviews on the basis of a reasonable apprehension of bias, see *R v Dowholis*, 2016 ONCA 801 [*Dowholis*].

lawyer, judge and jury, have some apprehension whether he would get as fair a hearing as if everyone were White?"[39]

Despite these questions, Canadian courts have continued to hold that Indigenous accused and those from other disadvantaged groups that are over-represented in the criminal justice system do not have a right under sections 11(d), 11(f) or 15 of the *Charter* to proportionate representation on a jury panel or array.[40]

C) Miscarriages of Justice Involving Indigenous Victims and No Indigenous Jurors

Much of our thinking about miscarriages of justice and representative juries have focused on unfairness to the accused. In Canada, only the accused has a right to appeal on the basis of a miscarriage of justice.[41] Broader definitions of miscarriages of justice such as Clive Walker's leading definition[42] could include so-called "wrongful acquittals" if they stemmed from stereotypes and prejudice that had the effect of denying Indigenous crime victims, including Indigenous women, the equal protection of the law.

The Manitoba Aboriginal Justice Inquiry found that two white accused used six peremptory challenges to exclude visibly Indigenous people in a racially-charged case arising from the murder of a young Cree woman, Helen Betty Osborne.[43] The inquiry concluded that the "exclusion of

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39 *Commission*, *supra* note 37 at 177. The Commission did, however, seem aware of the potential for discriminatory use of peremptory challenges when it stated that it urged "those involved in selecting juries for trials involving Native people—both prosecutors and defence counsel—not to automatically exclude Natives simply because they are of the same race as the accused", *ibid*.

40 *Kokopenace*, supra note 7; *Cyr*, *supra* note 16; *R v Hoffman*, 2019 ONSC 2462 [*Hoffman*].

41 *Criminal Code*, *supra* note 9, s 686. But for arguments that the Crown could be given a right to appeal on this basis without necessarily undermining the jury's ability to decide whether a reasonable doubt existed about guilt, see Roach, *supra* note 3 at 235-237.

42 Clive Walker, "Introduction" in Walker and Starmer, eds, *Justice in Error* (London: Blackstone Press, 1993) at 4, defining miscarriages of justice to include "whenever individuals are treated by the State in breach of their rights; whenever individuals are treated adversely by the State to a disproportionate extent in comparison with the need to protect the rights of others; or whenever the rights of others are not properly defined or vindicated by State action against wrongdoers."

43 Manitoba, Manitoba Aboriginal Justice Inquiry, *The Deaths of Helen Betty Osborne and John Joseph Harper* (Winnipeg: Queens Printer, 1991) at ch 8. It identified that 18 of 105 prospective jurors in the case were Aboriginal and that Aboriginal people had been historically not been jurors in part because they did not receive the vote in Manitoba until 1952.

Aboriginal people from the jury fuelled public concern that racism might have played some part in the trial … Whether it is the accused or the victim who is Aboriginal, the perception of a fair trial will be enhanced if Aboriginal persons are properly represented on juries."[44]

There have been concerns that all-white juries in Saskatchewan may have discriminated against Indigenous victims in a series of cases before *Stanley*. These cases include a 1966 acquittal of three men of manslaughter for killing Allan Thomas, a Saulteaux man in a village north of Battleford. This case caused Peter Gzowski to write a provocative article titled, "This is our Alabama". The trial judge in the case stated, after the jury's acquittal, that he hoped "nothing like this ever happens in this part of the province again" and the verdict should not be taken as "an approval of racial prejudice of any kind."[45]

More recent Saskatchewan cases include decisions by all-white juries in 1996 to convict two white men of manslaughter, as opposed to murder, in the death of Saulteaux woman, Pamela George; the 2001 acquittal of a white man in the death of William Kakakaway of the White Bear First Nation; and the 2003 acquittal of two of three white men charged for the sexual assault of a 12-year-old Indigenous girl in Tisdale.[46] Recently, Bradley Barton was acquitted of killing Cree woman Cindy Gladue, and Cree woman Connie Oakes was wrongfully convicted of murder by Alberta juries with no visible Indigenous representation.[47] Even if the existence of a miscarriage of justice has not been conclusively established in each of these cases, public confidence in the verdicts was adversely affected by the lack of visible Indigenous representation on the jury. It is also relevant that jury trials in Canada are much rarer than in Australia or the United States. In serious cases not involving murder, an accused can elect a jury

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44 *Ibid* at 87–88.

45 Roach, *supra* note 3 at 58–59. For related proceedings affirming that nine men originally charged with non-capital murder could not be compelled to testify at a coroner's inquest into Thomas's death see *Batary v. Attorney General of Saskatchewan*, [1965] SCR 465.

46 *Ibid* at 62–64. Like wrongful convictions, any list of possible miscarriages of justice that resulted in acquittals will be incomplete. This is especially true given that the Crown cannot appeal convictions on the grounds of a miscarriage of justice. *Ibid* at 232–37.

47 The Supreme Court has ordered a new trial on manslaughter but has also given effect to the jury's acquittal of Barton on murder charges. See *Barton SCC*, *supra* note 1. On the absence of Indigenous representation on these juries, see Claire Theobald, "Lack of Indigenous jurors undermine faith in Canadian justice system", Toronto Star (22 May 2018), online: <www.thestar.com/>. See also Karen Busby, "Could Cindy Gladue consent to what killed her?", *Winnipeg Free Press* (8 April 2015), online: <www.winnipegfreepress.com/opinion/>.

trial where they can attempt to place an Indigenous complainant or victim on trial. People such as Donald Marshall Jr. and Connie Oakes—who were both charged with murders that they did not commit—are *required* to have a trial by jury unless the Crown consents to a trial by judge alone.[48]

D) Summary

Indigenous underrepresentation on juries needs to be understood in light of the larger context of systemic and colonial discrimination against Indigenous people in the justice system. Indigenous people are dramatically overrepresented as offenders and victims of crime, especially in more serious cases such as homicide when jury trials are more likely to be used.[49] Victor Williams, the Indigenous accused in the Supreme Court's landmark 1998 case of *Williams*—which established the right to question prospective jurors for anti-Indigenous bias—eloquently summarized his case on the holistic basis that his lawyers explained, that it was very unlikely that any Indigenous person would be on his jury, but he hoped that "the 12 people that try me are not Indian haters."[50] The question about racist bias was not asked of the jurors in the *Stanley* case despite widespread evidence of racist bias in social media commentary surrounding the case. In addition, the all-white jury was given no specific instructions about the danger of racist stereotypes with respect to Indigenous victims and witnesses.[51] Although some may view any criticism of jury verdicts as

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48 *Supra* note 9, ss 473(1). On Indigenous peoples and wrongful convictions, see Kent Roach, "The Wrongful Conviction of Indigenous People in Australia and Canada" (2015) 17 Flinders LJ 203; Malini Vijaykumar "A Crisis of Conscience: Miscarriages of Justice and Indigenous Defendants in Canada" (2018) 51 UBC Law Rev 161.

49 In 2017, one quarter of homicide victims were Indigenous and 38% of people accused of homicide as reported by the police were Indigenous. Sara Beattie et al, *Homicide in Canada 2017* (Ottawa: Statistics Canada, 2018), 13–14.

50 *Williams*, *supra* note 22 at para 3.

51 The trial judge in the *Stanley* case gave no specific instructions to the jury about the danger of engaging in stereotypes towards Indigenous victims, as recommended by the Alberta Court of Appeal in *R v Barton*, 2017 ABCA 216 at para 162 [*Barton CA*]. He issued only generic charges to the jury that told them only to be influenced by the evidence and not to "be influenced by sympathy for or prejudice against everyone" and "not on passion or sympathy or prejudice against the accused, the Crown, or anyone else connected with the case. In addition, you must not be influenced by public opinion. Your duty as jurors is to assess evidence impartially": *R v Stanley*, Trial Transcripts at 85 and 879 (respectively). The Supreme Court of Canada has subsequently endorsed more specific warnings and stated in *Barton SCC*, *supra* note 1 at para 197:

> Trial judges, as gatekeepers, play an important role in keeping biases, prejudices, and stereotypes out of the courtroom. In this regard, one of the main tools trial judges have at their disposal is the ability to provide instructions to the jury. Bearing in mind this Court's admonition that "it cannot be assumed that judicial directions to act impartially will always effectively counter racial

improper, the justice system risks much if it continues to ignore the long and continuing legacy of miscarriages of justice involving Indigenous people as accused or victims.

2. The Underrepresentation of Indigenous People on Panels of Prospective Jurors

Addressing Indigenous underrepresentation on panels of prospective jurors is complex and difficult. Much of the urgency that motivated the Iacobucci Report—which responded to lower courts holding that Indigenous underrepresentation on coroner's and criminal juries in Northern Ontario violated the *Charter*[52]—has unfortunately been calmed by the Supreme Court's majority decision in *Kokopenace*. This decision has been ably criticized elsewhere,[53] but the relevant point for better understanding the *Stanley* case, and future jury reform efforts, is that Justice Moldaver rejected a results-based approach of representativeness in favour of one that requires the state to only make reasonable efforts to achieve representativeness and to only avoid the *obvious* wrongs of deliberate exclusion or the appearance of partiality in selecting a jury.[54] He stressed that jury selection should not be used as a means to remedy systemic wrongs and problems. The Court upheld a manslaughter conviction even though only 8 of 175 people on a Kenora jury panel lived on reserve, in a judicial district where on-reserve residents constitute about 30% of the adult population.[55] The Court also held that Mr. Kokopenace, an Indigenous man and the accused, did not have standing to raise equality rights claims on behalf of prospective Indigenous jurors,

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> prejudice" (*Williams*, at para 21), such instructions can in my view play a role in exposing biases, prejudices, and stereotypes and encouraging jurors to discharge their duties fairly and impartially. In particular, a carefully crafted instruction can expose biases, prejudices, and stereotypes that lurk beneath the surface, thereby allowing all justice system participants to address them head-on—openly, honestly, and without fear.

52 See e.g. *Nishnawbe Aski Nation v Eden*, 2009 CanLII 30144 (ON SCDC); *Pierre v McRae*, 2011 ONCA 18; *R v Kokopenace*, 2013 ONCA 389, rev'd [2015] 2 SCR 398 [*Kokopenace CA*]. I represented the David Asper Centre for Constitutional Rights in its intervention arguing that Indigenous underrepresentation violated section 15 of the Charter.

53 Vanessa MacDonnell, "The Right to a Representative Jury: Beyond *Kokopenace*" (2017) 64 CLQ 334.

54 *Kokopenace*, *supra* note 7 at para 50 [emphasis added].

55 *Ibid* at 138. The majority described the percentage as between 21.5% and 31.8%, whereas the Court of Appeal estimated the population as between 30.2% to 36.8%: see *Kokopenace CA*, supra note 52 at n 4. These varying estimates are themselves indications of the need for better statistics in this area.

and that *R v Gladue*[56] and the duty to consult did not apply to Ontario's jury selection procedure, which was at the time somewhat archaic in its reliance on property tax rolls as supplemented by *ad hoc* lists of Indigenous persons on reserves. Justice Moldaver's majority judgment shows how little has changed since Professor Cynthia Petersen concluded in 1993 that Canadian jury selection was resistant to substantive equality because of its focus on results over the equity of the process. As Professor Petersen noted, the Canadian approach failed to respect the equality rights of both accused people and complainants from disadvantaged groups.[57] It also confirmed what Don Worme argued in 1994: "[T]here is nothing so unequal as the equal treatment of unequals."[58] The Supreme Court's 2015 rejection of a results-based, substantive equality standard for jury selection is regrettable and regressive, but alas, not an aberration. The courts have been cautious and defensive when it comes to challenges to the jury selection process.

In 2014, a Saskatchewan court rejected a *Charter* challenge to the underrepresentation of Indigenous people on a Regina jury panel. It stressed that Saskatchewan's use of a health card database was more inclusive of Indigenous people than Ontario's system (as set out by the Ontario Court of Appeal in *Kokopenace*). A person who had served as a sheriff summonsing jurors in the Regina district since 1996 "was unable to recall any trial where a First Nations person sat on the jury in circumstances where the accused was also First Nations."[59] Such a shocking result—one that recalls the trials of First Nations and Métis accused in 1885 in Regina before all-white juries, and foreshadowed the all-white jury in the *Stanley* case—likely reflected Indigenous underrepresentation on the panel of prospective jurors and perhaps prosecutorial use of peremptory challenges. It seemed to have little effect on the judge perhaps because of the courts' constant rejection of the need for any proportionate representation on a jury panel or an actual 12-person jury. The judge also stressed that Mr. Cyr had presented no statistical evidence that Indigenous people were less likely to receive jury notices, even though the evidence showed the notices were sent to the post offices in the town or village nearest to a reserve and despite the government's position to be better able to collect

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56 [1999] 1 SCR 688, 171 DLR (4th) 385. I represented Aboriginal Legal Services of Toronto in this case.

57 Cynthia Petersen, "Institutionalized Racism: The Need for Reform of the Jury Selection Process" (1993) 38 McGill LJ 147.

58 Don Worme, "First Nations Perspective on Self-Government" in Gosse, Youngblood Henderson and Carter, eds, *Continuing Poundmaker's and Riel's Quest* (Saskatoon: Purich Press, 1994).

59 *Cyr*, supra note 16 at 15.

such information to put before the court.[60] As the Supreme Court would later affirm in *Kokopenace*, so long as the state made "reasonable efforts" to call Indigenous peoples for jury service, gross underrepresentation of Indigenous people on panels of prospective jurors and on the actual jury did not violate the *Charter*.

A) The Need to Reform Section 629 of the Criminal Code to Reflect Substantive Equality

Since it was first enacted in 1892, section 629 of the *Criminal Code* only allows the accused or prosecutor to challenge jury panels on the basis of "partiality, fraud or wilful misconduct." Reported challenges have failed in the absence of evidence of intentional discrimination.[61] Ironically, one of the few that have succeeded involved an attempt by an Alberta sheriff to ensure that reserve residents were included in a panel of prospective jurors in a case where an Indigenous person was charged and convicted of firing warning shots during a protest of the construction of the Oldman Dam, built on Indigenous land. In language that is unfortunately typical of the way judges have rejected challenges of Indigenous underrepresentation, the judge warned that affirmative action to include Indigenous people on the panel of prospective jurors would lead to the "demise of the jury system" and demands that "numerous distinct segments of Canadian society" be represented.[62] All of the judges of the Supreme Court used the same slippery slope "where does it all stop?" approach in *Kokopenace*.[63] Such an approach downplays the distinct experience of Indigenous people and modern approaches to substantive equality that focus on enumerated and similarly analogous groups of disadvantaged people. It is true that juries cannot be perfectly proportionate of all of a citizenry's diverse personal characteristics, but it is difficult to understand why judges constantly use the straw person of perfectly mirrored proportionality when it comes to juries, yet have effectively managed similar line drawing exercises with respect to analogous groups under section 15 of the *Charter*.[64] One factor may be that jurors act as judges. Judges may be sensitive to

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60 *Ibid* at 177. This also raises the issue of state responsibility for collecting and publishing data about the criminal justice system including race-based data.

61 Richard Jochelson et al, "Revisiting Representativeness in the Manitoba Jury" (2015) 37 Man LJ 365; Mark Israel, "The Underrepresentation of Aboriginal People on Canadian Jury Panels" (2003) 25 U Denver L & Policy 37.

62 *R v Born With a Tooth,* 1993 CanLII 7066 at 12–14, 10 Alta LR (3d) 1.

63 *Kokopenace*, supra note 7 at para 39, *per* Moldaver J; at para 155, *per* Karakatsansis J; at para 227, *per* Cromwell J (dissenting).

64 *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1 [*Andrews*]; *R v Turpin*, [1989] 1 SCR 1296, 34 OAC 115; *Corbiere v Canada*, [1999] 2 SCR 203, 173 DLR (4th) 1; *R v Malmo-Levine*, 2003 SCC 74 at para 184–85,

the underrepresentation of Indigenous people both on juries and on the Bench.

Judicial reluctance in this area, however, should not affect Parliament's ability to be selective when deciding what steps to take to ameliorate the position of disadvantaged groups.[65] Other parts of Bill C-75 single out both Indigenous people and other groups that are overrepresented in the criminal justice system.[66] I made a proposal to the House of Commons Justice Committee, endorsed by Aboriginal Legal Services and the Canadian Civil Liberties Association, that the reference in section 629 of the *Criminal Code* to challenging jury panels "on the ground of partiality, fraud or wilful misconduct" be replaced with the words "on the grounds of significant underrepresentation of Aboriginal people or other disadvantaged groups that are overrepresented in the criminal justice system."[67] No doubt the wording of this proposal could have been improved upon, but it is still regrettable that Parliament did not amend section 629 and exercise its ability to enact laws that required more representative jury panels than the *Charter minimum* as required by the majority in *Kokopenace*.

Even if the prosecutor in the *Stanley* case had raised concerns about possible underrepresentation of Indigenous people on the panel of prospective jurors, his challenge would have been dismissed. A more modern *Criminal Code* standard, however—one rooted in substantive equality, and patterned after the dissent in *Kokopenace* that focuses on the resulting jury panel's make-up and not just its selection—could require jury panels to be more representative of Indigenous people and perhaps other groups that experience systemic discrimination in the criminal justice system. A more robust, substantive equality standard in federal legislation would place due pressure on the provinces to develop better policies to ensure more representative jury panels. These policies could include outreach in terms of education about juries, providing travel assistance and childcare support for Indigenous people and other

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65 *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37.

66 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*, 1st Sess, 42nd Parl, 2019, s 210, amending s 493.2 of the *Criminal Code* in reference to accused who "is overrepresented in the criminal justice system and that is disadvantaged[.]"

67 Kent Roach, "Brief to the House of Commons Justice and Human Rights Committee" (2018), online (pdf): <www.ourcommons.ca/>. See also "Brief to the House of Commons Justice and Human Rights Committee" (2018), online (pdf): *Aboriginal Legal Services* <www.ourcommons.ca/>; "Brief to the House of Commons Justice and Human Rights Committee" (2018), online (pdf): *Canadian Civil Liberties Association* <www.ourcommons.ca/>.

underrepresented groups, such as Black Canadians. Such a *Criminal Code* amendment could start with one group, address concerns as they arise, and then be phased in over time—as the *Charter* and section 15 were. It could be linked to the federal spending power, if necessary, to assist in incentivizing provinces to compile more representative jury pools from which to draw more representative jury panels.

B) The Role of the Provinces and Territories

Increasing the representativeness of panels of prospective jurors will also require provincial, territorial and community-based efforts. In response to reports in 1992[68] and 2004[69] that raised concerns about Indigenous underrepresentation on juries, Saskatchewan uses random selection from provincial health cards to compile jury lists. This includes more Indigenous people than the approach taken in some other provinces that still use less inclusive methods like voting or property tax lists. Saskatchewan has increased the pay that jurors receive to $110.00 a day, more than many other provinces. It also has the least exclusive provincial jury legislation of all the provinces and territories, including people with past convictions as eligible to sit on a jury panel.[70] In short, Saskatchewan actually appears ahead of many provinces when it comes to accommodating more representative Indigenous participation on juries.

Ontario has recently followed the recommendations of the Iacobucci Report, struck an implementation committee, and will now use the more inclusive health card list registry to give notice of jury duty. The former method of using property and tax-based lists was particularly deficient to serve notice for jury duty because those lists relied on intermittently available—and often incomplete and out-of-date—supplementary lists of Indigenous people who live on reserves to compile lists of who is eligible for jury duty.[71] Using the provincial health card database to serve jury duty

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68 Indian Justice Review Committee, *Report of the Saskatchewan Indian Justice Review* (Regina: Queens Printer, 1992) (Chair: Judge Patricia Linn) at 48.

69 Commission on First Nations and Métis Peoples and Justice Reform, *Final Report from the Commission on First Nations and Métis Peoples and Justice Reform* (Regina: Queens Printer, 2004) (Chair: Wilton Littlechild) at ch 6.

70 *Manarin*, *supra* note 6 at 52–54.

71 *Juries Act*, RSO 1990, c J.3 s 4.1, as amended by SO 2019, c 7, Sched 35, s 4. For a case rejecting a challenge to the array based on the old property tax source list see *Hoffman*, *supra* note 40. Justice Woollcombe concluded, at para. 89, that "the problem with focusing on distinctive perspectives, derived from specific racial characteristics such as being "[B] lack", is that this wrongly leads to a focus on what characteristics require representation, rather than on the process used. The applicant does not have a right to the inclusion of any set percentage of people on the jury source list who share his particular characteristics." I thank Don Stuart for bringing this case to my attention.

notices should not discriminate so starkly on race and class lines. There are still concerns, however, that Indigenous people may be deterred from jury duty because of a lack of transportation or child-care accommodations and the up-front costs of service that will be eventually be reimbursed.[72] Both the Debwewin Committee and the House of Commons Justice Committee have recently raised concerns that provinces pay jurors below-minimum wages and noted that this is a barrier to more representative juries.[73] There is also a need for more frequent and meaningful consultation with local Indigenous communities on a range of justice issues if Indigenous people are ever to be more willing to serve on juries.[74] For example, Justice Iacobucci recommended wide and meaningful consultation with Indigenous communities not only about participation on juries but on policing, legal aid and court workers. Indeed, 7 of his 17 recommendations related to justice matters other than the jury.[75]

C) Bill C-75's Superficial Reforms to Juror Qualifications

One legal factor that contributed to Indigenous underrepresentation on panels of prospective jurors until September 19, 2019 was the categorical and archaic disqualification of jurors under section 638(1)(c) of the *Criminal Code* that people who "have been sentenced to death" or a prison term of over 12 months. Bill C-75 tinkered with this by changing the permanent disqualification to only apply to those who have been sentenced to 24 months in prison or more and have not received a pardon or a record suspension—something that requires time, money, and faith in the justice system to even consider getting. As mentioned above, Saskatchewan's *Jury Act, 1998*[76] takes a more inclusive approach than the *Criminal Code* of only prohibiting those who were actually imprisoned from serving on civil or criminal juries.[77] Unfortunately, Bill C-75 enacted this superficial reform despite evidence that the majority of Indigenous people in Ontario who

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72 Guy Quenneville, "'Huge' jury pool of 750 summoned as potential jurors for Boushie case", *CBC News* (28 January 2018), online: <www.cbc.ca/news/>.

73 Debwewin, *Final Report*, *supra* note 17 at recommendation 16; See also Canada, House of Commons, Standing Justice and Human Rights Committee, "Improving Support for Jurors in Canada", 42nd Parl, 1st Sess, No 20 (May 2018) at 5.1.

74 One albeit under-inclusive example of relying on community knowledge is found in regulations under the Northwest Territories Jury Act that contemplate appointing a three person panel familiar with the Francophone community to assist the Sheriff in compiling bilingual juries if need be by adding to the list of prospective jurors: see Jury Regulations, NWT Reg 034-99, ss 3–4.

75 *Iacobucci Report*, *supra* note 2 at 352, recommendations 1–7.

76 *Supra* note 8, s 6(h).

77 *Criminal Code*, *supra* note 9, s 638.

fill in jury questionnaires are disqualified by *Criminal Code* provisions;[78] and despite ongoing (albeit so far unsuccessful) *Charter* challenges still arising from an Edmonton case where not 1 of the 178 prospective jurors for the trial were apparently Indigenous.[79] The *Charter* only establishes minimum standards of fairness and equality, but Parliament could surpass these minimums.[80] Given that 28% of the penitentiary population in Canada is Indigenous,[81] Bill C-75's new disqualification of those who have been sentenced to more than two years imprisonment will have a disproportionate and discriminatory effect on Indigenous people who, when released from prison, might be willing to serve on juries.

D) Allowing Permanent Residents to Serve on Juries

Another reform not taken in Bill C-75 was to allow permanent residents to serve on a jury. Although the Ontario Court of Appeal previously rejected a *Charter* challenge to the citizenship requirement—and that requirement is retained and merely cosmetically changed in Bill C-75[82]—nothing stops Parliament from allowing otherwise-qualified permanent residents to serve on a jury. This could help address concerns raised by a recent study finding that only 7% of jurors in 52 trials in Toronto and Brampton were Black and 7% were Brown while 46% of the accused were Black and 19%

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78 In 2016, only 650 Indigenous persons responded to 6023 jury questionnaires. Moreover, 356 of the 650 who were found ineligible for a variety of reasons such as disability, language and criminal record. In 2017, there were only 553 returns on 6131 questionnaires with again a majority of the returnees, 294, being found ineligible. See Canada, *Report to the Canadian Judicial Council on Jury Selection in Ontario*, (Ontario: Canadian Judicial Council, 2018) (Chair: Justice Giovanna Toscana Roccamo) at 16, online: <www.cjc-ccm.gc.ca>.

79 *R v Newborn*, 2016 ABQB 13, aff'd 2019 ABCA 123 at para 11, ruling no *Charter* violation because "there is no indication on this record of any deliberate exclusion of aboriginal citizens; those excluded are excluded because of their criminal records, not because of their ethnicity." But see Michael Johnston, "The Automatic Exclusion from Juries of those with Criminal Records Should be Ruled Unconstitutional" (2014) 17 Crim Reports (7th) 335; Manarin, *supra* note 6, ch 3 for powerful contrary arguments made by both defence lawyers and former Crowns. Manarin also notes that section 642 authorizes the use of alternates as jurors who are disqualified under section 638, suggesting that the jury system will not break if non-citizens or those with criminal records sit as jurors.

80 For my concerns in other contexts that the minimum standards of fairness and equality under the *Charter* have become the maximum standards of what can be expected of government, see Kent Roach, "The Dangers of a Charter-Proof and Crime-Based Response to Terrorism" in Daniels, Macklem & Roach, eds, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001).

81 Canada, Office of the Correctional Investigator, *Annual Report 2017-2018* (Ottawa: June 28, 2018) at 61.

82 *R v Church of Scientology of Toronto*, 199 CanLII 16226, 33 OR (3d) 65 (CA); *R v Laws*, 1998 CanLII 7157, 165 DLR (4th) 301 (ON CA).

were Brown. This research also found that 71% of the jurors were white even though visible minorities constitute 51.4% of Toronto residents and 73.3% of Brampton residents.[83] The 2016 census data indicates that only 3 out of 10 Canadians who identify as visible minorities were born in Canada. South Asian, Black and Chinese people constitute Canada's three largest visible minority groups.[84] Including permanent residents as eligible jurors could likely increase the representation of visible minorities on Canadian juries.

E) Accommodating Indigenous Languages on Juries

Another reform to juror qualifications would be to amend the *Criminal Code* to allow those who are fluent in Indigenous languages, but not English or French, to serve on juries with adequate interpretation services, as is already done in Quebec and the Northwest Territories.[85] If necessary, provinces and territories could opt-in as adequately robust translation services become available. Bill C-75 itself acknowledged the possibility of this kind of cooperative federalism approach to criminal justice reforms when, after initial criticism, it essentially delegated the issue of determining when non-lawyers could represent accused people in summary conviction offences to the provinces.[86]

F) Volunteer Jurors from Indigenous Communities

Bill C-75 also failed to follow up on Justice Iacobucci's recommendation that the use of volunteer jurors from Indigenous communities could be a promising way to increase Indigenous representation on juries. Even if authorized by the *Criminal Code*, such a reform might be challenged under of the *Charter* to extent that sections 11(d) and 11(f) require random selection of jury panels and the use of volunteer jurors would depart from random selection and thus risk losing impartiality.[87] But concerns that volunteer jurors may not be impartial could be dealt with by improvements to challenges for cause, which will be discussed below. There is already an element of *de facto* voluntariness given high rates of non-returns of jury summons and high rates of excusing jurors on the basis of hardship. The real issue with all prospective jurors should be whether they are impartial.

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83 Ebyan Abdigir et al., "How a Broken Jury List Makes Ontario's Justice White, Richer and Less like your Community", *Toronto Star* (16 February 2018), online: <www.thestar.com/news/>.

84 Statistics Canada, *Immigration and Ethnocultural Diversity: Key Results from the 2016 Census* (Ottawa: Statistics Canada, 2017), online: <www150.statcan.gc.ca>.

85 *Jurors Act*, CQLR c J-2, s 45; *Official Languages Act*, RSNWT c 0-1, s.9

86 *Supra* note 66, s 317.1, amending s 802.1 of the *Criminal Code*.

87 One court has rejected volunteer jurors as inconsistent with the emphasis on random selection in *Kokopenace*. See *Rice c R*, 2016 QCCS 4507 at para 13.

G) Local Juries

Most jury trials in the provinces are held in the largest city in the judicial district. This creates a barrier to Indigenous participation in rural and remote regions. For example, the *Stanley* trial was held in Battleford, Saskatchewan, in the winter. Although nearby North Battleford has a substantial Indigenous population, most First Nations persons in the Battleford judicial district live north of that city on reserves.

Local jury trials are held in Nunavut and the Northwest Territories, indicating that they are possible.[88] The Manitoba Aboriginal Justice Inquiry recommended provincial reforms to require local trials and juries.[89] This could increase Indigenous representation in rural and remote communities with significant Indigenous populations. A recent case upheld the unorthodox selection of a Labrador panel of prospective jurors despite concerns that the choice to draw the jury from near Happy Valley would have the effect of precluding local and largely Innu and NunatuKavat jurors who are from the place where the crimes were alleged to have occurred from being able to sit on the jury.[90] Moves toward more local trials would require provincial reforms to restrict summons for jury duty to the relevant locality and work to bring the superior courts into smaller communities, but could increase representation and legitimacy, improving the repute of the administration of justice.[91] One barrier may be the initial costs and increased resources needed to be able to hold more local jury trials.

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88 The Supreme Court of the Northwest Territories is based in Yellowknife but holds jury trials in and outside of Yellowknife: see "Supreme Court" (2020), online: *Courts of the Northwest Territories*, online: <www.nwtcourts.ca/en/courts/supreme-court/>. The Nunavut Court of Justice is a unified court which travels to 25 of 27 communities and can sit with a jury: see "Nunavut Court of Justice" (2020), online: *Nunavut Courts* <www.nunavutcourts.ca/nunavut-court-of-justice>. Nunavut also makes accommodations with respect to not disqualifying broader family members for reasons of impartiality: see "Practice Directive 28" (21 December 2009), online (pdf): *Nunavut Courts* <www.nunavutcourts.ca/index.php/court-policies-nucj/practice-directives>. My thanks to Rachel Furey for informing me of the practices in Nunavut.

89 Manitoba Aboriginal Justice Inquiry, *supra* note 17.

90 *R v LS*, 2017 CanLII 145096 at para 47 (NL SC). The trial judge also found that "while there is no obligation on the state to ensure that a particular group is represented on a jury list, the evidence in this case demonstrates that members of the groups of people who make up for the most part the population of the coastal communities of Labrador are in fact represented on the jury list for the Judicial Centre of Happy Valley-Goose Bay."

91 Christopher Gora, "Jury Trials in the Small Communities of the Northwest Territories" (1993) 13 Windsor YB Access Just 156.

H) Mixed Juries that Require Indigenous Participation

Building on old English traditions of mixed juries composed of six citizens and six foreigners, and Canadian traditions that used mixed juries of six Francophones and six Anglophones when requested by the accused in Quebec or Manitoba,[92] the Saskatchewan legislature amended its *Coroner's Act* to allow for the representation of specific racial and cultural groups.[93] In 2014, however, a Saskatchewan court rejected a claim by an Indigenous accused that Treaties required a jury in a criminal trial in Regina to be composed of six Indigenous and six non-Indigenous jurors.[94] Some dismiss mixed juries as a medieval relic and manifestly not suited for criminal trials. Nevertheless, a mixed jury of six Indigenous and six non-Indigenous people would have to agree unanimously on a verdict. Its members could be challenged for cause if there were a realistic possibility that they would not attempt to decide the case impartially, on the basis of the evidence they heard at trial.

It is impossible to know if the result of the *Stanley* case or, indeed, the Louis Riel or the other 1885 trials would have been different if mixed juries had been used. Nevertheless, any verdict rendered by a mixed jury would have been less divisive, and commanded broader public confidence, than what actually occurred. Whether Indigenous people would be willing to participate in mixed juries is, however, an open question that would require meaningful consultation. Many Indigenous people might prefer Indigenous justice systems controlled by Indigenous peoples applying Indigenous law.[95] Alas, this may not always be possible in cases, like the *Stanley* case, that include both Indigenous and non-Indigenous participants.

By including "the other" in the jury, and requiring that their views be respected in order to reach a verdict, the mixed jury could work towards the difficult task of true impartiality as a collective institution.[96] It could also work towards reconciliation, clearly signalling that Indigenous peoples are trustworthy and wanted to act as jurors. After the Civil War, the Supreme Court of the United States banned formal and overt exclusions of African-Americans on juries but rejected arguments that having African-Americans on a jury was required for the equal protection

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92 *Supra* note 15.

93 S*upra* note 14, s 29(3).

94 *R v Cyr*, 2014 SKQB 61; *R v Papequash*, 2014 SKQB 118.

95 For example, the Six Nations Council responded to Peter Khill's acquittal by a jury by banning him from their territory for life. See Dan Taekema, "Khill banned from Six Nations Territory for Life", *CBC News* (13 July 2018), online: <www.cbc.ca/news/>.

96 Daniel Van Ness, "Preserving a Community Voice: The Case for a Half and Half Jury in Racially Charged Jury Cases" (1994) 28 John Marshall L Rev 1 at 37-39.

of the law.[97] This discounted the role that subtle and informal, as well as overt and formal, exclusions played in suppressing Black representation on juries, and the role of all-white juries in nullifying criminal laws and refusing to convict white accused of violence, including 3,220 lynchings of African-Americans between 1877 and 1930.[98] Professor Taslitz argued that the exclusion of Black people from US juries created a danger of "racial blindsight"[99] where there was a lack of understanding of the reasonable fear that many African-Americans have of the police. Other commentators have suggested that the lack of diversity in the juries that acquitted the Los Angeles police officers who beat Rodney King in 1992, and the jury that acquitted O.J. Simpson, may have led people, perhaps unfairly, to conclude that the jury's verdict was simply the product of racial bias and solidarity.[100]

If Parliament provided for mixed juries again it might, like in some states in Argentina, require an equal number of men and women in cases of alleged sexual or domestic violence. Other Argentinian states use mixed juries of six Indigenous and six non-Indigenous peoples in cases involving Indigenous peoples.[101] Requiring mixed juries or some guarantee of minority[102] and gender representation in relevant cases may be more efficient and effective than attempting to control possible prejudice and discrimination through litigation about the fairness of prospective jury pools and challenges to alleged discriminatory uses of peremptory

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97 *Ex parte Virginia*, 100 US 339 at 369 (1880). Justice Field went on to raise the spectre that a mixed jury would lead to "in cases affecting members of the colored race only, the juries should be composed entirely of colored persons, and that the presiding judge should be of the same race". *Ibid*. On how this and a series of similar cases harmed African-Americans during reconstruction, see Carol Anderson, *White Rage* (New York: Bloomsbury, 2015) at ch 1.

98 Caroline Light, *Stand Your Ground* (Boston: Beacon Press, 2017) at 62.

99 Andrew E Taslitz, "Racial Blindsight: The Absurdity of Color-Blind Criminal Justice" (2007) 5 Ohio St J Crim L 1.

100 Nancy S Marder, "The Interplay of Race and False Claims of Jury Nullification" (1999) 32 U Mich JL Ref 285.

101 Caitlyn Scheer, "Chasing Democracy: The Development and Acceptance of Jury Trials in Argentina" (2016) 47 U Miami Inter-Am L Rev 316 at 334-335, 343. There are unlimited challenges for cause based on lack of impartiality in those Argentinian states that have adopted the jury and one of the provinces, Chaco, that uses a mixed jury requires a unanimous verdict to avoid a hung jury: *ibid* at 347.

102 Two UK commissions of inquiry have recommended that certain numbers of minorities sit on juries involving cases where those minorities are accused or victims: see Viscount Runciman, *Report of the Royal Commission on Criminal Justice* (Cm 2263) (London: Queens Printer, 1993) at 63–64; Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (London: Queens Printer, 2001) at 159. These reforms have not been implemented.

challenges.[103] Despite their long history under the common law mixed juries—just like volunteer jurors and indeed some of the measures in Bill C-75—would be challenged under section 11 of the *Charter* because it departs from random selection. That said, mixed juries could be sheltered from such challenges under section 15(2) of the *Charter* and, with respect to Indigenous peoples, perhaps under section 25 of the *Charter* and section 35 of the *Constitution Act, 1982*.

I) Bill C-75's New Public Confidence Stand Aside: An Invitation to Affirmative Action?

Bill C-75 did give trial judges a new power to stand aside prospective jurors on the basis of "maintaining public confidence in the administration of justice."[104] Unfortunately, Parliament did not provide any guidance in the law to judges about when and how they should exercise their new public confidence stand aside power. It did not define what public confidence entailed, nor did it make specific reference to Indigenous peoples and other groups that are underrepresented among decisionmakers in the justice system but overrepresented among accused and victims. This is likely not a mere oversight because such degrees of direction are provided in other parts of Bill C-75.[105] The sponsors of Bill C-75, in both the House of Commons and the Senate, indicated that the new stand aside power could be used "in order to make room for a more diverse jury that will in turn promote confidence in the administration of justice"[106] with Senator Murray Sinclair later stating: "As a former judge, I have the utmost confidence that our judiciary is attuned to the will of Parliament and will exercise this power appropriately."[107]

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103 Hiroshi Fukurai & Richard Krooth, *Race in the Jury Box Affirmative Action in Jury Selection* (New York: SUNY Press, 2004).

104 *Supra* note 66, s 269, amending s 633 of the *Criminal Code*. This is distinct from the ability of judges to excuse jurors at any time under s 632. Note also that s 641(1) contemplates that prospective jurors who have been stood aside may still be called again but also again excused by the judge or challenged by the accused or the prosecutor.

105 *Supra* note 66, s 210, amending s 493.2 of the *Criminal Code* in reference to accused "who is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this part."

106 "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", 1st reading, *House of Commons Debates*, 42nd Parl, 1st Sess, No 300 (24 May 2018) at 1530 (Hon Jody Wilson-Raybould).

107 "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", 2nd reading, *Debates of the Senate,* 42nd Parl, 1st Sess, No 264 (19 February 2019) at 1610, online: <https://sencanada.ca>. But see *R v Campbell*, 2019 ONSC 6285 at para 16 and *R v Dorion*, 2019 SKQB 266 at para 36, suggesting stand asides should be rarely used to increase the diversity of juries.

The new public confidence stand aside may turn out to be a superficial reform unless judges abandon their traditional preferences for random selection even when the results fall short of achieving substantive equality and greater representation of underrepresented groups on juries. Another factor is that trial judges may believe that they risk unfairly entering the arena if they exercise stand asides in a way to increase the representativeness of the jury. Trial judges should be assisted by counsel in exercising their new stand aside power. They may, however, face difficult issues especially if prosecutors and defence counsel disagree on the jurors that should be stood aside.

Even if they are prepared to use the stand aside power to increase the representativeness of juries, trial judges may conclude that they do not have adequate information about prospective jurors to do so. One delicate issue is whether judges should inquire if prospective jurors have the relevant personal characteristics that may increase public confidence in the relevant case. In some cases, these personal characteristics will be obvious to the judge, in other cases prospective jurors may self-identify, especially if the issue is raised as part of an expanded challenge for cause process.[108] At the same time, all of the judges in *Kokopenace*[109] warned that inquiring into a prospective juror's background was both contrary to traditional Canadian practices and an invasion of the juror's privacy. In addition, prospective jurors may be unwilling to reveal such information.

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[108] A juror who articulates how his or her experiences of being racialized may unfortunately be more vulnerable to challenge for cause on an alleged lack of impartiality: see *R v RDS*, [1997] 3 SCR 484, 151 DLR (4th) 193.

[109] *Kokopenace*, supra note 7 at para 74, *per* Moldaver J; at para 155, *per* Karakatsanis J; at para 227, *per* Cromwell J (dissenting). At the same time, a focus on section 15 groups would not make such inquiries more intrusive than most employment applications. Some privacy could be preserved if the questions were asked on a jury questionnaire form and not in open court. Provinces would also have an interest in collecting such information if their jury panels or arrays could be challenged on substantive equality grounds.

[110] Gender may be a difficult case. In a sexual assault case with a male accused and a female complainant, judges should in my view use the stand aside power to avoid an all-male jury. I would also be inclined to use a stand aside to avoid an all-female jury though I appreciate that some judges have refused to hold that juries in sexual assault cases of all one gender are not representative. See *R v Biddle*, [1995] 1 SCR 761, 123 DLR (4th) 22, McLachlin J and L'Heureux-Dube J, concurring. My overall point is that public confidence in jury verdicts should be increased by mixed juries that include both male and female perspectives on the evidence. Sexual orientation is also a difficult case. It is clear that jurors have in the past made homophobic remarks that have required new trials to be ordered: see *Dowholis, supra* note 38. In cases where issues about discrimination are raised in the challenge for cause process, trial judges and counsel should be attentive to the possible need to use the stand aside power to increase the representativeness of the jury as indeed contemplated by those who sponsored Bill C-75 in Parliament.

In my view, trial judges should use the new public confidence stand aside to include a visibly Indigenous person or a Black person on a jury in relevant cases where doing so would likely increase public confidence in the jury's verdict. Like section 15 of the *Charter*, this should not be seen as a closed list or one that only applies to the accused.[110] The rationale for the use of the new public confidence stand aside power would also be found in section 15 of the *Charter*. As Justice Sharpe has explained, albeit in the context of peremptory challenges:

> It cannot be the case that concern about the exclusion of jurors on racial grounds is exhausted once an appropriate array of potential jurors has been assembled. The *Charter* right of equality, the right to the benefit of trial by jury and the right to a fair and impartial trial must also be considered in relation to the process that is used to select the jury that will try the case. Just as those *Charter* rights cannot be frustrated or thwarted by the manner in which the array is assembled, nor can they be impeded by shortcomings in the jury selection process.[111]

A judge who exercises the new public confidence stand aside power in a manner informed by substantive equality should be concerned with whether the accused, the complainant, or even material witnesses come from a disadvantaged group that may be vulnerable to discriminatory stereotypes or animus. It will be interesting to see if judges do indeed use the new grounds for stand asides in order to increase the representativeness of juries. Counsel may have to make submissions about how this power should be exercised to ensure that trial judges give reasons for how it is exercised. It is unfortunate that Parliament did not provide any guidance about how this new power should be exercised and did not have the courage to clearly relate public confidence in the administration of justice to the representativeness of juries.[112]

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111 *R v Gayle*, 2001 CanLII 444, 54 OR (3d) 36 (CA) at para 58 [*Gayle*].

112 The Library of Parliament in its legislative summary suggested that the new stand aside power could be used in some cases to increase the representativeness of a jury and deal with the risk of racial bias: See "Legislative Summary of 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" (7 May 2018), online: *Library of Parliament* <http://lop.parl.ca/>.

Another commentary suggests that such judicial use of stand asides would be contrary to the stress in *Kokopenace* on random selection of jurors and in any event would be unable to deal with other structural barriers to Indigenous participation on juries: See Nathan Afilalo, "Jury Representation in Canada: Memo on Bill 75" (2019) at 4–6, online (pdf): *Canadian Institute for the Administration of Justice* <https://ciaj-icaj.ca/>. In my view, *Kokopenace* does not control how judges should exercise this new power. Legitimate concerns that public confidence stand asides may not remove all barriers to Indigenous under representation on juries does not mean that judges should not use one tool provided them by Parliament in an appropriate case to increase the representativeness of a jury and with it public confidence in both the administration of justice and the jury's ultimate

3. Peremptory Challenges

William Blackstone defended peremptory challenges during the 18th century on the basis that they allowed the accused to act upon "sudden impressions and unaccountable prejudices." Quoting Blackstone with approval, the Supreme Court of Canada has described peremptory challenges as "purely subjective."[113] In 1982, a judge referred to peremptory challenges as "guess work", noting that they could be used even if the prosecution or the accused could not establish that a prospective juror was not impartial, but because they "may be suspicious of the views of a particular juror because of his or her age, occupation, appearance, place of residence, dress, nationality, race, religion and numerous other reasons."[114] Peremptory challenges, which were abolished in England in 1988, were an invitation to both prosecutors and the accused to engage in stereotypical and discriminatory reasoning based on how prospective jurors looked.

A) Attempts to Control the Discriminatory Use of Peremptory Challenges

Since 1986, the Supreme Court of the United States has attempted to prevent discriminatory uses of peremptory challenges; first by the prosecutor,[115] and since 1992 also by the accused.[116] The American courts require a neutral, non-discriminatory reason for using a challenge and, lamentably, have often been unsuccessful in preventing the exclusion of Black jurors[117] except in cases of a clear intent to discriminate.[118] A

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verdict. In *R v Brown* 2006 CanLII 42683, 215 CCC (3d) 330 (CA) at para 22, the Ontario Court of Appeal did, however, disapprove of a trial judge's attempt to bring forward mini panels of prospective jurors that included non-whites in a highly publicized case where the accused were Black. That decision, however, predates the expansion of judicial stand asides in Bill C-75.

113 *Cloutier v The Queen*, [1979] 2 SCR 709 at 720, 99 DLR (3d) 577; *R v Davey,* 2012 SCC 75 at para 22.

114 *R v Piraino,* 1982 CanLII 3135 at para 8, 136 DLR (3d) 83 (Ont SC).

115 *Batson v Kentucky,* 476 US 79 (1986).

116 *Georgia v McCollom*, 505 US 42 (1992).

117 Jeffrey Bellin and Junichi Semitsu, "Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney" (2011) 96 Cornell L Rev 1075; Caren Moyers Morrison, "Negotiating Peremptory Challenges" (2014) 104 J Crim L & Criminology 1; Antony Page, "Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge" (2005) 85:1 BUL Rev 155; Samuel Sommers and Michael Norton "Race-Based Judgments, Race-Neutral Explanations" (2007) 31 Law and Human Behaviour 261.

118 *Foster v Chatman,* 578 US 2 (2016); *Flowers v Mississippi*, 588 US 1 (2019). In some cases, attempts by Black accused to remove white jurors have been successfully challenged: see *People v Randall*, 671 N.E.2d 60 (1996) at 65–66.

number of US judges, including Thurgood Marshall, have concluded that the abolition of peremptory challenges was necessary.[119] In his 2013 report, Justice Iacobucci warned: "First Nations jury service could still be significantly undermined through discriminatory use of peremptory challenges."[120] The well-publicized use of peremptory challenges against visibly Indigenous people in the *Stanley* case provided another reason why many Indigenous people may be reluctant or unwilling to respond to jury duty summons.

A less radical alternative to the abolition of peremptory challenges would have been an attempt to prevent their discriminatory use.[121] There is little room for optimism about such an approach given that Canadian jurisprudence has failed since the introduction of equality rights in 1985 to prevent the discriminatory use of peremptory challenges. A statutory mechanism to prevent discriminatory use of peremptory challenges would likely have been both cumbersome and ineffective. It is not clear that the accused is bound by equality rights or can be required to justify the use of peremptory challenges. The simpler, better, and more efficient—albeit controversial—solution was to abolish peremptory challenges.

Since 2001, Canadian courts have indicated that racially discriminatory uses of peremptory challenges by the prosecutor can be challenged, but such challenges have been rare and unsuccessful.[122] The Supreme Court of Canada recently denied leave to appeal in a case where the Yukon Court of Appeal rejected an allegation that the prosecutor had engaged in a discriminatory use of a peremptory challenge. The press reported the prosecutor's explanation, which was that he challenged the prospective juror not because he was Indigenous but because he worked for an Indigenous Band.[123] This underlines the scepticism that many have

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[119] *Batson*, *supra* note 115 at 107–08; Judge Mark W Bennett, "Unravelling the Gordian Knot of Implicit Bias in Jury Selection" (2010) 4 Harv JL & Pub Pol'y 149.

[120] *Iacobucci Report*, *supra* note 2 at 396.

[121] Another less radical reform would have been to decrease the number of peremptory from 20 in first degree murder cases and 12 in murder cases to four or less. This may have decreased discriminatory use of peremptory challenges. Depending on the representativeness of the panel of prospective jurors, however, even four peremptory challenges could still have resulted in juries with no Indigenous persons.

[122] *Gayle*, *supra* note 111; *Gardner c R*, 2019 QCCA 726 at 5–17 [*Gardner*]. See also *R v Brown*, [1999] OJ No 4867 (Ont Ct (Gen Div)) [*Brown* (1999)]; *R v Amos*, 2007 ONCA 672 [*Amos*].

[123] Sunny Dhillion,"First Nations challenge jury representation", *The Globe and Mail* (27 February 2018) A4, also online: <www.theglobeandmail.com/news/>; in reference to the decision in *R v Cornell*, 2017 YKCA 12 at paras 18–20, leave to appeal to SCC refused, 38003 (7 June 2018), rejecting allegations of discrimination by the prosecutor in using peremptory challenges.

about attempts to regulate discriminatory uses of peremptory challenges that require facially non-discriminatory reasons. Such cases cast doubt on whether legislation that attempts to stop the discriminatory use of peremptory challenges would actually be effective.[124]

A study conducted in 2015, based on observations of 32 trials in Ontario where the *Parks* question about racism was asked of prospective jurors, recorded one murder case where the Crown used four peremptory challenges to exclude all Black candidates from the jury. The study concluded that while discriminatory uses of peremptory challenges by the Crown were improper "in practice, it is extremely difficult to prove or enforce."[125] Even if some blatantly obvious excuses for discriminatory uses of peremptory challenges were enumerated and prohibited, it would not be long before at least some prosecutors and defence lawyers found new ways to provide facially non-discriminatory reasons to justify excluding Indigenous and other racialized groups from juries when it was in their perceived adversarial interest to do so. Even in cases where there was no subjective intent to discriminate, the "neutral" reason accepted by the courts may fail to command widespread public confidence, as has tended to be the case in the United States.

The Canadian history of attempting to control the discriminatory use of peremptory challenges by the accused is even more dismal than attempts to regulate their use by the prosecutor. In a 1993 case, the prosecutor sought to prevent a white accused police officer from using peremptory challenges to challenge prospective jurors who were Black in a case where the victim was also Black.[126] The judge noted, "as anyone who lives in the Metropolitan Toronto area well knows, there have been a number of incidents in recent years in which white police officers have shot usually-young black males, which has caused understandable concern in Toronto's Black community."[127] Nevertheless, the judge decided that the accused's use of peremptory challenges was not subject to the equality rights guaranteed by the *Charter*. Consistent with Blackstone's rationale of peremptory challenges as primarily being an adversarial advantage for the accused, the judge concluded: "[I]n a criminal trial the accused is pitted against the state. In my opinion it is fanciful to suggest that in the selection of a jury he doffs his adversarial role and joins with the Crown in some sort of joint and concerted effort to empanel an independent and impartial

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124 Carol Aylward, *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood Publishing, 1999) at 157–58 [*Aylward*].

125 Regina Schuller et al, "Challenge for Cause: Bias Screening Procedures and their Application in a Canadian Courtroom" (2015) 21:4 Psychol Pub Pol'y & L 407 at 417 [Schuller et al].

126 *R v Lines*, [1993] OJ No 3284 (Ont Ct (Gen Div)).

127 *Ibid* at para 8.

tribunal."[128] This essentially condoned race-based uses of peremptory challenges by this accused. The accused police officer was acquitted by a jury of 11 white people and 1 Asian. The peremptory challenge issue was not appealed.[129]

The Quebec Court of Appeal recently dismissed a challenge to the Crown's use of four peremptory challenges, all used to keep African-Canadian jurors off of the jury in a drug trial with an African-Canadian accused. The Court stressed, "[T]he absence of any demonstration at first instance of an oblique motive on the part of the Crown."[130] This is a stricter standard than would even be required in the United States. Moreover, it is a standard that seems impossible for the accused to satisfy unless the Crown admits to intentional discrimination. The Court of Appeal dismissed the accused's complaint on the basis that the accused was really attempting to challenge the representativeness of the jury and "as explained in *Kokopenace*, however, a results-based test is not the proper test. Absent any evidence that the sheriff did not make the necessary efforts to compile a representative jury roll, the appellant's argument must fail."[131]

Even trial judges who have recognized that the prosecutor could challenge discriminatory uses of peremptory challenges by the defence have concluded that the *Charter* would not assist such challenges. They have reasoned that the accused's *Charter* right to silence would prevent the court from requiring the defence to explain their use of a peremptory challenge.[132] This is different from the US experience where the accused, like the prosecutor, must provide some non-discriminatory reason for the use of a peremptory challenge when racial discrimination may be in play. In short, Canadian law has failed to develop the complex jurisprudence that has emerged in the US in an attempt to control discriminatory uses of peremptory challenges with respect to both prosecutorial or defence use of such challenges. This may actually be a good thing because most commentators have concluded that the US jurisprudence has

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128 *Ibid* at para 26.

129 Tracey Tyler, "Province contemplating appeal of police officer's acquittal", Toronto Star (21 May 1993) A28. David Tanovich, "The Charter of Whiteness" (2008) 40 SCLR (2d) 655 at 668.

130 *Gardner*, supra note 122 at para 16, leave to appeal to SCC refused, 38683 (17 October 2019). The Court of Appeal elaborated that the accused "is not claiming that counsel for the Crown acted in a discriminatory, unjust or unfair manner or abused their position as officers of the court when they exercised the peremptory challenge discretion, in order to obtain a conviction at any price": *ibid* at para 15.

131 *Ibid* at para 13.

132 *Brown* (1999), *supra* note 122 at paras 6–11.

failed to prevent anything but the most blatant and obvious forms of discrimination.[133]

B) The Need to Abolish Peremptory Challenges

Control of discriminatory use of peremptory challenges would be very difficult. The possibility of challenging discriminatory Crown usage of peremptory challenges has been recognized, but not realized. It is unclear whether the *Charter* applies to the accused's use of peremptory challenges or if the accused could be required to provide non-discriminatory reasons for the use of peremptory challenges. The victim or complainant, as well as the prospective jurors subject to the peremptory challenge, may not have standing and would have to rely on the Crown to raise objections. Here it must be noted that neither the prosecutor nor the trial judge said a word on the trial transcript in response to the accused's use of peremptory challenges in the *Stanley* trial despite the racially-charged nature of the case.

Some defence lawyers opposed the abolition of peremptory challenges and submitted briefs to Parliament asking the government to reconsider its decision.[134] They cited cases where peremptory challenges have been used to keep people off juries whom they sincerely believed were partial or incompetent. They also argued that peremptory challenges can be used by the accused to produce a more representative jury. These concerns should not be dismissed, but there are other, more transparent tools to achieve these laudable objectives. They include, as will be discussed below, expanded challenges for cause and, as discussed above, a trial judge's use of the public confidence stand aside power to increase the representativeness of juries. These tools should also include allowing the representativeness of panels of prospective jurors to be challenged on a substantive equality basis, with special attention paid to the representation of Indigenous people. It is important to understand the different parts of jury selection as an interconnected system so that a comprehensive approach to reform of jury selection can be taken. Bill C-75's abolition of peremptory challenges will affect many different aspects of jury selection, including challenges for cause.

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133 Melynda Price, "Performing Discretion or Performing Discrimination" (2012) 15 Mich J Race & L 57. Samuel R Gross, Race, Peremptories, and Capital Jury Deliberations (2001) 3 U Pa J Const L 283.

134 "Submissions On Behalf of the Criminal Lawyers' Association (Ontario) to the House of Commons' Standing Committee On Justice and Human Rights Studying Bill C-75" (2018) at 6–7, online (pdf): *Criminal Lawyers' Association* <https://criminallawyers.ca>.

C) The Constitutionality of the Abolition of Peremptory Challenges

The Ontario Court of Appeal, in *R v Chouhan*, decided that Parliament's decision to abolish peremptory challenges did not violate sections 7, 11(d) or 11(f) of the *Charter*.[135] It noted that the abolition of peremptory challenges in the United Kingdom had been found consistent with fair trial rights. It stressed that, "[a]t bottom, peremptory challenges are not an effective tool for weeding out biased jurors. They are exercised arbitrarily, relying on guess work and uncertain mythologies about those most likely to react unfavourably to the challenger's case."[136] Despite submissions from Aboriginal Legal Services on this point—as an intervenor who supported the abolition of peremptory challenges—the Court of Appeal, unfortunately, did not examine how peremptory challenges can decrease the representation of Indigenous peoples and other racialized minorities on juries. Instead, it relied on the traditional concept that, "[a]n accused is not entitled to a particular racial or ethnic composition of the jury selected for the trial."[137] Courts may be reluctant to revisit this approach based on colour-blind ideas of formal equality despite its tension with concepts of substantive equality that have long been recognized by courts in every other area of public law.[138]

Parliament could take a different approach, based in substantive equality, to encourage the representation of Indigenous peoples and other groups on juries. As recognized by the Ontario Court of Appeal, this would not violate the *Charter* rights of accused people provided that the challenge for cause procedures were available and could be applied to every juror.[139] At the same time, the Court of Appeal held that the amendment did affect Mr. Chouhan's right to participate in the selection of the jury and the composition of juries. As such, the abolition of peremptory challenges should be applied prospectively.[140] This seems like a pragmatic recognition of the reality of the controversial reform, but this also begs the question about the fairness of the composition of many juries that have been shaped by discriminatory uses of peremptory challenges.[141]

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135 *Chouhan*, *supra* note 18.

136 *Ibid* at para 57.

137 *Ibid* at paras 94, 106.

138 *Bhinder v Canadian National Railway Co.*, [1985] 2 SCR 561, 23 DLR (4th) 481; *Andrews*, *supra* note 64.

139 *Chouhan*, *supra* note 18 at paras 89–91.

140 *Ibid* at paras 210–11.

141 The Court of Appeal did recognize that peremptory challenges "can enhance or facilitate discrimination against racialized or marginalized prospective jurors. This is so because the exercise of peremptory challenges may often be based on assumptions, stereotypes, or prejudices. The result is a diminution rather than an enhancement of

4. Challenges for Cause

Bill C-75 has changed challenges for cause by providing that the trial judge, as opposed to two dynamic or static triers otherwise qualified as jurors, will decide whether prospective jurors should be disqualified on the basis of partiality.[142] This follows one of the many recommendations that the Manitoba Aboriginal Justice Inquiry made with regards to jury reform.[143] This is a significant reform with respect to jury selection that may change the observed conduct of triers, who in some cases have accepted prospective jurors who admitted racial prejudice, and in others have excluded prospective jurors who denied racial prejudice when questioned about it.[144]

A) No Challenges for Cause

In the *Stanley* case, jurors were not asked any questions about racism or stereotypes about Indigenous people despite the fact that a question about racism towards an Indigenous victim had been asked of Saskatoon jurors in a 2001 case arising from that city's infamous starlight tours.[145] In addition, the trial judge did not warn the jurors about anti-Indigenous racism[146] and the only reference to systemic issues affecting Indigenous peoples was when the trial judge twice inquired about an Eagle feather in the courtroom and conveyed the jury's concerns about it being waved.[147]

B) Limited and Simplistic Questioning at Challenges for Cause

In June 2018, Ontario prosecutors in the Peter Khill and Jon Styres case sought and received judicial approval to ask Hamilton jurors: "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

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representativeness in the trial jury": *ibid* at para 56. Peremptory challenges are not the only way an accused can participate in jury selection given the ability to challenge the array and to seek challenges for cause.

142 *Supra* note 66, s 272, amending s 640 of the *Criminal Code*.

143 Manitoba Aboriginal Justice Inquiry, *supra* note 17.

144 Schuller et al, *supra* note 125.

145 *Munson*, *supra* note 23.

146 See *supra* note 51.

147 Roach, *Canadian Justice, Indigenous Injustice* supra at 160–63. On the benefits of such instructions, see *Barton CA*, supra note 51 at para 162, aff'd on other grounds but with instructions about the importance of warnings about using stereotypes against Indigenous victims. See also *Barton SCC*, *supra* note 1 at para 197. See also Elizabeth Ingriselli "Mitigating Jurors' Racial Biases: The Effects of and Content of Jury Instructions" (2015) 124 Yale LJ 1690.

person and the person charged with this crime is a white person?"[148] The effectiveness of such a blunt, "Are you a racist?" question that invites a simplistic yes-or-no response to reveal deep-seated and unconscious racism has been questioned.[149]

More radical reforms would facilitate, and perhaps even require, more in-depth questioning of prospective jurors about racism, and more specific judicial instructions to counter the dangers of racist stereotypes that cause discrimination against Indigenous peoples, whether they are an accused, complainant, or victim.[150] One Canadian study has even found that a minor modification of the traditional Canadian question asked in the *Khill* case can avoid having prospective jurors reflexively answer yes or no, and may be better at revealing and acknowledging racial bias.[151] In other words, a question that asks prospective jurors how race may affect their decision-making could reveal much more about the subconscious racist stereotypes that may influence jurors.

Since its 1998 decision in *Williams*, the Supreme Court of Canada has recognized that the accused can generally ask prospective jurors whether racial prejudice against an Indigenous accused would influence their deliberations.[152] The Supreme Court has also stated that asking questions about racial bias

> [E]liminates from the panel potential jurors who cannot, in good conscience and under oath, give a negative answer to the question. It also brings home to the other jurors the potentially insidious effect of racial stereotyping, and thirdly it provides the accused (and members of visible minorities generally) palpable assurance

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148 Ameil Joseph "Erasing race but not racism in the Peter Khill trial", *CBC News* (6 July 2018), online: <www.cbc.ca/news/>.

149 Ameil Joseph, "Erasing Race but not Racism in the Peter Khill trial", *The Conversation* (5 July 2018), online: <www.theconversation.com>; David Tanovich, "How Racial Bias Likely Affected the Stanley Verdict" *The Conversation* (6 April 2018), online: <www.theconversation.com>.

150 At present, the onus is on the prosecutor or accused to establish a realistic possibility of prejudice and the resulting need for each question to be asked of prospective jurors as part of the challenge for cause procedure.

151 Regina Schuller, Veronica Kazoleas & Kerry Kawakami, "The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom" (2009) 33 L & Human Behavior 320 at 323, 325, finding similar guilt and confidence of guilt ratings in those asked the yes/no question and those asked no question about possible racial bias but finding less findings of guilt and less confidence of guilt of those in a case with a Black defendant where jurors had been asked the reflective question. For a decision allowing more open-ended questioning, see *R v Barnes*, 2015 ONSC 6299.

152 *Williams*, *supra* note 22.

> that the law takes seriously the overriding objective of empanelling an impartial jury.[153]

Such goals of non-discriminatory and impartial justice are important. They were not achieved in the *Stanley* case because the question was not asked. That being said, it is not clear that asking this one question—which may invite a simple and often defensive yes-or-no answer rather than a more reflective and open-ended response—would achieve the Supreme Court's goals. This is especially the case given the lead-up to the *Stanley* case, which invoked stereotypes associating Indigenous peoples with rural crime; or in the *Khill* case, where stereotypes associating Indigenous peoples with car theft may have been in play. Indeed, the possibility that a single yes-or-no question could be counterproductive cannot be dismissed. For example, in the *Khill* case, it may have reminded the jurors that the victim was Indigenous and perhaps triggered stereotypes and assumptions associating the victim with crime and violence.

A single yes-or-no question, first approved over a quarter of a century ago,[154] may be incapable of revealing deep-seated stereotypes and implicit bias.[155] One of the reasons why defence counsel have frequently defended peremptory challenges is that they can be exercised after an unsuccessful challenge for cause, including ones where prospective jurors quickly deny that they would be affected by the race of the accused. Defence lawyers have been frustrated by the restraints that judges often place on their questioning of prospective jurors about particular racist stereotypes that associate their clients with crime and danger. This, again, underlines the need to understand how the various parts of jury selection interact with each other.

C) Will Trial Judges Now Allow More Questions in Order to Make More Informed Decisions about Juror Impartiality?

Trial judges have traditionally been reluctant to allow questions to be asked of prospective jurors because of concerns about juror privacy and the efficiency of the jury selection process. They have even disallowed multiple choice questions that allow prospective jurors to indicate that they "do not know", or "only might be able to judge the case fairly", as

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153 *R v Spence*, 2005 SCC 71 at para 25 [*Spence*].

154 *R v Parks*, 1993 CanLII 3383, 15 OR (3d) 324 (CA).

155 *Aylward, supra* note 124 at 117–18, 158–65; David Tanovich, "The Charter of Whiteness: Twenty Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008) 40 SCLR 655 at 665; Rakhi Ruparelia, "Erring on the Side of Ignorance: Challenge for Cause Twenty Years After Parks" (2013) 90 Can Bar Rev 267 at 295; Cynthia Lee, "A New Approach to *Voir Dire* on Racial Bias" (2015) 5 UC Irvine L Rev 843.

opposed to one yes-or-no question.[156] Some questions about racist stereotypes related to particular forms of crime—such as rural crime in the *Stanley* case, or car theft in the *Khill* case—could run afoul of the Supreme Court's refusal to allow jurors to be questioned about their attitude towards crimes. For example, the Supreme Court denied challenges for cause based on concerns about the nature of the crime alleged in a sexual assault case,[157] and on the basis that the victim was South Asian.[158] Judges have been concerned that allowing more questions might lengthen jury selection, invade juror privacy, and bring Canadian jury selection closer to US practices.

These traditional judicial concerns suggest that radical reform of the challenge for cause process may have to come from Parliament, as opposed to the judiciary. In my view, section 638(1)(b) of the *Criminal Code* should have been amended to allow questions with special regard to:

> (a) the dangers of discriminatory stereotypes that may apply to Aboriginal accused, witnesses and complainants and those from other groups who are overrepresented in the criminal justice system and as such vulnerable to discrimination and (b) to the difficulties of determining whether a prospective juror would act on discriminatory stereotypes.[159]

Such an amendment would have facilitated the use of more sophisticated multiple choice and open-ended questions that could better reveal often subconscious racism. There may also be a place for national guidelines on the use of such questions that could be revised in response to new evidence, including research with actual jurors, which unfortunately is still prohibited under section 649 of the *Criminal Code*. Expanded challenges for cause may take more time, but it would still be less time than US-style *voir dires*, which in some cases allow questions about attitudes towards crime and juror predispositions.

D) The Role of Section 15 of the Charter

Some may question why we should be as concerned about racial bias against complainants and witnesses as the accused. One answer is that

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156 *R v Suarez-Noa*, 2018 ONSC 6749; *R v Jaser*, 2014 ONSC 7528; *R v Borden*, 2014 ONSC 5751; *R v Gayle and Gayle*, 2013 ONSC 5343; *R v LW,* 2013 ONSC 58252; *R v O'Hara-Salmon and Phillips*, 2014 ONSC 5880; *R v Barnes*, 2012 ONSC 7184; *HMQ v Johnson*, 2010 ONSC 5190; *R v Ahmad et al.*, 2010 ONSC 256; *R v Stewart*, 2011 ONSC 1949; *R v McKenzie*, 2018 ONSC 2764. But for a case allowing multiple choice answers albeit in the context of pre-trial publicity, see *R v Oland*, 2018 NBQB 256.

157 *R v Find*, 2001 SCC 32. See also *R v Shirvastava*, 2018 ABQB 245.

158 *Spence*, *supra* note 153. See also *R v Rajput*, 2018 ABQB 572.

159 As proposed in Roach, *supra* note 67.

jury selection implicates not only the accused's right to a fair trial and an impartial jury but also the rights that every person has to equal protection of the law without discrimination. Another answer is that social science evidence suggests racial prejudice towards the victim may influence mock jury deliberations, especially when they trigger stereotypes associating the victim with acts of violence and danger.[160] Relatedly, other social science studies conducted in the US have stressed the danger of such stereotypes when, as in the *Stanley* and *Khill* cases, white men are charged with killing racialized victims and self-defence is implicitly or explicitly raised.[161]

Hopefully, the new responsibilities granted under Bill C-75 will make trial judges more active in ensuring that jurors are properly screened for racism and racial bias, but that remains to be seen. Part of that screening ought to be assessing exposure to prejudicial pre-trial publicity, including that on social media, which was prevalent in the *Stanley* case and could taint jurors' perspectives. Brian Manarin, an experienced prosecutor, has argued in favour of more searching questions on challenges for cause. He suggests that better decisions about impartiality will be produced by more evidence, and that "it is extremely unlikely that a professional judge would be willing or able to decide the challenge issue" based on the "Spartan record"[162] produced by a single question about racism that invites a yes-or-no answer. Under the Bill C-75 regime, trial judges may be more willing to allow for more extensive questioning of prospective jurors during a challenge for cause without fear that counsel are using the questions to obtain information about jurors so that they can subsequently use peremptory challenges for an adversarial advantage.[163]

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[160] Erin Cooley et al, "Personal Prejudice, Other Guilt: Explicit Prejudice Towards Black People Predicts Guilty Verdicts for White Officers who Kill Black Men" (2019) 45 Personality & Soc Psychology Bulletin 745; Kristin Dukes & Sarah Gaither, "Black Racial Stereotypes and Victim Blaming: Implications for Media Coverage and Criminal Proceedings" (2017) 73 J Soc Issues 789; L Niemi & L Young, "When and Why we See Victims as Responsible: The Impact of Ideology on Attitudes towards Victims" (2016) 42 Personality & Soc Psychology Bulletin 1227; Caroline Erentzen, Regina Schuller & Robert Gardner, "Model Victims of Hate: Victim Blaming in the Context of Islamophobic Hate Crime" (2018) J Interpersonal Violence, DOI: <0886260518805097>.

[161] L Song Richardson & Philip Goff, "Self-Defence and the Suspicion Heuristic" (2012) 98 Iowa L Rev 293. Although self-defence was not left to the jury, much of the evidence and argument in the *Stanley* case implicitly appealed to self-defence. See Roach, *supra* note 3 at 167–72. Self-defence was left to the jury in the *R v Khill*, 2020 ONCA 151, leave to appeal to SCC granted, 39112 (06 August 2020) and is subject to an ongoing appeal by the accused.

[162] Manarin, *supra* note 6 at 116.

[163] As prohibited by *R v Hubbert*, 1975 CanLII 53, 11 OR (2d) 464 (CA), aff'd [1977] 2 SCR 267.

Since judges are now meant to make the ultimate decision about whether a prospective juror is impartial, they should seek out as much relevant information as possible, while respecting the reasonable expectations of privacy of prospective jurors. However, it is possible that despite these new powers, trial judges may retain traditional concerns that prioritize juror privacy and efficiency over substantive equality and thus continue to limit the number of questions asked about racist beliefs and racial bias. Similarly, trial judges may be reluctant to use their new public confidence stand aside power to increase the representativeness of juries because of their traditional commitment to and confidence in, random selection. If this latter course of actions comes to pass, Bill C-75 will only improve jury selection through its removal of peremptory challenges and will fail to address many remaining concerns about increasing representativeness on juries and dismantling systemic discrimination in the creation of the jury roll.

Conclusion

The *Stanley* case, especially when considered alongside a series of similar miscarriages of justice, reinforces the case for comprehensive reform of jury selection to make juries look more like the people in Canada. Recognizing Indigenous justice systems based on Indigenous legal traditions, not settler traditions, should also be a priority. Juries are not going away, especially in the most serious cases, so there is still a very pressing need to reform the jury selection process to avoid having more cases like *Stanley* that increase Indigenous peoples' justifiable distrust of the Canadian settler justice system and raise reasonable concerns about possible jury discrimination against Indigenous peoples, whether as an accused or as victims.

Bill C-75 recognized the need for jury reform by abolishing peremptory challenges. While this was controversial, and was unsuccessfully challenged under the *Charter*, it was also the most effective and efficient way to ensure that neither the Crown nor the accused can use peremptory challenges to exclude Indigenous peoples and other racialized groups simply because of the way they look. Canadian jurisprudence has utterly failed to prevent the discriminatory use of peremptory challenges, so Parliament had to step in. Moreover, attempts to control the discriminatory use of peremptory challenges would likely have been both ineffective and time-consuming. Defence lawyers who are critical of this change are correct that they, on occasion, could have used peremptory challenges to produce a more representative jury, or remove accepted jurors who may have been biased against the accused. However, the new powers granted by Bill C-75 let trial judges serve that gatekeeping role, both with respect to public confidence stand asides and deciding challenges for cause to obtain these ends. As

the Ontario Court of Appeal recognized in *Chouhan*,[164] the arbitrary and sometimes discriminatory assumptions made on the basis of how prospective jurors look are not a proper substitute to the necessary and difficult task of ensuring that every juror is impartial. It remains to be seen how trial judges will use these new powers, whether such use will result in an increase in the representativeness of juries, and whether that will better allow such juries to reach impartial decisions that inspire broader public confidence.

It is unfortunate that Bill C-75 was not more aggressive in terms of imposing more robust standards, rooted in substantive equality, to allow for a jury's composition to be challenged when Indigenous peoples and other racialized groups overrepresented in the justice system are underrepresented on the jury. Such focused attention would not have required a mythical perfectly proportionate jury that judges have frequently ridiculed. It would have, however, addressed the very real disadvantage of groups, such as Indigenous and Black peoples, whose liberty and security is at risk in jury trials because of consistent overrepresentation as accused persons, victims, or complainants and underrepresentation as trusted triers of facts. Such a focus might also have provided guidance to trial judges in exercising their new powers to see that justice not only be done, but be seen to be done.

Jury selection in Canada is undoubtedly complex. A new statutory standard for challenges to the jury panel or array—based on substantive equality and that effectively overrules the majority judgment in *Kokopenace*—would place pressure on the provinces and territories that are responsible for compiling jury duty rolls to make their lists returns more representative of their population. A more robust standard for challenging panels could also have been made subject to a proclamation by the provinces and territories to give time to implement the reforms for facilitating more representative jury panels.

Bill C-75 failed to abolish restrictive juror qualifications that preclude permanent residents, those with prior criminal convictions, and those who are not fluent in English or French from serving on juries. It also failed to authorize the use of volunteer jurors from Indigenous communities and local juries. Saskatchewan has taken the brunt of the criticism for the *Stanley* case, but the province allows everyone, except those that are actually imprisoned, to serve on civil or criminal juries and this should serve as a model for additional federal *Criminal Code* reform. Saskatchewan also has undertaken a number of other reforms to improve the representativeness of their juries. First, Saskatchewan allows coroner's juries, in relevant

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164 *Chouhan*, *supra* note 18 at paras 87–89.

cases, to have a specified number of Indigenous peoples (or other relevant racial or cultural group) as jurors.[165] Second, the list of potential jurors was expanded by using healthcare lists, which will also include permanent residents in many cases. Third, Saskatchewan pays jurors more than many other provinces. These reforms may help to explain why at least 20 of the 178 potential jurors who came to Battleford, Saskatchewan for the *Stanley* trial were Indigenous people. It was the federal *Criminal Code* process for selecting jurors that failed, because Gerald Stanley used his peremptory challenges to remove five visibly Indigenous people, among others, from the jury that then, without going through any challenges for cause, acquitted him of both murder and manslaughter in the death of Colten Boushie.

Bill C-75 may have addressed the immediate problem with the *Stanley* case, and it has survived *Charter* challenges. Nevertheless, more reform is required if jury verdicts are going to be able to inspire the widest form of public confidence. Permanent residents should be allowed to serve on juries, criminal convictions should not bar people from being jurors, volunteer jurors from Indigenous communities, and the use of local trials should all be allowed. The parties should be able to challenge jury panels or arrays on the basis of theories of substantive equality that focus on the effects and results of provincial efforts to summons jurors, not only on the basis of "deliberate exclusion"[166] or "partiality, fraud or wilful misconduct."[167]

We should seriously consider even more radical reforms. In the past, Canada has used mixed juries of equal numbers of Francophones and Anglophones, and of citizens and non-citizens. Mixed juries requiring six Indigenous and six non-Indigenous people could be defended under sections 15(2) and 25 of the *Charter,* and as a section 35(1) constitutional Treaty right based on aid and assistance clauses. Representative or volunteer jurors would still be subject to challenges for cause and could be disqualified if they would not be prepared to decide the case solely based on the evidence presented at trial. Mixed juries would still have to agree unanimously on a verdict and the different perspectives guaranteed by a mixed jury would be a starting point, not an endpoint, in their deliberations. Mixed juries should not be seen as an attack on the ancient institution of the jury, or as a form of extreme multiculturalism or identity politics; rather they would demonstrate an awareness that jurors, like all human beings, inevitably have their judgments informed by their

165 *Supra* note 14, s 29(3).

166 *Kokopenace*, *supra* note 7 at para 50.

167 *Criminal Code*, *supra* note 9, s 629. Note that the Supreme Court has also included "the appearance of partiality" as a basis for challenging panels of prospective jurors. See *Kokopenace*, *supra* note 7 at para 50.

experiences and perspectives. Mixed juries would also demonstrate a faith that Indigenous and non-Indigenous jurors could openly discuss difficult issues and unanimously agree on a verdict that would be much more likely to inspire wide public confidence.

Additional and more comprehensive jury reform is necessary, but it will not be easy. Even if achieved, it will not be a panacea. As Justice Iacobucci, and the Debwewin Committee charged with implementing his report in Ontario both cautioned,[168] jury reform requires meaningful engagement with Indigenous communities on a range of justice issues well beyond juries. Many Indigenous peoples are understandably reluctant to participate in a justice system that has consistently failed them, and their families, both as accused people and victims.

168 *Iacobucci Report*, *supra* note 2; Debwewin *Final Report*, *supra* note 17.