

## **Brief to the House of Commons Justice Committee examining Bill C-75**

Kent Roach, Prichard and Wilson Chair in Law and Public Policy, University of Toronto

### **Introduction**

Bill C-75 is a massive proposed piece of legislation. For reasons of time and priority, I will focus on its proposals to reform jury selection and its proposal with respect to guilty pleas. I will propose five specific amendments summarized in the conclusion.

### **The Failure of the Justice System with Respect to Indigenous People**

Although Bill C-75 addresses many issues, none is more important than responding to well documented failures of the Canadian justice system with respect to Indigenous people. The most recent statistics suggest that more than 20 years since the enactment of s.718.2(e) of the Code that Indigenous over-representation in jail is getting much worse, not better.

The 2016-17 statistics indicate that 28-30% of custody admissions are Indigenous. The numbers are even higher for youth (50%) and women (42%). <sup>1</sup> This is well beyond a crisis and underline how Canadian courts are sending many Indigenous people to jail every day.

Victimization studies also indicate that the justice system is failing Indigenous women and men who are also significantly over-represented as victims of crime. In 2016, one quarter of homicide victims were Indigenous, six times the rate of others. <sup>2</sup> The most serious crimes- crimes most likely to be tried by juries- disproportionately involve Indigenous people both as accused and victims.

Criminal justice reform alone cannot respond to how colonialism — including but not limited to the legacy of residential schools — has contributed to this shameful state of affairs, but it must make all reasonable attempts to do so. We should have the humility to recognize that the Canadian criminal justice system has repeatedly failed Indigenous people both as accused and victims. In some and perhaps many cases, there may be better ways to handle criminal justice matters that do not involve juries under the Criminal Code but rather involve Indigenous laws and justice systems. That said, the Canadian criminal justice system must not discriminate and jury selection reform is urgently needed to prevent a repeat of the discriminatory jury selection process used in the Gerald Stanley/Colten Boushie case.

---

<sup>1</sup> Adult and Youth Correctional Statistics 2016/2017 at <https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54972-eng.htm>

<sup>2</sup> Homicide in Canada 2016 at <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2017001/article/54879-eng.pdf?st=pl7P8jn0>

Some opponents of Bill C-75 have criticized its jury reforms as a knee jerk reaction to the acquittal in this case, but Bill C-75 actually and belatedly implements many but not all of the 1991 recommendations of the Manitoba Aboriginal Justice Inquiry. These reforms are long overdue but they are not enough.

### **The Importance of Juries**

Juries are important because they are used in our most serious cases and because they are symbolic of the community that we are and want to be. Although accused often avoid jury trials and the availability of jury trials would likely decrease given the expanded use of summary conviction procedures that Bill C-75 promotes, accused have a Charter right to them if they face five years imprisonment or more. Murder trials can be conducted by judge alone with Crown consent, but the acquittals in the Cormier, Stanley and Khill case raises concerns that the accused may have benefited from defences and bias that effectively placed Indigenous victims on trial.

A jury based on a fair cross-section of the community that has to unanimously agree to a verdict can encourage full and frank discussion of difficult issues including racism and can empower those who find themselves in the minority. At the same time a jury that does not represent a cross-section of the community can render verdicts that will inflame tensions and raise reasonable concerns about bias and racism.

### **The Provincial Role in Relation to Section 629 of the Criminal Code and *Kokopenace***

Problems with the provincial role in jury selection have been well-documented. The 1991 Manitoba Aboriginal Justice Inquiry stressed the under-representation of Indigenous people on juries and looked to local jury trials as an important way to address this deficiency. A 1992 Saskatchewan justice review raised concerns that Indigenous accused experienced difficulties being tried by a jury “of his or her peers”. *Report of the Saskatchewan Indian Justice Review* (1992) at 48. A 2004 report also recommended efforts to increase Indigenous representation on juries while noting that special efforts had been made to enhance it on coroners’ juries. *Final Report from the Commission on First Nations and Metis Peoples and Justice Reform* (2004) ch.6. Justice Frank Iacobucci’s 2013 report on Indigenous under-representation on juries in Northern Ontario has made clear the depth of the problem and how it is tied to larger issues of colonial and systemic discrimination. A recent study by Justice Rocco also confirms continued problems since that time with low Indigenous participation on juries including high rates of prospective Indigenous jurors being disqualified under some of the qualifications under s.638 of the Code or related provisions in provincial Jurors Act.<sup>3</sup>

The Supreme Court in *R. v. Kokopenace*, [2015] 2 SCR 398 decided that there is no right to proportional representation on a roll of prospective jurors assembled by the provinces or the actual jury. It rejected a results-based approach in favour of one that required the state

---

<sup>3</sup> Justice Giovanna Toscana Rocco *Report to the Canadian Judicial Council on Jury Selection in Ontario* May 2018 at 16 at <https://www.cjc-ccm.gc.ca/cmslib/general/Study%20Leave%20Report%202018%20June.pdf>

to make reasonable efforts to achieve representativeness. It stressed that jury selection should not be used as a means to remedy systemic wrongs and problems. It upheld a manslaughter conviction even though only 8 of 175 people on a Kenora jury panel lived on reserve. The Court also held that the Indigenous accused did not have standing to raise equality right claims on behalf of prospective Indigenous jurors and the *Gladue* and the duty to consult did not apply to Ontario's jury selection procedure which remains somewhat archaic in its reliance on property tax roles as supplemented by ad hoc resort to list of Indigenous persons on reserves.

In a strong and prophetic dissent, Justice Cromwell (Chief Justice McLachlin concurring) argued that the majority's reasonable efforts test was not sufficient given the significant under-representation of Indigenous people on the jury roll and the state's ability to do better in achieving a representative sampling of the community. Cromwell J. stated that "the unintentional yet substantial under-representation" of Indigenous people on the jury "inevitably, in my view, casts a long shadow over the appearance that justice has been done." Ibid at 304. The Stanley and Khill cases have in my view affirmed the wisdom of Justice Cromwell's more robust and equality based approach and the inadequacy of the majority's approach. Although the summoning of prospective jurors to court is a matter of provincial responsibility, Parliament can and should set out a higher standard than provided by the majority judgment in *Kokopenace*. The Charter as interpreted by the Supreme Court establishes only minimal standards of fairness for criminal trials.

Since it was first enacted in 1892, section 629 only allows the accused or prosecutor to challenge jury panels on the basis of "partiality, fraud or wilful misconduct." Almost all reported challenges under this old provision have failed in the absence of evidence of intentional discrimination.

A more modern standard rooted in substantive equality and patterned after the *Kokopenace* dissent could promote more representative jury panels. The accused and the prosecutor and perhaps also judges on their own initiative given the public interest in representative juries should be able to challenge jury panels under s.629 because they fail to produce a fair and random sample of the community and judges when reviewing challenges to the jury panel under s.629 should pay special regard to the representation of Aboriginal people and other disadvantaged groups that are overrepresented in the justice system but under-represented on juries.

Such a reform would place pressures on provinces to develop better ways to ensure more representative jury panels including outreach and support of Indigenous and other groups such as African-Canadians who are under-represented both on jury panels and actual juries. Local jury trials especially in the north and better pay and accommodations for jurors could also ease the barriers and hardships that some Indigenous people face in serving on juries. This amendment could be phased in over time and perhaps linked to the federal spending power if necessary to assist provinces to compile more representative jury panels

**Proposed Amendment One:** supplement the words in s.629 of the Criminal Code “on the ground of partiality, fraud or wilful misconduct” with the words “on the grounds of significant under-representation of Aboriginal people or other disadvantaged groups that are over-represented in the criminal justice system” and consider allowing judges to raise such concerns on their own initiative.

This proposed amendment borrows from the proposed s.493.2 in C-75. It should allay concerns articulated by the majority of the Supreme Court in *Kokopenace* about the impossibility of perfectly proportionate jury panels. It might encourage provinces and courts to hold jury trials closer to Indigenous communities as recommended by the Manitoba Aboriginal Justice Inquiry. As stated above, if time is needed to consult the provinces, the amendment could, as is the case with many Criminal Code amendments, be proclaimed in force at a later date. The time for jury reform, however, is now.

### **Abolish Categorical and Unjustified Restrictions on Potential Jurors and Allow Volunteer Jurors**

Section 273 of Bill C-75 tinkers with categorical and archaic disqualifications of jurors who are “aliens” or “have been sentenced to death” or a prison term over 12 months by changing the reference to aliens to Canadian citizens and by having a life time ban on jury services to those who have been sentenced to 24 months as opposed to 12 months. Exclusions based on criminal record have been challenged in Charter litigation, but again the Charter only sets minimal standards. The starting point should be equality. The exclusion of those with criminal records will have the effect of excluding more Indigenous people and others groups that are over-represented in the justice system. Such exclusions make discriminatory assumptions about the impartiality of those who have been imprisoned that may more proportionately be explored through challenges for cause.

Section 638 should be amended to allow Canadian citizens and permanent residents of Canada to serve on juries. Allowing permanent residents to be jurors could help respond to recently observed under-representation of Black and Brown people on juries in Toronto and Brampton. A *Toronto Star* survey published shortly after the Stanley verdict found 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% were Brown. The survey 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.<sup>4</sup> It might also respond to concerns raised by some defence lawyers that the abolition of peremptory challenges could make juries in some metropolitan centres less diverse and representative of their clients.

The Code should also be amended to allow those who are most comfortable in Indigenous languages to serve on juries with adequate interpretation services, as is already done in the

---

<sup>4</sup> [Lhttps://www.thestar.com/news/investigations/2018/02/16/how-a-broken-jury-list-makes-ontario-justice-whiter-richer-and-less-like-your-community.html](https://www.thestar.com/news/investigations/2018/02/16/how-a-broken-jury-list-makes-ontario-justice-whiter-richer-and-less-like-your-community.html)

Northwest Territories and Quebec. If necessary, provinces and territories could opt in as translation services became available.

As used in New York and recommended by Justice Iacobucci, volunteer jurors should be authorized in the Code to supplement the jury roll as another way to increase Indigenous participation. Volunteer jurors from Indigenous communities have been used in Ontario. Any concerns that they may not be impartial could be dealt with by improvements to challenges of cause to 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 a hardship basis. The real issue with all prospective jurors should be whether they are competent and impartial and this will be addressed below.

***Proposed Amendment Two: Amend s.638 (c) to provide “a juror is not currently serving a sentence of imprisonment” Amend s.638 (d) to provide “a juror is not a Canadian citizen or a permanent resident of Canada” Amend s.638(f) to make reference to allowing jurors who speak Indigenous languages but not the official languages of Canada to participate if sufficient interpretation services are available including the use of interpreters in jury deliberations who would be bound by the secrecy provisions in s.649. Finally, amend s.638 to allow otherwise qualified volunteer jurors from Indigenous communities.***

### **Peremptory Challenges**

After examining the trial of those accused of murdering Cree women Helen Betty Osborne in the Pas and finding evidence of both defence and Crown use of peremptory challenges to exclude Indigenous people, the Manitoba Aboriginal Justice Inquiry recommended in 1991 that peremptory challenges be abolished. If this had been done, Gerald Stanley would not have been able to use his 14 peremptory challenges to challenge five visibly Indigenous people from his jury.

Justice Iacobucci in his 2013 report warned that despite a range of efforts that could and should be undertaken to increase Indigenous representation on juries, they all could be defeated if peremptory challenges were used in a discriminatory manner to exclude prospective Indigenous jurors.

Alas, Canadian law has been unable to control the discriminatory use of peremptory challenges. The Ontario Court of Appeal in *R.v.Gayle* (2001) 154 C.C.C.(3d) 1 suggested that their discriminatory use may be inconsistent with the special role of the Crown but the few reported challenges to Crown uses of peremptories have failed, most recently in *R. v. Cornell*, 2017 YKCA 12, a case where concerns were also raised about the under-representation of Indigenous people on the jury panel.

*R. v. Lines* 1993 O.J. no 3284 (Ont.Gen.Div.) concluded that Charter norms of equality may not even apply to defence use of peremptory challenges. *R. v. Brown* 1999 O.J. no 4867 at paras 6-11 suggests that Canadian courts may be unable to require defence counsel to provide non-discriminatory justifications for their use of peremptory challenges. In short,

Canadian law has been resistant to developing the complex jurisprudence that has emerged in the US in an attempt to control discriminatory uses of peremptories but many have concluded that it has failed. This may actually be a good thing because most commentators have concluded that the US jurisprudence has failed to prevent anything but the most blatant and obvious form of discriminatory use of peremptory challenges and there are echoes of this failed jurisprudence in the small Canadian jurisprudence that has developed around Crown use of peremptory challenges.<sup>5</sup>

Control of discriminatory defence use of peremptories would be very difficult. It could lengthen jury selection. 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 may not have standing and would often have to rely on the Crown. A statutory mechanism to prevent discriminatory use of peremptories would be cumbersome and likely ineffective. The simpler and better solution is to abolish peremptories. The accused does not have a Charter right to peremptory challenges or racist uses of them.

### **The Arguments to Retain Peremptory Challenges**

Some defence lawyers and some Crowns oppose the abolition of peremptories. They cite cases where they have used peremptories to keep people off juries who they sincerely believe were partial or incompetent. These important concerns can be addressed by expanding challenges for cause and giving judges more discretion and responsibility to remove jurors as Bill C-75 does. There is little support for the idea that the abolition of peremptory challenges violates s.7 or s.11 of the Charter, especially given the importance of preventing discrimination and having a fair cross section of the community on juries.

Some invoke Blackstone who defended peremptories as part of "the tenderness and humanity" towards the accused that "English laws are justly famous". But even Blackstone admitted that peremptories could be used by the parties to ensure that they not "be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike." Moreover, England abolished peremptories in 1988. Canada should do so in 2018.

Some argue that peremptories can be used to produce a more representative jury. But there are other more transparent tools to achieve these laudable objectives including requiring a more inclusive standard for jury panels under s.629, abolishing some of the categorical exclusions of non-citizens and those sentenced to more than 12 months. Each province and territory must work with Indigenous communities to find creative and respectful ways to make Indigenous people more willing and able to serve on juries.

---

<sup>5</sup> Discussed in Roach *Canadian Justice, Indigenous Injustice: The Gerald Stanley/Colten Boushie Case* (Montreal: McGill Queens, forthcoming) ch. 5.

**The proposed abolition of peremptory challenges in s.271 of Bill C-75 is the most effective and efficient way to ensure that neither the Crown or the accused engages in discrimination against Aboriginal people and other disadvantaged and identifiable groups when selecting a juror. There is no ground in concluding that peremptory challenges much less their discriminatory use are a Charter right. The Canadian jurisprudence since 1985 has failed to prevent the discriminatory use of peremptory challenges and provides challenges in extending Charter norms of equality to defence use of peremptory challenges.**

### **Expand Challenges for Cause**

Many of the arguments in favour of peremptory challenges and against expanded and volunteer jury participation ignore the continued and perhaps more important role that challenges for cause could play under a reformed jury selection system. The fact that the US has gone too far in allowing questioning of prospective jurors does not mean that we have struck the right balance between juror privacy and the need for an impartial jury. The jurors will not be challenged for cause on the basis of racism or pre-trial publicity in the Stanley trial. Only one loaded question about the race of the victim was asked in the Peter Khill case presently under appeal.

Section 638 of the Code could be amended to resolve conflicting lower court jurisprudence and allow for the use of more sophisticated multiple choice questions that could better reveal the deep and often subconscious type of racism that may give rise to challenges for cause.<sup>6</sup> It could also deal with real concerns that the blunt question allowed in *R. v. Williams* [1998] 1 SCR 1128 does not really reveal subconscious racist stereotypes and assumptions about accused or victims that may taint jury deliberations.

There is precedent for the Crown to establish that there is a realistic possibility of partiality and hence a ground for challenge for cause in cases where the victim was Indigenous even though such a question was not asked in the Stanley case.

In *R. v. Rogers* (2000) 38 CR (5th) 331; [2000] OJ No 3009. Justice Mackinnon held in that case “racism will be at work on the jury panel as soon as the victim is described as an Aboriginal... I do not agree with defence counsel’s submission that the question proposed would be counterproductive in that it would inject racial overtones into a case where none previously existed. A question directed at revealing those of the panel whose bias renders them partial does not “inject” racism into the trial but seeks to prevent that bias from destroying the impartiality of the jury’s deliberations.” *ibid* at para 6 Consistent with *R. v. Find* [2005] 3 SCR 458 [7], the focus of such a Crown initiated challenge for cause should

---

<sup>6</sup> Carol Aylward *Canadian Critical Race Theory* (Halifax: Fernwood, 1999) at 117-118, 158-165; David Tanovich “The Charter of Whiteness: Twenty Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System” (2008) 40 S.C.L.R.2d 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 U.C. Irvine L.Rev. 843

be on racial hostility towards in this case the complainant. See also *R. v. Munson*, 2001 SKQB 410 at para 2 aff'd 2003 SKCA 28

Expanded challenges for cause may take more time, but probably less time than US style litigation about alleged discrimination in the use of peremptories. Amendments could also be worded to encourage all parties to make challenges for cause related to discrimination against Aboriginal and other persons who are over-represented in the justice system whether as accused, witnesses or complainants/victims. Equality does not protect just the accused and Indigenous people are over-represented as crime victims and likely witnesses as well.

***Proposed Amendment Three: Section 638(1)(b) should be amended to include “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 vulnerable to discrimination and b) to the difficulties of determining whether a prospective juror would act on discriminatory stereotypes.”***

The above amendment would not allow wide open or American style challenges for causes and trial judges would retain the discretion and indeed new powers to determine whether prospective jurors were impartial. It would advance equality values which should apply to protect not only the accused but also witnesses and victims/complainants from discrimination.

### **Elaborating on the New Public Confidence Ground for Judges Standing Aside Prospective Jurors in s.633.**

Section 271 of Bill C-75 would amend s.633 to allow judges to stand aside prospective jurors not only for reasons of personal hardships or other reasonable cause but for reasons of “maintaining public confidence in the administration of justice”. The rationale for such an amendment seems to be to increase the representativeness of juries, but in my view this should be made more explicit in order to provide more guidance for judges. At present, this will simply be a discretionary power that may be exercised in different ways by different trial judges or not at all.

***Proposed Amendment Four: Add to the amendment to s 633 allowing judges to use stand asides to maintain confidence in the administration of justice the phrase: “with special regard to the fair representation of Aboriginal people and other groups overrepresented in the justice system.”***

### **The Emerging Problems of Guilty Plea Wrongful Convictions**

Section 270 of Bill C-75 responds to the emerging recognition that many wrongful convictions are made when accused make rational or irrational decisions to plead guilty even though they did not commit the crime. For example, the Manitoba Court of Appeal recently reversed a wrongful conviction when an Indigenous accused with FASD pled guilty to a crime in Winnipeg when he was in Brandon. *R. v. Catcheway* 2018 MBCA 54. Bill C-75

would respond by following the model of the Youth Criminal Justice Act by amending s.606(1.1) of the Code to provide that trial judges should determine not simply if guilty pleas are made voluntarily and knowingly but also whether “the facts supports the charge” This is an important safeguard. However, it is a somewhat illusory one given s.606(1.2) which provides that the failure of courts to fully to inquire whether the conditions in s.606 (1.1) are satisfied “does not affect the validity of the plea”.<sup>7</sup> To be sure, courts have corrected some guilty plea wrongful convictions but s.606(1.2) may present some barriers in doing so.

***Proposed Amendment Five: Repeal Section 606.(1.2) in order to bolster the protection by adding the new requirements that a failure to determine whether the facts support the charge before accepting a guilty plea could affect the validity of the plea.***

## **Conclusion**

**The proposed abolition of peremptory challenges in s.271 of Bill C-75 is the most effective and efficient way to ensure that neither the Crown or the accused engages in discrimination against Aboriginal people and other disadvantaged and identifiable groups when selecting a juror. There is no ground in concluding that peremptory challenges much less their discriminatory use are a Charter right. The Canadian jurisprudence since 1985 has failed to prevent the discriminatory use of peremptory challenges.**

**Bill C-75 can and should do more with expanding the panel of prospective jurors to make it more reflective of the diversity of Canadian society and to take all reasonable steps to ensure that racist bias and stereotypes do not influence jury deliberations. This would include amendments that would encourage judges to allow more in-depth challenges for causes in an attempt to identify bias and stereotypes that affect Indigenous people and others disadvantaged groups that are over-represented in the justice system. Another way to do this is to abolish a number of the restrictions found in the Criminal Code on who can serve on juries to allow permanent residents and those who have served sentences of imprisonment to sit on juries. In addition, there is a need to expand the power to challenge jury panels that under-represent Aboriginal people and other disadvantaged groups over-represented in the justice system. Such focused attention would not require perfectly proportionate juries, but would address those groups most immediately affected by jury trials. Such an amendment will impact the provinces, but this should not be used as an excuse for not legislating more appropriate and equality sensitive Criminal Code standards.**

There is a special need to work creatively and respectfully with Indigenous communities to attempt to increase Indigenous participation on juries and to eliminate the hardships and

---

<sup>7</sup> Amanda Carling “A Way to Reduce Indigenous Over-representation: Prevent False Guilty Plea Wrongful Convictions” (2007) 64 CLQ 415.

reasonable suspicions that Indigenous people may have about jury service in a Canadian criminal justice system that has failed their communities. We need to be imaginative and consider the use of volunteer jurors from Indigenous communities and to abolish many of the categorical restrictions on jury service including citizenship requirements and prohibitions on those who have served prison sentences. Bill C-75 should also be amended to encourage judges to be more proactive in allowing questions to take all reasonable steps to prevent racist bias and stereotypes from influencing jury deliberations and ensuring more representative juries.

### **The Five Proposed Amendments**

- 1. supplement the words in s.629 of the Code “on the ground of partiality, fraud or wilful misconduct” with the words “on the grounds of significant under-representation of Aboriginal people or other disadvantaged groups that are over-represented in the criminal justice system” and consider allowing judges on own initiative to raise such concerns.**
- 2. Amend s.638 ( c ) to provide “a juror is not currently serving a sentence of imprisonment”. Amend s.638 (d) to provide “a juror is not a Canadian citizen or a permanent resident of Canada”, Amend s.638(f) to make reference to allowing jurors who speak Indigenous languages but not the official languages of Canada to participate if sufficient interpretation services are available including the use of interpreters in jury deliberations who would be bound by the secrecy provisions in s.649. Amend s.638 to allow otherwise qualified volunteer jurors from Indigenous communities.**
- 3. Section 638(b) should be amended to include “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 vulnerable to discrimination and b) to the difficulties of determining whether a prospective juror would act on discriminatory stereotypes.”**
- 4. Add to the amendment to s 633 allowing judges to use stand asides to maintain confidence in the administration of justice the phrase: “with special regard to the fair representation of Aboriginal people and other groups overrepresented in the justice system.”**
- 5. *Proposed Amendment Five:* Repeal Section 606.(1.2) in order to bolster the protection by adding the new requirements that a failure to determine whether the facts support the charge before accepting a guilty plea could affect the validity of the plea.**