

**DISCRIMINATORY AND UNFAIR
PRACTICES AGAINST THE INDIGENOUS
PEOPLES OF CANADA IN THE SELECTION
OF CRIMINAL JURIES**

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ABSTRACT

Indigenous Peoples are overrepresented in all aspects of the Canadian criminal justice system. Most dramatic are their rates of incarceration. One way to potentially reduce conviction rates and the resulting custodial numbers is to make improvements to the fairness and effectiveness of jury selection. For the purposes of this thesis that requires reconsidering the disqualification of the criminally convicted from jury service as well as rethinking the systems that are in place for challenging prospective jurors.

The goal of the jury selection process is to seat a representative, independent and impartial body of citizen adjudicators. It is and will always be an imperfect system as are all human ventures. However, the aim of the enterprise remains of fundamental importance to the rendering of just and accurate verdicts. Yet identifying and selecting a group of ideally diverse and fair-minded jurors to sit in judgment is not a simple task. Indeed, the question ultimately becomes not whether the paradigmatic jury can be compiled, but whether the present model of empanelment can be improved upon.

My analysis of the governing Canadian jurisprudence suggests that the present jury selection regime is inadequate. That view is further buttressed after considering and comparing the experiences in England and the United States of America on the same issues. In the end, I propose utilizing a more expansive pool of prospective jurors given the significant number of Indigenous Peoples who are presently disqualified from jury service due to their criminal antecedents. Additionally, I argue that challenges for cause need to become more inquisitorial in order to function optimally. Finally, I conclude that peremptory challenges require more judicial oversight as to their use and a reduction of their number achieved through legislative action.

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ABBREVIATIONS

| | |
|-----------------------|---|
| AIDWYC | The Association in Defence of the Wrongfully Convicted |
| Auld Review | <i>A Review of the Criminal Courts of England and Wales</i> |
| <i>Charter</i> | <i>Canadian Charter of Rights and Freedoms</i> |
| CPIC | Canadian Police Information Centre |
| CPS | Crown Prosecution Service |
| CRA | <i>Criminal Records Act</i> |
| DNA | Deoxyribonucleic Acid |
| England | England and Wales |
| HDR | Higher Degree Research |
| IP | Indigenous Peoples |
| Lord Mansfield's Rule | <i>Vaise v Deleval</i> (1785) 1 TR 11 |
| LSO | Law Society of Ontario |
| PBC | Parole Board of Canada |
| RCMP | Royal Canadian Mounted Police |
| Roskill Committee | <i>Fraud Trials Committee Report</i> |
| USA | United States of America |
| White Paper | <i>Criminal Justice: Plans for Legislation</i> |

CHAPTER 1

INTRODUCTION

I am a seasoned Canadian lawyer with over 30 years of experience at the Bar. The lion's share of my career has been occupied by prosecuting criminal matters including a considerable number before juries. While my practical experience has helped guide much of my doctoral research and influenced the concluding recommendations found herein, the actual inspiration to undertake the PhD endeavour was drawn from some observations that I made long before I took to the law.

As a young man, I had occasion to watch a criminal jury being selected. While I was unaware at the time of the legalities associated with jury empanelment, I was nonetheless cognizant of the fact that the opposing lawyers were deciding which prospective jurors they did and did not want seated on the jury. I heard various remarks being uttered by counsel that resulted in the candidates either going into the jury box or being ushered elsewhere in the courtroom. I watched one of the lawyers challenge persons of colour three times during the process, a man and two women. I could see what I believed to be disappointment on their faces as they were led away and my intuition told me that something was amiss. And then I looked at the man in the prisoners' dock, who was also a person of colour, and saw that his head was shaking in silent disapproval. Yet the presiding judge did nothing and the lawyers seemed unconcerned. When 12 jurors were finally selected they were all white, male and presumptively ready for the task at hand.

1.1 The Importance of Jury Trials

Whenever concerns are raised over the proper functioning of juries, some are quick to recommend their abolition. Rather than going to the time and expense of summoning Canadian citizens for jury duty and inconveniencing them for days, weeks or even months at a time, the easy fix would be to simply have trials by judges sitting alone. Certainly the bench trial standard is in place in a number of countries.¹ In Canada, save for a few

¹ Consider for example the Netherlands and Israel, two democratic states that do not employ the jury system. See Michael Csere, 'Reasoned Criminal Verdicts in the Netherlands and Spain: Implications for Juries in the United States' (2013) 12 Conn Pub Int LJ 415, 419 and Steven J Colby, 'A Jury for Israel?: Determining When a Lay Jury System is Ideal in a Heterogenous Country' (2014) 47 Cornell Int'l LJ 121, 122.

select offences, an accused person may elect to be tried without a jury.² Yet various arguments have consistently foreclosed any notion of abandoning the jury trial practice altogether. Three main justifications are apparent: (1) the historical importance of the jury trial in Canada and other common law countries; (2) the positive public opinion of Canadians that remains associated with the jury trial in contemporary times; and, (3) the constitutional mandate in Canada that requires at least the option of a jury trial depending on the potential punishment upon conviction.

1.1.1 Historical Significance

Canada is a relatively youthful country, having only come into being in 1867 by confederating its four original provinces.³ However, even before confederation, the original four provinces all provided a right to a criminal trial by jury.⁴ As a British colony, Canada inherited the foundation of its justice system from England and, as such, embraced the philosophies that supported that country's particular mode of adjudication.⁵ Indeed, the first comprehensive *Criminal Code* for Canada appeared in 1892 and was based on a draft code originally written by James Fitzjames Stephen for use in England.⁶ As explained by L'Heureux-Dubé J in *R v Sherratt*, the Canadian jury is an amalgam of many virtues:

The jury, through its collective decision making, is an excellent fact finder; due to its representative character, it acts as the conscience of the community; the jury can act as the final bulwark against oppressive laws or their enforcement; it provides a means whereby the public increases its knowledge on the criminal justice system and it increases, through the involvement of the public, societal trust in the system as a whole.⁷

² See the *Criminal Code*, RSC 1985, c C-46 at ss 536(2), 555(3) and 566(2). The Attorney General can require a jury trial under ss 568 and 569. Section 471 states that all indictable offences are to be tried with a jury save for where there is an express provision that indicates otherwise. Pursuant to s 473(1), even a s 469 offence, for example murder, can be tried by a judge sitting alone with the consent of the accused and the Attorney General.

³ The four provinces were Ontario, Quebec, Nova Scotia and New Brunswick. See Adam Dodek, *The Canadian Constitution* (Dundurn 2013) 19 and Christopher Granger, *The Criminal Jury in Canada* (2nd edn, Carswell 1996) 26.

⁴ See *R v Bryant* (1984), 48 OR (2d) 732 at paras 26-27 (CA) and *Reference re: Juries Act (Ont)*, 2011 ONSC 1105 at para 16.

⁵ Granger (n 3) 26.

⁶ Allan M Linden, 'Recodifying Criminal Law' (1989) 14 Queen's LJ 3, 5. See also the *Criminal Code*, SC 1892, c 29.

⁷ *R v Sherratt*, [1991] 1 SCR 509 at para 30.

Each of the foregoing traits associated with jury trials can be traced to the English experience. In *Ward v James*, Lord Denning MR, while exalting the fact-finding prowess of a jury remarked that '[w]henever a man is on trial for serious crime, or when in a civil case a man's honour or integrity is at stake, or when one or other party must be deliberately lying, then trial by jury has no equal.'⁸ Regarding the moral qualities associated with the communal decision-making of the jury, Thomas and Balmer observed that '[t]he view that currently underpins jury policy in this country [England and Wales] is that a randomly selected jury is most likely to be representative and a representative jury is most likely to be impartial.'⁹ Moreover, juries have been known to stave off or otherwise nullify unjust laws in the face of overwhelming evidence of guilt. Such a stance was taken in *Bushell's Case*¹⁰ where the jury famously refused to convict William Penn and William Mead of an unlawful assembly allegation.¹¹ Finally, the educative effect of jury service and the respect that inures to the system from the experience was touched upon over a half century ago by the Honourable Sir Patrick Devlin when he underscored '[u]pon what jurymen think and say when they get home the prestige of the law in great measure depends.'¹²

The lineage of the criminal jury trial to common law countries, as a fact-finding institution,¹³ has been traced to chapter 39 of the *Magna Carta* of 1215, which reads: 'No free man shall be taken or imprisoned or disseised [deprived of his land] or outlawed, or exiled, or in any way ruined, nor will we go against or send against him, except by the lawful judgment of his peers, or by the law of the land.'¹⁴ While it is beyond the scope of this brief historical discussion to detail the academic analysis of the famous 'judgment of his peers' reference, suffice it to say that some scholars dispute that the *Magna Carta*

⁸ *Ward v James* [1966] 1 QB 273 (CA) 295.

⁹ Cheryl Thomas (with Nigel Balmer), *Diversity and Fairness in the Jury System* (Ministry of Justice Research Series 2007, June 2007) 6.

¹⁰ *Bushell's Case* (1670) 124 ER 1006.

¹¹ For a more fulsome understanding of *Bushell's Case*, see Kevin Crosby, 'Bushell's Case and the Juror's Soul' (2012) 33 J Leg Hist 251.

¹² Patrick Devlin, *Trial by Jury* (Stevens & Sons Limited 1956) 25.

¹³ It should be emphasized that early English jurors were far from neutral fact finders. Rather, they were 'chosen in the community from those who would be most likely to know the circumstances and thus would be able to pass an intelligent judgment upon them'. See Charles L Wells, 'Early Opposition to the Petty Jury in Criminal Cases' (1914) 30 LQR 97, 105. See also *Bryant* (n 4) paras 17-20.

¹⁴ As translated and reproduced in Thomas J McSweeney, 'Magna Carta and the Right to Trial by Jury' in Randy J Holland (ed), *Magna Carta: Muse & Mentor* (Thomson Reuters 2014) 148.

guaranteed a right to be tried by a representative jury.¹⁵ In any event, subsequent legal figures and judicial bodies have accepted the nexus between the language used in chapter 39 and the modern concept of trial by jury.¹⁶ Thus, the roots of a community-based justice system took hold. Whether or not ‘twelve heads are better than one’ when it comes to resolving disputes remains open for debate.¹⁷ But at least the final decision will be one of the people and thus not nearly as susceptible to the jadedness and idiosyncratic logic that may potentially form in the mind of a professional judge. As explained by Gillers:

Intuitively, juries, chosen in accordance with rules calculated to assure that they reflect a ‘fair cross-section of the community,’ are more likely to accurately express community values than are individual state trial judges. This is true because twelve people are more likely than one person to reflect public sentiment, because jurors are selected in a manner enhancing that likelihood, and because trial judges collectively do not represent -- by race, sex, or economic or social class -- the communities from which they come. The response of a representative jury of acceptable size is consequently taken to be the community response. The jury does not try to determine what the community would say, but in giving its conclusion, speaks for the community. The judge, on the other hand, must assess the community’s ‘belief’ or ‘conscience’ and impose it or must impose his own and assume it is the community’s. Whichever the judge does, the representative jury would seem to have a substantially better chance of identifying the community view simply by speaking its mind.¹⁸

As such, the decision-making legitimacy of the group was recognized early on, irrespective of the accuracy of the verdicts it may render,¹⁹ as a viable and often preferable adjudicative option to that of a single judge.

1.1.2 Public Opinion and Support

In any democracy, the lifespan of a social institution remains, at least theoretically, at the pleasure of the citizenry. Thus, if the institution of the jury did not enjoy the high regard

¹⁵ *ibid* 157. Arguably chapter 39 of the *Magna Carta* was more about being judged by those of equal station than by a randomly selected adjudicative body. See Penny Darbyshire, ‘The lamp that shows that freedom lives - is it worth the candle?’ [1991] Crim LR 740, 742-43.

¹⁶ See for example Devlin (n 12) 164-65 and the United States Supreme Court in *United States v Booker*, 543 US 220, 239 (2005).

¹⁷ See Phoebe C Ellsworth, ‘Are Twelve Heads Better Than One?’ (1989) 52 Law & Contemp Probs 205.

¹⁸ Stephen Gillers, ‘Deciding Who Dies’ (1980) 129 U Pa L Rev 1, 63-64 (footnotes omitted). Indeed, a jury has been described as a ‘little parliament’ by Devlin (n 12) 164.

¹⁹ For a discussion of the perceptions associated with verdict accuracy see Robert J MacCoun and Tom R Tyler, ‘The Basis of Citizens’ Perceptions of the Criminal Jury’ (1988) 12 Law & Hum Behav 333, 350.

of the public then the likelihood of its continued existence would presumably be called into question by elected officials. In 2005, Binnie J recognized the support for the jury when he remarked: ‘Over the years, people accused of serious crimes have generally chosen trial by jury in the expectation of a fair result. This confidence in the jury system on the part of those with the most at risk speaks to its strength.’²⁰

While the confidence of the court in jury trials is clear from its pronouncements,²¹ public opinion surveys in Canada make the point even more evident. In reviewing jury systems across the globe, Hans found that Canadian survey data existed suggesting that while judges and juries were ‘equally likely to arrive at just verdicts’, ultimately the jury was seen as the best choice by those who distinguished between the two.²² In 2009, Roberts and Hough conducted a literature review which confirmed that in Canada:

- (1) The public appear opposed to any movement to restrict or abolish the right to a trial by jury;
- (2) That four-fifths of sampled respondents in one study supported retaining the jury for more serious offences; and,
- (3) That almost nine out of ten respondents in another study supported the continued presence of the jury.²³

As dictated by Canada’s *Criminal Code*, only certain offences will be tried before a jury either because of statutory compulsion or due to an accused person’s election.²⁴ Indeed, only indictable offences can be tried by a jury.²⁵ Indictable offences, as compared to summary conviction offences, are generally considered to be the more serious of the two

²⁰ *R v Spence*, 2005 SCC 71 at para 22. In *R v Connor and another*; *R v Mirza* [2004] UKHL 2 [144] Lord Hobhouse similarly commented: ‘The jury trial has been adopted in all main common law jurisdictions. It is highly regarded as a bastion of the criminal justice system against domination of the state and a safeguard of the liberty of its citizens.’

²¹ Consider the positive comments of the Supreme Court of Canada in *R v Corbett*, [1988] 1 SCR 670 at paras 38-41 and *R v Pan*; *R v Sawyer*, 2001 SCC 42 at para 41.

²² Valerie P Hans, ‘Jury Systems Around the World’ (2008) 4 Ann Rev L Soc Sci 275, 281. See also the comments of Anthony Doob in, *Public’s view of the criminal jury trial: Report to the Law Reform Commission of Canada on the results of the public opinion poll conducted on matters related to the criminal jury in Canada* (Law Reform Commission of Canada, 1979) 1-26.

²³ Julian V Roberts and Mike Hough, *Public Opinion and the Jury: An International Literature Review* (Ministry of Justice Research Series 1/09, 2009) 23.

²⁴ *Criminal Code* (n 2) ss 473 (1), 536 (2), 555 (3), 568 and 569.

²⁵ *ibid* s 471.

classifications.²⁶ Thus, the pool of eligible charges for trial by jury is limited even before an accused person's election is contemplated. As explained by Schuller and Vidmar, '[w]hen summary conviction offenses are taken into account, the vast bulk of cases, at least ninety percent, are tried by judge alone.'²⁷

The attendant costs associated with a jury trial might logically be a consideration for those members of society who support fiscal conservatism. However, research on the issue suggests that cost savings are not a concern to the public 'if it meant restricting the right to a jury trial'.²⁸ Thus, trials by jury fall into the category of administration of justice services for which the general citizenry will not scrimp. While Darbyshire questions the pragmatism of juries as a mode of trial, she also suggests a viable answer as to why they remain in place:

If the jury is such a "palladium" of English justice (Blackstone), why is it reserved for such a small number of cases, most defendants being treated to the quicker, cheaper, less flamboyant "trivial" justice of the magistrates' court? If the jury is such a guardian of our liberties and of justice, are we implying that magistrates dispense some lesser form of justice? Are we implying, since we invest so much cash and rhetoric in the jury system, that it is more likely to do justice and get the verdict right, whatever that means, than the magistrates? If so, why do we, in this, the fairest of legal systems, allow most of our defendants to be processed by the magistrates' courts? And, this being the case, why have academics invested so much argument and research into the jury?

There is one obvious answer to my questions here. The symbolic function of the jury far outweighs its practical significance.²⁹

²⁶ The maximum sentence of incarceration for most summary conviction offences is only six months; *ibid* s 787 (1).

²⁷ Regina Schuller and Neil Vidmar, 'The Canadian Criminal Jury' (2011) 86 Chi-Kent L Rev 497, 500. See also Kazi Stastna, 'Jury duty: Unfair burden or civic obligation?' (*CBC News*, 8 November 2011) 9 <<http://www.cbc.ca/news/canada/jury-duty-unfair-burden-or-civic-obligation-1.994514>> accessed 10 August 2015. Similarly small numbers of jury trials are reported in England and in the USA. See, respectively, *Mirza* (n 20) [5] where the figure cited by the House of Lords was one percent while Victor E Flango in 'Trends in State Courts' (2016) National Center for State Courts at 98 cited statistics suggesting '[b]etween 1976 and 2009, [state] criminal jury trials dropped from 3.1 percent of dispositions to 1.1 percent'.

²⁸ Julian V Roberts and Mike Hough, 'Public Attitudes to the Criminal Jury: a Review of Recent Findings' (2011) 50 How J Crim Justice 247, 257 (speaking of English views). MacCoun and Tyler (n 19) 347 report that '[f]airer jury procedures are also perceived to be more expensive, indicating that subjects perceive a trade-off between efficiency and fairness.'

²⁹ Darbyshire (n 15) 741 (references omitted).

Whether symbolism or a perceived need for a cross-section of the community to be directly connected to the judicial branch of government drives the continued existence of the jury remains open for discussion. Both justifications will find utility in a democratic society. However, in the final analysis, ‘the criminal jury trial remains a robust institution in the scheme of Canadian life and law’.³⁰

1.1.3 The Constitutional Mandate

While s. 471 of the *Criminal Code* declares that ‘[e]xcept where otherwise expressly provided by law, every accused who is charged with an indictable offence shall be tried by a court composed of a judge and jury’,³¹ the Constitution of Canada³² is dispositive of the issue. Section 11(f) of the *Canadian Charter of Rights and Freedoms* (‘Charter’), being Part 1 of the *Constitution Act, 1982*, reads as follows:

11. Any person charged with an offence has the right

...

- (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.³³

Despite there being a right to a jury trial in the above-described circumstances, the right can be waived by the right-holder, that being the accused. Indeed, there may be occasions where the evidence and legal issues to be addressed at trial are perceived to be best left

³⁰ Neil Vidmar, ‘The Canadian Criminal Jury: Searching for a Middle Ground’ (1999) 62 *Law & Contemp Probs* 141, 172.

³¹ *Criminal Code* (n 2) s 471.

³² *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11, s 52 indicates:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes

- (a) the *Canada Act 1982*, including this Act;
- (b) the Acts and orders referred to in the schedule; and
- (c) any amendment to any Act or order referred to in paragraph (a) or (b).

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

³³ *Canadian Charter of Rights and Freedoms*, being Part 1 of the *Constitution Act, 1982*, enacted by the *Canada Act, 1982* (UK) c 11, s 11(f).

to ‘one person trained in the law rather than twelve laypersons’.³⁴ As explained by Wilson J, who supported her position with reference to American jurisprudence:

To compel an accused to accept a jury trial when he or she considers a jury trial a burden rather than a benefit would appear, in Frankfurter J.’s words, “to imprison a man in his privileges and call it the Constitution”: see *Adams v. U.S. ex rel. McCann*, 317 U.S. 269 at 280 (1942).³⁵

But could Canada’s Constitution be amended to remove the guaranteed right to a jury trial? The short answer is ‘yes’, but the reality is that accomplishing such a feat would be exceedingly difficult.³⁶ While it is beyond the scope of this thesis to discuss in any detail what is required to orchestrate such a change, Albert explains that its occurrence is very unlikely:

The extraordinary difficulty of formal amendment in Canada derives equally from sources external to the Constitution’s formal amendment rules. The supermajority and federalist thresholds entrenched in the *Constitution Act, 1982* are demanding on their own, but major constitutional amendment now also requires conformity with extra-textual requirements imposed by Supreme Court decisions interpreting the Constitution of Canada, parliamentary and provincial as well as territorial statutes, and arguably also by constitutional conventions, which refer to the unwritten yet binding constitutional norms that develop in the course of constitutional politics. These extra-textual requirements for formal amendment appear nowhere in the text of the *Constitution Act, 1982*, but they are perhaps just as significant as the ones that do. Uncodified, though broadly recognized as valid, they so exceedingly complicate the process of formal amendment that we might more accurately speak of amendment *impossibility* in Canada rather than mere difficulty.³⁷

Thus, the right to the benefit of trial by jury as envisioned in s. 11(f) of the *Charter*³⁸ would appear to be practically unalterable. Indeed, the combination of historical importance, public approval and constitutional mandate make the Canadian jury trial a formidable and distinctive institutional device within the criminal justice system. Some

³⁴ Charles Whitebread and Christopher Slobogin, *Criminal Procedure: An Analysis of Cases and Concepts* (2nd edn, The Foundation Press 1986) 607.

³⁵ *R v Turpin*, [1989] 1 SCR 1296 at 1313.

³⁶ In Part V, between ss 38 to 45 of the *Constitution Act, 1982* (n 32), there are five different amending procedures for various types of amendment concerns. See Peter W Hogg, ‘Formal Amendment of the Constitution of Canada’ (1992) 55 *Law & Contemp Probs* 253, 257.

³⁷ Richard Albert, ‘The Difficulty of Constitutional Amendment in Canada’ (2015) 53 *Alta L Rev* 85, 87 (emphasis in original).

³⁸ See the text to n 33 for the language of s 11(f).

may say that the notion of community adjudication is more important to the general public than it is to the person whose individual liberty is at stake.³⁹ Whatever may be the case, the conceptual underpinnings of the jury trial are firmly entrenched in the Canadian psyche.

1.2 The Research Questions

Three research questions are addressed in this thesis:

- (1) Should potential jurors be disqualified due to their criminal antecedents and what is the impact of such a policy on Indigenous Peoples?
- (2) Does the ‘challenge for cause’ procedure work fairly and effectively for Indigenous Peoples when attempting to expose partiality?
- (3) Is the ‘peremptory challenge’ option neutral in its application or potentially discriminatory against Indigenous Peoples?

1.3 The Choice of Research Methods

Doctrinal and comparative law methodologies were seen to be well-suited for answering the research questions in a way that would encourage both pragmatic and ethically sound concluding propositions. The practical knowledge that comes from the study of fundamental legal and systemic constructs combined with the wealth of viewpoints that can be drawn from comparison make for a cohesive and complementary research approach. While it has been posited that law is ‘not a field with a distinct methodology’,⁴⁰ it is often the case that the particular legal issue in question will dictate which analytical tool is best suited for the task. The two selected research modes make for a manageable thesis inquiry that is coherent and focused, thus contributing to a final product that reflects a clear vision of the issues and potential solutions. However, this is not to underestimate the value of socio-legal approaches, including empirical studies, as is further explained below.

³⁹ See generally Laura I Appleman, ‘The Lost Meaning of the Jury Trial Right’ (2009) 84 Ind LJ 397.

⁴⁰ Richard Posner, ‘Conventionalism: The Key to Law as an Autonomous Discipline’ (1988) 38 UTLJ 333, 345.

1.3.1 Doctrinal Law

As explained by Hutchinson, '[t]he research topic needs to be tailored to the individual researcher's expertise and then refined so as to be able to be completed within the stipulated time and resources.'⁴¹ Being a criminal law practitioner influenced my decision to use doctrinal research methods to underpin the investigation of the legitimacy of jury selection practices in Canada. It has been suggested that '[d]octrinal research is at the heart of any lawyer's task because it is the research process used to identify, analyse and synthesise the content of the law.'⁴²

In order to assess the efficiencies, shortcomings and overall goals of any law, whether statutory or judge-made, it is necessary to first understand the law on a pragmatic level. Once an appreciation of the systemic formulation of the law as it applies to jury selection has been achieved, the overall process can be intelligently evaluated as can the interstitial aspects that might otherwise never come to light. For the uninitiated there is a natural tendency to look at things simplistically. The benefit of doctrinal research is that it has the initial capacity to dispel many of the rudimentary assumptions that are associated with an area of the law. By achieving a command of the 'normative assertions, views and concepts'⁴³ that are often at the core of statutory and judicial pronouncements, the doctrinal scholar can revisit his or her earlier views with the benefit of an enlightenment that may challenge or support positions that were once purely intuitive in nature. Certainly the notion of trial by jury is well known in common law countries, but a sensitive understanding of what conceptually appears to be a simple process must initially come from engaging doctrinal investigative techniques.

Once the relevant legal rules, principles and theories are uncovered and fully comprehended, a significant achievement in itself, opportunities may arise to reconstruct, restate and reapply the law to better accommodate the needs of the public or a discrete group that may be particularly impacted by its application. Although objectivity is essential to ethical and accurate research findings, '[t]he researchers' philosophical stance

⁴¹ Terry Hutchinson, 'Doctrinal research: researching the jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 18.

⁴² *ibid* 9.

⁴³ Rob van Gestel, Hans-W Micklitz and Miguel Poiars Maduro, 'Methodology in the New Legal World' (2012) European University Institute Working Papers: Law 2012/13, 2.

frequently determines the research questions, progress and possible outcomes of academic research.⁴⁴ Thus, any legal methodology will be vulnerable to such a criticism. Both practitioner and academic reviewers of the research will be alive to evidence of pre-existing bias that was not eradicated by the author's self-monitoring efforts.

What is important is to recognize that the human condition makes a purely objective research agenda impossible. Being aware that extraneous influences are constantly informing decisions will, if nothing else, keep the researcher critical of his or her thoughts. While scientific certainty is not required in the law given its lesser thresholds of proof, the epistemological underpinnings that drive legal findings should change with societal needs.⁴⁵ Whether that means the revamping of legislation or the revisiting of common law principles, doctrine will lose its utility if it remains static and unresponsive.

The title to this thesis suggests that concerns about jury selection exist as they relate to the Indigenous Peoples⁴⁶ ('IP') of Canada. While potential solutions will be offered, it is submitted that what may be proposed need not be immediately pragmatic or completely remedial in nature, so long as a discussion occurs that inspires new ideas or reinvigorates old ones. As Hutchinson and Duncan explain, '[t]he doctrinal method is similar to that being used by the practitioner or the judge, except that the academic researcher (or HDR student) is not constrained by the imperative to find a concrete answer for a client.'⁴⁷ Indeed, in the quest to empanel a representative jury it must all the while be recognized that it is really a fictional pursuit. True representativeness is impossible given the limited demographic and ethnographic balance that can ever be achieved in a group of only 12

⁴⁴ Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin L Rev 83, 107.

⁴⁵ However, Chynoweth emphasizes that since doctrinal research lacks an empirical research component, 'the validity of doctrinal findings is unaffected by the empirical world' and he further remarks that:

Legal rules are *normative* in character as they dictate how individuals ought to behave. They make no attempt either to explain, predict or even to understand human behaviour. Their sole function is to prescribe it. In short, doctrinal research is not therefore research about law at all. In asking 'what is the law?' it takes an internal, participant-orientated epistemological approach to its object of study and, for this reason, is sometimes described as research in law.

Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Blackwell Publishing 2008) 30 (emphasis in original, citations omitted).

⁴⁶ The term 'Indigenous Peoples' is presently the most widely used and accepted collective description of Canada's first inhabitants and thus will be used wherever possible in this thesis. See Bob Joseph, 'Indigenous or Aboriginal: Which is Correct?' (*CBC News*, 21 September 2016) <<http://www.cbc.ca/news/indigenous/indigenous-Aboriginal-which-is-correct-1.3771433>> accessed 14 April 2018.

⁴⁷ Hutchinson and Duncan (n 44) 107. Note that the acronym 'HDR' stands for 'Higher Degree Research'.

people.⁴⁸ However, fundamental to a representative jury is its impartiality⁴⁹ which is arguably the more attainable quality, particularly when empanelment has been aided by a properly designed and executed selection process. Nevertheless, with each degree of jury heterogeneity comes a closer likeness to social diversity at large.

Despite the strengths of doctrinal legal research, it remains open to criticism. Put simply, '[i]t assumes that law exists in a vacuum rather than within the social framework or context.'⁵⁰ Thus, it is limited and vulnerable because the research 'is often done without due consideration of the social, economic, and . . . political importance of the process'.⁵¹ As explained further by Qureshi, '[l]aw in books is understood as the image that the law projects, and law-in-action is the actual effects it produces when translated into reality.'⁵² Thus, the intended normative function of the law may miss its mark as a result of what society has otherwise engineered.

Cardozo J, writing extra-judicially, remarked that '[t]he rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice.'⁵³ While it is true that the common law has the capacity to and does self-correct, the corrective option is limited by the skill sets possessed by the judiciary. Indeed, courts are often ill-equipped to implement non-doctrinal assessments of their findings on their own initiative.⁵⁴ Judges need socio-legal research assistance from outside their domain. When they attempt to

⁴⁸ Indeed, even assembling a representative jury roll, let alone a representative panel or petit jury, is impossible given that '[t]he roll is selected from a discrete geographic district which itself may or may not be representative of the broader Canadian Society.' See *R v Church of Scientology of Toronto* (1997), 33 OR (3d) 65 at para 146 (CA). In *R v Fowler*, 2005 BCSC 1874 at para 85, Neilson J remarked that a 'multitude of decisions from Canadian courts have held that an accused is not entitled to demand that members of his race be included in the jury roll, the jury panel or the jury'. Darbyshire (n 15) 744 comments in sardonic fashion that 'many writers assume random selection will, magically, throw up a representative cross section of the population, reflecting the views of the community at large'.

⁴⁹ The Ontario Court of Appeal has observed that 'a representative jury enhances the impartiality of a jury'. See *Nishnawbe Aski Nation v Eden*, 2011 ONCA 168 at para 28.

⁵⁰ Salim Ibrahim Ali, Zuryati Mohamed Yusoff and Zainal Amin Ayub, 'Legal Research of Doctrinal and Non-Doctrinal' (2017) 4 IJTRD 493, 494.

⁵¹ *ibid.*

⁵² Shazia Qureshi, 'Research Methodology in Law and Its Application to Women's Human Rights Law' (2015) 22 J Pol Stud 629, 632.

⁵³ Benjamin R Cardozo, *The Nature of the Judicial Process* (Yale University Press 1921) 23.

⁵⁴ In the context of sentencing law and the potential use of sentencing commissions to help construct guidelines for the court, it has been argued that the judiciary on its own 'lacks the institutional competence to do the empirical and policy analysis that fair and proportionate guidelines require'. See Allan Manson and others, *Sentencing and Penal Policy in Canada* (3rd edn, Emond Montgomery Publishing Limited 2016) 35.

introduce and interpret all but the most rudimentary data using their own devices, not only do they stray from their traditional function of assessing litigant-produced evidence, in doing so they are as likely to make interpretive mistakes as any other layperson.⁵⁵ Consequently, the most comprehensive doctrinal research should, either at the time it is being done or as a follow-up exercise, look to challenge the legal arguments and conclusions first formed with subsequent ‘observations, experiences and data regarding the functioning and the effects of the law’.⁵⁶ In doing so, it may be that certain closely held doctrinal beliefs are exposed as being nothing more than myths.⁵⁷

1.3.2 Comparative Law

It is recognized that ‘doctrinal research can . . . be enriched by taking a comparative perspective’.⁵⁸ Certainly ‘[e]xamining a foreign solution may help a judge choose the best local solution. This usefulness applies both to the development of the common law and to the interpretation of legal texts.’⁵⁹ After an initial perusal of the relevant Canadian primary sources, including both provincial and federal legislation, as well as the body of case law, it was apparent to me that much of the jurisprudence in the area of jury selection law was underdeveloped and largely inert. The stasis could be traced to some conservative mindsets and less-than-convincing views about the propriety of questioning potential jurors that seemed outdated and unnecessarily limiting.⁶⁰ Thus, in addition to bringing some contemporary Canadian views to the jury selection debate, it behooved the author’s analysis to include related case and statute law from other closely configured common law countries.

⁵⁵ See the comments of Doherty JA in *R v Hamilton*, [2004] OJ No 3252 at paras 75-81 (CA).

⁵⁶ Aikaterini Argyrou, ‘Making the Case for Case Studies in Empirical Legal Research’ (2017) 13 *Utrecht L Rev* 95, 97.

⁵⁷ See generally Cheryl Thomas, ‘Exposing the myths of jury service’ [2008] *Crim L R* 415.

⁵⁸ van Gestal, Micklitz and Maduro (n 43) 7.

⁵⁹ Aharon Barak, ‘A Judge on Judging: The Role of a Supreme Court in a Democracy’ (2002) 116 *Harv L Rev* 19, 111.

⁶⁰ For instance, the Ontario Court of Appeal in 1975 simply declared that ‘[c]hallenge for cause is not for the purpose of finding out what kind of juror the person called is likely to be – his personality, beliefs, prejudices, likes or dislikes.’ See *R v Hubbert* (1975), 11 OR (2d) 464 at para 21 (CA), aff’d [1977] 2 SCR 267.

The comparative experiences of England⁶¹ and the United States of America ('USA') were selected because of the historical importance of trial by jury in the former country,⁶² and the perceived litigious nature and therefore expected wealth of relevant precedent to be found in the latter country.⁶³ Additionally, both comparator countries are democratic states that use English as their official language and are dependent on the common law for the advancement of their jurisprudence. Despite the cultural differences unique to any country, there remains a lasting interest between parent country and colony as can be seen in the development of the law in England, the USA and indeed Canada.⁶⁴ However, one obvious difference between England and the USA is that England does not have a written, single-document Constitution with entrenched rights⁶⁵ while the USA does.⁶⁶ In that limited sense, Canada⁶⁷ and the USA are more alike.

Certainly comparative law has its detractors.⁶⁸ There are inherent dangers in using foreign law to help resolve domestic problems, despite the inclination to see similarities between states or jurisdictions when availing opportunities arise. Indeed, in the era of online research and the vastness of the World Wide Web, it is doubtless the case that similar or confirming jurisprudence can be uncovered on almost any legal issue when searched on the global stage. However, the lack of precise and current information; the need for detailed consideration as opposed to mere general appreciation; the impact of socio-economic and political environments; and, other factors tend to detract from, as opposed to contribute to, any sense of comparative homogeneity.⁶⁹

⁶¹ While the author is aware that the United Kingdom is made up of England and Wales, Scotland and Northern Ireland, the legal system that applies to England and Wales has been and will continue to be referred to simply as that of 'England'.

⁶² Roberts and Hough (n 28) 12-30. See also generally Robert von Moschzisker, 'The Historic Origin of Trial by Jury' (1921) 70 U Pa L Rev 1.

⁶³ Although the sheer volume of legal research that emanates from the USA is no doubt appreciated by all who use law libraries, whether Americans are more prone to litigate matters than are others is open to debate. See generally Basil S Markesinis, 'Litigation-Mania in England, Germany and the USA: Are We So Very Different?' (1990) 49 CLJ 233; Sara Sun Beale, 'Too Many and Yet Too Few New Principles to Define the Proper Limits for Federal Criminal Jurisdiction' (1995) 46 Hastings LJ 979; and, David M Engel, *The Myth of the Litigious Society: Why We Don't Sue* (The University of Chicago Press 2016).

⁶⁴ For example, settlers in Canada 'were deemed to take with them the common law of England and, insofar as it was applicable, any statute law of England then existing'. See Alan W Mewett and Morris Manning, *Criminal Law* (Butterworths 1978) 3.

⁶⁵ Darbyshire (n 15) 743.

⁶⁶ US Const (1787).

⁶⁷ *Constitution Act, 1982* (n 32).

⁶⁸ For example, see the dissents of Scalia J in *Olympic Airways v Husain*, 540 US 664, 658-67 (2004) and *Roper v Simmons*, 543 US 551, 607-30 (2005).

⁶⁹ See Basil S Markesinis and Jörg Fedtke, 'The Judge as Comparatist' (2005) 80 Tul L Rev 11, 109-36.

It is submitted that many of those who undertake comparative law research, if called upon to speak in all candour, would concede that the task of informed analytical comparison is a daunting one. This is because the knowledge bases that are required to truly compare laws in a comprehensive and meaningful sense is largely outside effective human capacity, at least in the case of short-term research. Siems, in speaking about the relative lack of comparative research, noted that some see the pursuit as ‘positivistic, superficial and providing a mere illusion of understanding of other legal systems’.⁷⁰ He further posits that ‘people from different legal systems cannot understand each other because of irreconcilable differences in mentalities’.⁷¹

The study and mastery of an area of the law is often a lifelong occupation for both the practitioner and the scholar alike, working in one particular global jurisdiction. Indeed, generalists in the law, given its expanding complexities, are becoming increasingly rare. Specialism, for that reason, is much more the norm after the completion of a basic law school education. Consequently, to suggest that the same area of specialty can be mastered in two (or more) separate and distinct jurisdictions is doubtful. As explained by Azarian, ‘[m]ore often than not, the researcher lack [*sic*] sufficient knowledge about these other cases and is forced to rely heavily upon selected secondary sources the worth of which he is not capable of assessing properly.’⁷² This reference to ‘cases’ can easily include examples of comparison using case law, legislation and other sources.

Ideally, group research efforts could divide their comparative focus along specialty lines to ensure strong knowledge bases within the study.⁷³ Another option is to engage in ‘a deep textual analysis’⁷⁴ of a particularly discrete area of the law. However, even with the use of a highly focused lens within an already specialized area of the law comes the same danger of misapprehension due to the lack of an overall foundational grounding. Before moving to the specific, the general must be understood in order to avoid diminished and unreliable research returns.

⁷⁰ Mathias M Siems, ‘The End of Comparative Law’ (2007) Centre for Business Research, University of Cambridge Working Paper No 340, 6.

⁷¹ *ibid.*

⁷² Reza Azarian, ‘Potentials and Limitations of Comparative Method in Social Science’ (2011) 1 *Int J Hum SS* 113, 121. The author continues at page 122 to describe the knowledge imbalance as a ‘problem of asymmetric understanding’.

⁷³ Siems (n 70) 6. However, Siems cautions that even if separate chapters were written by separate researchers, comparison would remain impossible beyond generalizations.

⁷⁴ Geoffrey Samuel, ‘Comparative law and its methodology’ in Watkins and Burton (n 41) 111.

A related concern in comparative methodology, as alluded to earlier in this chapter, is the tendency to see similarities when one is looking for them. The latin term *tertium comparationis* speaks to the notion that ‘what is shared between the objects of any comparison . . . provides the necessary common ground’.⁷⁵ However, Van Hoecke has warned that when engaging such a fundamental comparative impulse as searching for resemblance or equivalence ‘we should not look at a foreign legal system with the eyes and doctrinal framework of our own legal system, but try to transcend it’.⁷⁶ To achieve this state of objectivity ‘the comparatist must eradicate the preconceptions of his native legal system’.⁷⁷ While guarding against inherent bias is important in any research, being able to wipe clean a slate of learning may be asking too much of any researcher. Indeed, as with a prospective juror, the *tabula rasa* expectation is an illusory one.⁷⁸

While some would proscribe the use of extra-national law generally, and particularly as an aid to interpreting constitutional issues,⁷⁹ others view such stances as myopic and bordering on xenophobic.⁸⁰ Even though a cautionary approach is advisable, it should not stymie the exploration process altogether. Utilizing or adapting a foreign solution will be closely scrutinized and may ultimately be shown to be inappropriate. However, the intellectual journey taken that may conclude in the refutation of a comparative law answer has its own epistemological benefits. Indeed, much can be learned from mistakes and failures. As President of the Supreme Court of Israel, Aharon Barak, suggested while writing extra-judicially, the prudent broadening of legal horizons will likely bring with it some sort of advantageous result:

⁷⁵ Lei Zhu, ‘On the origin of the term *tertium comparationis*’ (2017) 60 Language & History 35, 35.

⁷⁶ Mark Van Hoecke, ‘Methodology of Comparative Legal Research’ (2015) (December) Law & Method 1, 24-25.

⁷⁷ *ibid* 25.

⁷⁸ See the text pertaining to Kaplan and Miller in n 79 in ch 4.

⁷⁹ See generally: Richard Posner, ‘No Thanks, We Already Have Our Own Laws’ (2004) (July-August) Legal Aff <https://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp> accessed 20 October 2017; Roper (n 68); and, A Mark Weisburd, ‘Using International Law to Interpret National Constitutions - Conceptual Problems: Reflections on Justice Kirby’s Advocacy of International Law in Domestic Constitutional Jurisprudence’ (2006) 21 Am U Int’l L Rev 365.

⁸⁰ Michael Kirby, ‘International Law - The Impact on National Constitutions’ (2006) 21 Am U Int’l L Rev 327, 346. As explained by Jackson, ‘[c]aution is important before reasoning from foreign legal practices to draw any conclusions about U.S. law, since each foreign system differs in important ways. But caution need not mean wholesale avoidance.’ See Vicki Jackson, ‘Yes Please, I’d Love to Talk With You’ (2004) (July-August) Legal Aff <https://www.legalaffairs.org/issues/July-August-2004/feature_jackson_julaug04.msp> accessed 20 October 2017.

Naturally, one must approach comparative law cautiously, remaining cognizant of its limitations. Comparative law is not merely the comparison of laws. A useful comparison can exist only if the legal systems have a common ideological basis. The judge must be sensitive to the uniqueness of each legal system. Nonetheless, when the judge is convinced that the relative social, historical, and religious circumstances create a common ideological basis, it is possible to refer to a foreign legal system for a source of comparison and inspiration. Indeed, the importance of comparative law lies in extending the judge's horizons. Comparative law awakens judges to the potential latent in their own legal systems. It informs judges about the successes and failures that may result from adopting a particular legal solution. It refers judges to the relationship between a solution to the legal problem before them and other legal problems. Thus, comparative law acts as an experienced friend. Of course, there is no obligation to refer to comparative law. Additionally, even when comparative law is consulted, the final decision must always be "local." The benefit of comparative law is in expanding judicial thinking about the possible arguments, legal trends, and decision-making structures available.⁸¹

While the jury as an institution may be imbued with differing powers,⁸² come in differing sizes⁸³ and have differing standards of agreement before verdicts can be rendered,⁸⁴ the common thread between the English, American and Canadian jury is that the guilt or innocence of the accused person will be determined by their number. They determine the facts which will or will not support a conviction, as further undergirded by the applicable law provided to them by the court. As a body of laypeople they are supported by and vulnerable to their life experiences and belief systems when presiding over a trial and this feature applies to any of the comparator countries. It is this commonality that makes comparison particularly apposite.⁸⁵

History must, to a certain extent, inform jury selection scholarship since it brings to light developments that helped shape some of the prevailing attitudes regarding trial by jury in the countries in question. For example, race relations in the USA figured prominently in

⁸¹ Barak (n 59) 111.

⁸² For instance, at one time American juries could actually determine questions of law. See Mark DeWolfe Howe, 'Juries As Judges of Criminal Law' (1939) 52 Harv L Rev 582.

⁸³ See *Williams v Florida*, 399 US 78, 101-02 (1970) where the Supreme Court of the United States stated '[i]n short, neither currently available evidence nor theory suggests that the 12-man jury is necessarily more advantageous to the defendant than a jury composed of fewer members.'

⁸⁴ See for example the Juries Act 1974, s 17 which allows English juries to render various types of majority verdicts under certain circumstances.

⁸⁵ See the discussion of the 'nature' paradigm of the jury as a transcendent institution and the 'cultural' paradigm which views the jury as a product of how its number was socialized in Geoffrey Samuel, 'Comparative law and its methodology' in Watkins and Barton (n 41) 101-04.

some of the common law tests that were developed in that country.⁸⁶ In England, perceived abuses by counsel contributed to its lawmakers abandoning or restricting formerly revered jury selection mechanisms.⁸⁷ Thus, while not a thesis grounded in orthodox legal history methodology, which tends to guard against attempts to introduce current concepts to bygone eras,⁸⁸ there will nonetheless be some backward-looking occasions in this thesis in order to be in a position to ‘challenge the assumptions that inform and underpin modern legal scholarship’.⁸⁹ Thus, the present stances that have been taken in the USA and England will be explored and considered with a view to understanding what has happened to trial by jury in each country and whether those developments may foretell Canada’s future should the *status quo* be maintained or should changes be recommended.

1.3.3 The Absence of Empirical Research

There is no doubt that empirical research is always useful and, at times, is an essential method for gaining answers to complex socio-legal questions. Strongly held beliefs and other time-honoured presumptions have often been shown to be erroneous, including those that relate to the compilation and workings of a jury.⁹⁰ While time constraints and limited resources do inhibit gaining knowledge through direct observation and other experimental study, using merely expedient research methods often results in the generation of less than valid conclusions. However, in other circumstances a fresh look at a longstanding body of evidence, given contemporary needs, is all that is required. As pointed out by Burton, ‘[w]hilst the literature review will set the scene for empirical research, there is arguably little point in carrying out empirical research if it is entirely dominated by existing ideas.’⁹¹ Although it is practically impossible to know whether the ideas that exist have completely saturated the field, it is possible to determine whether such ideas remain sound.

⁸⁶ See Michael J Klarman, ‘The Racial Origins of Modern Criminal Procedure’ (2000) 99 Mich L Rev 48.

⁸⁷ For example, peremptory challenges were abolished pursuant to the Criminal Justice Act 1988, s 118.

⁸⁸ See Philip Handler, ‘Legal History’ referencing SFC Milsom, *Historical Foundations in the Common Law* (2nd edn, Butterworths 1981) vi, in Watkins and Burton (n 41) 96.

⁸⁹ *ibid* 95.

⁹⁰ Thomas (n 57).

⁹¹ Mandy Burton, ‘Doing empirical research: Exploring the decision-making of magistrates and juries’ in Watkins and Burton (n 41) 56.

The common refrain that is heard in the area of jury research is that the data is difficult to obtain because of the legal inscrutability of juries in most common law countries, the notable exception being the USA.⁹² In Canada, s. 649 of the *Criminal Code* penalizes the disclosure of jury proceedings as follows:

649. Every member of a jury, and every person providing technical, personal, interpretive or other support services to a juror with a physical disability, who, except for the purposes of

- (a) an investigation of an alleged offence under subsection 139(2) in relation to a juror, or
- (b) giving evidence in criminal proceedings in relation to such an offence,

discloses any information relating to the proceedings of the jury when it was absent from the courtroom that was not subsequently disclosed in open court is guilty of an offence punishable on summary conviction.⁹³

It is thus understandable that researchers may be concerned about what information they can legally receive from jurors. Thomas, however, suggests that there is a wealth of information that can be received directly and indirectly from jurors that does not run afoul of the British inscrutability rule.⁹⁴ Nevertheless, a great deal of research data instead comes from mock jury studies which, for ethical reasons, are all limited by the fact that the participants are made aware that their decision is not a real one, in the sense that it will not potentially impact on an individual's liberty interests.⁹⁵ Yet the knowledge that the verdict is devoid of true consequences need not detract from the study of aspects of the deliberative process and 'certainly should not be seen to prevent well-designed

⁹² *Pena-Rodriguez v Colorado*, 137 S Ct 855, 869-70 (2017).

⁹³ *Criminal Code* (n 2) s 649.

⁹⁴ Indeed, Thomas emphasizes that '[s]ection 8 [of the Contempt of Court Act 1981] prevents one specific thing: individual jurors in individual cases telling someone outside the jury what they or their fellow jurors said in their deliberating room.' See Cheryl Thomas, 'Avoiding the perfect storm of juror contempt' [2013] Crim LR 483, 502. Others have argued that juries should provide reasons for their verdicts. See Mark Coen and Jonathan Doak, 'Embedding explained jury verdicts in the English criminal trial' (2017) 37 LS 786.

⁹⁵ See generally Brian H Bornstein and Sean G McCabe, 'Jurors of the Absurd? The Role of Consequentiality in Jury Simulation Research' (2005) 32 Fla St U L Rev 443. See also Emily Finch and Vanessa E Munro, 'Lifting the Veil: The Use of Focus Groups and Trial Simulations in Legal Research' (2008) 35 JL & Soc'y 30, 36-37.

simulation studies from yielding valuable insights'.⁹⁶ Indeed, efforts at replication should not be viewed as being indicative of superficiality nor a concession that the participants will not respect an environment designed to reflect solemnity.⁹⁷ Importantly, it should be noted that even if it were allowable to observe an actual jury at work, the exercise would be lacking in experimental controls. Thus, 'no choice of method is free from . . . compromises'.⁹⁸

The importance of socio-legal research on jurors is that, assuming a receptive judicial or governmental audience, the findings can be used to inform real-world policies and procedures.⁹⁹ Of particular interest as an adjunct to this thesis would be to explore how and to what degree jurors actively use stereotypical reasoning during deliberations¹⁰⁰ and whether the instructions of trial judges have any discernable impact on those notions.¹⁰¹

Ultimately, the decision not to generate original data in this thesis came down to a determination that the three research questions could be tackled by using existing national and international databases, legislation and case law, and secondary sources. While I agree that 'not all research questions can be answered using secondary sources or other research methods',¹⁰² in the extant circumstances the research endeavour is well-suited to the tandem use of doctrinal and comparative methods. However, any of my recommendations arising from the research questions herein should be further assessed via empirically-aided research projects. Even the most robust and informed doctrinal and/or comparative law study, though significant on its own, will have its validity increased (or at times decreased¹⁰³) when underpinned by verifiable data.

⁹⁶ Louise Ellison and Vanessa E Munro, "Telling tales": exploring narratives of life and law within the (mock) jury room' (2015) 35 LS 201, 206.

⁹⁷ *ibid.* The authors commented that the majority of their study participants appeared to be 'markedly engaged', 'animated throughout the simulation' and 'taking their task as jurors very seriously'.

⁹⁸ Robert M Bray and Norbert L Kerr, 'Use of the Simulation Method in the Study of Jury Behavior' (1979) 3 L & Hum Behav 107, 116.

⁹⁹ Brian H Bornstein and Edie Greene, 'Jury Decision Making: Implications For and From Psychology' (2011) 20 Current Dir Psych Sci 63, 63.

¹⁰⁰ See the general concerns voiced by Louise Ellison and Vanessa E Munro regarding sexual assault stereotypes in 'A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study' (2010) 13 New Crim L Rev 78. Consider also the impediments built into the *Criminal Code* (n 2) s 276(3) that relate to accessing information about a complainant's sexual history.

¹⁰¹ It has already been shown, for instance, that real and mock jurors misinterpret and misapply the law at similar rates. See Ellison and Munro (96) 206.

¹⁰² Burton (n 91) 55.

¹⁰³ See Thomas (n 57) where the author exposes with the aid of empirical evidence, *inter alia*, that many of the positions taken in the past by Lord Roskill and certain other authors about juries were not accurate.

1.4 The Contents of the Thesis in Brief

In this thesis a tone is set that is admittedly curative in nature. The review of the applicable literature exposes the existence of flaws. Whether they appear in the governing legislation that determines the candidacy of individuals for jury duty or as a by-product of common law tests driven by human enterprise, the imperfections in the jury seating procedure can be manipulated and further corrupted. Ameliorating the harmful effects that can flow from unfair jury empanelment is therefore important. However, in the end a greater degree of fairness is all that can be hoped for since ‘the most favourable procedure that could be imagined’¹⁰⁴ or ‘perfection’¹⁰⁵ remains beyond human capacity. Thus, it is within the realm of fairness that the remedial tone of the thesis is set.

In chapter 2 the justification for exploring discriminatory and unfair jury selection practices as they relate to the IP of Canada is articulated. While there may be a commonality between other groups or even individuals who have experienced unjust treatment during jury selection proceedings, it is posited that IP are the most vulnerable of the lot. The chapter is important as it sets the subsequent substantive chapters in context. By appreciating the overrepresentation of IP in all aspects of the Canadian criminal justice system, the lack of IP on juries and their vulnerability to prejudicial selection activities becomes more understandable. A summary exposition on certain of the historical deprivations that have been visited on IP further advances a working comprehension of their present cultural difficulties. Finally, a discussion about the constitutional significance of IP in Canadian society is briefly explored in order to highlight their special status.

Chapter 3 raises the first research question. Given the overrepresentation of IP in the criminal justice system, more findings of guilt are likely to occur and, as a result, such individuals will be less likely to be able to serve on a jury. While some sort of disqualifying consequence is standard in common law countries across the globe, whether it is consistent with restorative justice principles to make those convicted branded unworthy for jury service is discussed along with the concept of ‘character’ generally. In

¹⁰⁴ *R v Lyons*, [1987] 2 SCR 309 at para 88.

¹⁰⁵ See *R v O'Connor*, [1995] 4 SCR 411 at para 193 where Cory J observes ‘[p]erfection in justice is as chimeric as perfection in any other social agency.’

Canada, the primary vetting mechanism for jury eligibility and disqualification is found in provincial and territorial statutes as well as the *Criminal Code*, all of which tend to be inconsistent with each other and generally draconian. The disparities are chronicled and juxtaposed to expose the relative illogic of the various regimes. In a similar vein, the lack of accuracy and contemporaneity associated with Canada's national criminal record keeping system is investigated in order to decide whether the state can be taken seriously when it espouses the importance of ensuring that the criminally convicted do not find their way on to juries. As well, the juridical reactions to situations where those with criminal records have served on juries is documented and assessed with a view to considering what remedies can and should be engaged. Indeed, as the number of Canadians, particularly Indigenous Canadians with criminal records rises, the question as to what constitutes a representative jury is revisited. Whether government-run pardon procedures, post-conviction time parameters or court-controlled vetting processes are most appropriate for determining juror suitability are explored. The chapter concludes by considering the gist of sentencing philosophies applicable to IP and whether they may provide insight into jury selection issues.

In chapter 4 the second research question is addressed. The mechanics of challenging for cause are explained and the conservatism associated with the practice is discussed to understand the reasons for the minimalist approach to jury questioning and the general opposition to changing the *status quo*. Certain presumptions of law that have influenced the conservatism are considered with a view to assessing their overall legitimacy. Additionally, the threshold for establishing a cause challenge is investigated to appreciate what is involved and how the doctrine of judicial notice has impacted the ability to meet the expected standard. When challenge for cause is granted by the court, the type and depth of questioning is assessed for its effectiveness. Included in that determination are considerations involving who should put the questions to potential jurors, the time that may be consumed by the process and the privacy expectations of each jury candidate. The issues of jury inscrutability and self-impeachment, better known as 'Lord Mansfield's Rule',¹⁰⁶ are addressed as potential justifications for employing more front-end inspection during the selection process. This is particularly important given the

¹⁰⁶ Lord Mansfield CJ was the judge who presided over the case of *Vaise v Delaval* (1785) 1 TR 11 wherein he famously ruled that jurors could not impeach their own verdict.

dramatic impact that the American case of *Pena-Rodriguez v Colorado*¹⁰⁷ has had on such concerns. The potential for the wrongful conviction of IP is also discussed using the logic that less juror partiality will result in less wrongful convictions and thus, albeit in small measure, help reduce their over-representation in the Canadian prison population. Finally, whether systemic changes to the cause challenge regime have renewed currency in the eyes of the Bench and the Academy are addressed in order to help gauge where resources might best be channeled.

Chapter 5 focuses on the last research question. The chapter starts out with a consideration of the concept of random selection theory and how in-court selection options tend to compromise that goal. The legal presumptions that are associated with jury candidates are again discussed to underscore that the overall challenge process, and particularly the peremptory challenge prerogative, amounts to a state concession that an impartial jury trial is often a hollow guarantee. In that regard, the history of the peremptory challenge as a check on the effectiveness of the cause challenge is addressed, going back to the Blackstonian notion that an accused person ‘should have a good opinion of his jury’.¹⁰⁸ Jury privacy issues are also revisited in the context of out-of-court vetting and its propriety, particularly given the present ease of online searching. The ethical rules promulgated by legal governing bodies are explored and contrasted with the legal standards that are found in legislation and the common law. The special role of the Crown is assessed not only in a general sense, but also with particular regard to its historic relations with IP. Similarly, the tension between client loyalties and officer-of-the-court obligations are considered from the perspective of defence counsel. The status of peremptory challenges from early times to the present are chronicled in England, the USA and Canada to inform a discussion regarding their continued utility and what aspects of the process may be in need of adjustment. In that regard, the dearth of reported case law on the misuse of the peremptory challenge in Canada is queried as a reflection on trial strategy and the effectiveness of the court’s gatekeeping function.

Finally, in chapter 6 answers to the research questions are offered along with some corresponding recommendations. In doing so I consider whether the *status quo* needs to

¹⁰⁷ *Pena-Rodriguez* (n 92).

¹⁰⁸ 4 Bl Comm 347.

be disturbed at all, whether discrete and limited modifications are what should be implemented, or whether a major overhaul of the jury selection process in Canada is required.

CHAPTER 2

CONTEXT SETTING: THE UNIQUE POSITION AND CIRCUMSTANCES OF INDIGENOUS PEOPLES IN CANADIAN SOCIETY

2.1 Introduction

It is important to set the research that appears in the following chapters in context. In order to best appreciate the various discussions in the following chapters, a working knowledge of the degree of overrepresentation in the criminal justice system of Canada's first inhabitants and why they deserve special consideration amongst the ranks of all who have been subordinated by discrimination is necessary. However, it is beyond the scope of this chapter to chronicle every factor that has contributed to the general oppression of IP since the time of sustained European contact.¹ Therefore, the focus will concentrate on a few significant governmental initiatives that have impacted present day circumstances.²

Social injustice and disadvantage have been recognized as being connected to aspects of offending behaviour.³ When one considers the background and current affairs of IP, who are often viewed as the most socially and economically impoverished, and racially ill-treated of all Canadians,⁴ the disproportionate engagement of criminal justice system

¹ Recognized to be *circa* 1500 by Indigenous and Northern Affairs Canada, *First Nations in Canada* (undated) 5 <<https://www.aaduc-aandc.gc.ca/eng/1307460755710/1307460872523>> accessed 11 August 2017.

² Statistically significant differences in incarceration rates for IP have only been noted since the mid-twentieth century. See Manitoba, Report of the Aboriginal Justice Inquiry of Manitoba, *The Justice System and Aboriginal People: The Aboriginal Justice Implementation Commission* (Manitoba 1999) vol 1, ch 4, 14 <<http://www.ajic.mb.ca/volume1/chapter4.html>> ('*Implementation Commission*') accessed 6 November 2015, where it was observed: 'Prior to the Second World War, Aboriginal prison populations were no greater than Aboriginal representation in the population. By 1965, however, 22% of the inmates at Stony Mountain penitentiary were Aboriginal. In the subsequent years this trend has continued and accelerated.'

³ See Allan Manson, *The Law of Sentencing* (Irwin Law 2001) 145-46 and Andrew Ashworth, *Sentencing and Criminal Justice* (3rd edn, Butterworths 2003) 73-74.

⁴ The volume of material on point is both substantial and mainstream in its coverage. For example, see the discussions found in Kim MacKrael, 'Close the gap between Canada and its aboriginal people: AFN chief' *The Globe and Mail* (Toronto, 14 May 2015) <<http://www.theglobeandmail.com/news/politics/close-the-gap-between-canada-and-its-aboriginal-people-afn-chief/article24430620/>> accessed 30 January 2016 as well as Scott Gilmore, 'Canada's race problem? It's even worse than America's' *Maclean's Magazine* (Toronto, 22 January 2015) <<http://www.macleans.ca/news/Canada/out-of-sight-out-of-mind-2/>> accessed 30 January 2016.

resources becomes more understandable. Indeed, the Department of Justice has conceded that the overall circumstances of IP are dire:

The relationship between Canada's Aboriginal People and the Canadian justice system has been an enduring and comprehensively documented problem, the complex product of disadvantaged socioeconomic conditions, culturally insensitive approaches to justice, and systemic racism. Over the years, numerous public inquiries, task forces and commissions have concluded that Canada's justice system has failed aboriginal people at every stage.⁵

Section 2.2 will detail the present difficulties that plague IP when it comes to their over-incarceration relative to non-Indigenous offenders so that the immensity of the sheer numbers can be appreciated. The numerical disproportion does nothing to explain the root causes of the disparity, however it does signal the need for attention and remedial efforts by all justice system stakeholders. While implementing corrective measures is likely best done before offending behaviour begins, the criminal justice system has its role to play once its processes are engaged.⁶ As will be explored in later chapters, by improving the representativeness and impartiality of juries, a better correlate with just trial outcomes may be achieved.⁷ In terms of verdicts, an increase in juror objectivity and fairness could conceivably translate into more 'not guilty' findings and thus reduce Indigenous carceral numbers, regardless of how statistically significant those desired changes may turn out to be.

Section 2.3 begins by recognizing that IP are not the only group in Canada that suffers from social disadvantage and is impacted by discrimination.⁸ However, the reason that

⁵ See page 2 of Canada, Department of Justice, *Aboriginal Justice Strategy Annual Activities Report 2002-2005* <http://www.justice.gc.ca/eng/rp-pr/aj-ja/0205/1_1.html> accessed 24 December 2014.

⁶ It was observed in *R v Gladue*, [1999] 1 SCR 688 at para 65 that there is a 'limited role that sentencing judges will play in remedying injustice against aboriginal peoples in Canada'. Certainly this role also applies before a verdict is rendered with judges ensuring that jury selection remains fair and free from discriminatory influences.

⁷ The concept of what constitutes a just or fair trial is a contentious one that can inspire vigorous debate. This thesis focuses on juror candidacy and the influence that prejudice can have on verdict accuracy.

⁸ The Ontario Human Rights Commission explains that discrimination typically is comprised of certain elements:

- not individually assessing the unique merits, capacities and circumstances of a person;
- instead, making stereotypical assumptions based on a person's presumed traits;
- having the impact of excluding persons, denying benefits or imposing burdens.

See page 1 at <<http://www.ohrc.on.ca/en/iii-principles-and-concepts-2-what-discr...>> accessed 14 August 2017.

the plight of IP is highlighted is because they are unique in Canadian history and seen as deserving of special consideration. While a comprehensive understanding of all the documented events that have contributed to current Indigenous circumstances is unnecessary, a general appreciation of the effects of colonization is important. Thus, an exploration of how certain legislative and institutional initiatives resulted in coercive assimilation practices and culminated in ethnocide will be embarked upon.⁹ As well, a perusal of the *Constitution Act*¹⁰ and some Supreme Court of Canada observations will underscore the fact that IP occupy a place of significance within the fabric of Canadian society.

2.2 The Numbers

Crime statistics show that the overrepresentation of IP in the Canadian criminal justice system reflects a ‘pattern [that] extends to reserves, urban areas, and remote settlements’.¹¹ This pattern translates into a disproportionate number of custodial sentences being meted out by courts wherever they may be situated, despite various and repeated calls to seek out alternatives.¹² The *Annual Report of the Office of the Correctional Investigator, 2015-2016*, provided a stark commentary on the present and future concerns over the degree to which IP are being incarcerated:

In January 2016, the Office reported that the federal correctional system reached a sad milestone - 25% of the inmate population in federal penitentiaries is now comprised of indigenous people. That percentage rises to more than 35% for federally incarcerated women. To put these numbers in perspective, between 2005 and 2015 the federal inmate population grew

⁹ See Hadley Friedland, ‘Different Stories: Aboriginal People, Order, and the Failure of the Criminal Justice System’ (2009) 72 Sask L Rev 105 at para 26:

Justice Sinclair suggests that “past and present administrations of justice in our country have been practitioners of ethnocide.” He distinguishes ethnocide from genocide based on the fact that ethnocide need not be based on malice or evil. Rather, the practitioners may genuinely believe that they are acting in the best interests of the group in question. However, the inherent premise is the superiority of one culture over another.

¹⁰ *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c11.

¹¹ Darryl S Wood and Curt T Griffiths, ‘Patterns of Aboriginal Crime’ in Robert A Silverman, James J Teevan and Vincent F Sacco (eds), *Crime in Canadian Society* (6th edn, Harcourt Brace 2000) 251.

¹² See the *Criminal Code*, RSC 1985, c C-46 at s 718.2(e) which emphasizes that imprisonment should only be imposed when employing other sanctions would not be reasonable and that the ‘circumstances of aboriginal offenders’ should be given ‘particular attention’. Additionally, the Supreme Court of Canada throughout its judgments in *Gladue* (n 6) and *R v Ipeelee*, 2012 SCC 13 has underscored the need for special consideration of Aboriginal offenders.

by 10%. Over this same period, the Aboriginal inmate population increased by more than 50% while the number of Aboriginal women inmates almost doubled.¹³

The foregoing statistics, as bald statements of fact, are significant for their asymmetry with those of the general inmate population. With one in four offenders in federal custody now being of Indigenous decent,¹⁴ an unacceptable trending appears. However, when one considers that IP only make up approximately five percent of the entire Canadian population,¹⁵ the gravity of the problem is better appreciated. Similar imprisonment rates for convicted Indigenous offenders are also seen in provincial and territorial prison facilities.¹⁶ As Perreault observed:

In all provinces and territories, the representation of Aboriginal adults in correctional services exceeds their representation in the general population, with gaps being wider in some jurisdictions than others. For instance, in Quebec the representation of Aboriginal adults in provincial and territorial sentenced custody is two times their representation in the province's general population. In Saskatchewan, the representation is seven times greater.¹⁷

While the disproportionate Indigenous figures speak for themselves as a bottom-line reckoning of relative imprisonment rates, they offer little insight into the reasons behind the phenomenon. The number of public inquiries that have been struck by federal and

¹³ The Correctional Investigator Canada, *Annual Report of the Office of the Correctional Investigator, 2015-2016* (June 30, 2016) 43.

¹⁴ *ibid.* The *Criminal Code* (n 12) at s 743.1(1)(b) indicates that a sentence of imprisonment for 'a term of two years or more . . . shall be . . . imprisonment in a penitentiary'. Penitentiaries are federally run institutions.

¹⁵ Statistics Canada, 'Aboriginal peoples in Canada: Key results from the 2016 Census' *The Daily* (25 October 2017) 1 <www.statcan.gc.ca/daily-quotidien/171025/dq171025a-eng.htm> accessed 8 May 2018. See also Employment and Social Development Canada, 'Indicators of Well-being in Canada: Canadians in Context - Aboriginal Population' 3-4 <<http://well-being.esdc.gc.ca/misme-iowb/.3ndic.1t.4f@-eng.jsp?iid-36>> accessed 25 September 2015, where the publication indicates that the Canadian Aboriginal population is growing faster than, and is much younger than, the general population.

¹⁶ Julie Reitano, 'Adult correctional statistics in Canada, 2015/2016' (2017) 37 *Juristat* 1, 5 <www.statcan.gc.ca/access_acces/alternative_alternatif.action?l=eng&loc=http://www.statcan.gc.ca/pub/85-002-x/2017001> accessed 16 August 2017. Note that the *Criminal Code* (n 12) at s 743.1(3) indicates that persons who are not imprisoned for life or for a term of two years or more, as a single or aggregate sentence, shall be confined in a place 'other than a penitentiary'.

¹⁷ Samuel Perreault, 'The incarceration of Aboriginal people in adult correctional services' (2009) 29 *Juristat* 1, 9 <<http://www.statcan.gc.ca/pub/85-002-x/2009003/article/10903-e...>> accessed 12 January 2016 (table references excluded). It should be noted that Saskatchewan has a significantly larger percentage of IP in its provincial population than does Quebec. See Statistics Canada, '2006 Census: Analysis Series' 1 <<http://www12.statcan.ca/census-recensement/2006/as-sa/97-588/xxx>>, in Figure 1 entitled 'Percentage of Aboriginal People in the population, Canada, provinces and territories, 2006', accessed 12 January 2016.

provincial governments, as well as other organizations and institutions, and the wide-ranging but similar findings that have been made by such bodies, strongly suggests that no single explanation can possibly suffice.¹⁸ A detailed analysis of the possible underlying causes for the overrepresentation and incarceration disparity is beyond the scope of this chapter. However, there appears to be common ground as to why the disparity has remained consistent, if not gradually getting worse.¹⁹ As explained by Roberts and Doob:

It has long been acknowledged by criminal justice officials and politicians of all levels that a disproportionate number of Aboriginals occupy Canada's prisons. It is further recognized that this disproportion is likely to be a consequence of some combination of the following: higher rates of offending by the Aboriginal population, higher use of the criminal justice system in some Aboriginal communities to deal with certain types of crime, direct and indirect discrimination by the criminal justice system, and the socially disadvantaged role occupied by Aboriginals in Canadian society.²⁰

While there is not space in this chapter to unpack the reasons behind the higher rates of offending by the Indigenous population, it is important to emphasize that offending rates do not necessarily equate to criminal propensity despite the superficial connectivity.²¹

¹⁸ A representative sampling of some of the major commissions of inquiry and reviews that have been convened over the last 25 years include: Nova Scotia, *Royal Commission on the Donald Marshall, Jr., Prosecution* (Nova Scotia 1989); Michael Jackson, 'Locking Up Natives in Canada' (1989) 23 UBC L Rev 215; Law Reform Commission of Canada, *Minister's Reference: Aboriginal Peoples and Criminal Justice* (Law Com No 34 1991); Canada, Report of the Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Minister of Supply and Services Canada 1996) ('*Bridging the Cultural Divide*'); *Implementation Commission* (n 2); Aboriginal Healing Foundation, *Historical Trauma and Aboriginal Healing* (Research Series 2004); Ontario, *First Nations Representation on Ontario Juries* (Ontario 2013); and, Canada, *The Truth and Reconciliation Commission of Canada: Honouring the Truth, Reconciling for the Future/Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Canada 2015) ('TRC').

¹⁹ See *Ipeelee* (n 12) para 62 where the court recognized that 'statistics indicate that the overrepresentation and alienation of Aboriginal Peoples in the criminal justice system has only worsened'.

²⁰ Julian V Roberts and Anthony N Doob, 'Race, Ethnicity, and Criminal Justice in Canada' (1997) 21 Crime & Just 469, 481-82.

²¹ One example of a practice which tends to skew the numbers for offending rates involves 'over-policing' an area frequented by an identifiable group. It stands to reason that when more police resources are deployed in a certain location, more arrests will be executed therein. See Tim Quigley, 'Some Issues in Sentencing of Aboriginal Offenders' in Richard Gosse, James Youngblood Henderson and Roger Carter (eds), *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Parich 1994) 273-74 and Jonathan Rudin, 'Aboriginal Peoples and the Criminal Justice System' (The Ipperwash Inquiry Report 2007) 28-36 <http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/index.html> accessed 18 July 2017.

Indeed, there is a danger in shaping views that suggest that pro-criminal behaviour is somehow connected to ethnological predilections:

Some theories are of no use at all in explaining the complex interaction of factors causing crime. One such theory relates to genetic causes of crime. There may well be certain biological or genetic conditions which affect a particular individual's ability to make rational choices and to behave in socially accepted ways. The notion that these individual problems occur across entire races or ethnic groups has no basis in fact. Crime is universal and its causes are not related to race or ethnicity.²²

Thus, while certain groups of people can always be numerically categorized using the metric of offending rates,²³ broad-brush labeling of such groups is misleading, unfair and can easily prime stereotypical thinking. Indeed, it is the potential for racialized thinking along these lines by those who are summoned for jury duty as well as those that are empowered to select the jury that make IP targets and, as such, deserving of greater procedural protections as the following chapters will attempt to explain.

2.3 Justifying Preferential Consideration for Indigenous Peoples in Jury Selection

As in any society, there are many disadvantaged groups or particular individuals who, because of socio-economic deprivation, racial stereotyping or other discriminatory preconceptions are singled out for more scrutiny or differential treatment by others. In this regard IP are not unique. Indeed, while relative assessments of measurable indicators of living standards such as rates of employment, income, incarceration, homicide, infant

²² *Implementation Commission* (n 2) vol 1, ch 4, 4. See also James Bonta, Carol LaPrarie and Suzanne Wallace-Capretta, 'Risk prediction and re-offending: Aboriginal and non-aboriginal offenders' (1997) 39 Can J Crim 127, 131 where the authors underscore that '[b]y itself, race provides no unique and significant contribution to the genesis of crime but is correlated with other causal factors.' In dispelling predisposition logic, it has been said that '[p]eople cannot be subject to a disastrous socio-economic situation for generations and then be expected to behave in the same way that they would had they been treated fairly by the colonizing powers.' See Archibald Kaiser, 'The Criminal Code of Canada: A Review Based on the Minister's Reference' (1992) 26 UBC L Rev 41, 67.

²³ For example, Blacks in some regions of Canada. See Philip Stenning and Julian V Roberts, 'Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders' (2001) 64 Sask L Rev 137, 146 citing statistics from Ontario, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Queen's Printer 1995).

mortality, life expectancy and education may be telling,²⁴ trying to separate out overall degrees of deprivation and discrimination from the indicia is likely more difficult given the subjectivity involved in the exercise.²⁵ Nevertheless, correcting social inequities is still important. As such, treating people and groups differently in order to achieve fairer results in life (the substantive approach to achieving equality), has become well-recognized in Canadian legal circles.²⁶ Despite the existence of this equity-based approach, prioritizing IP has been challenged for its exclusivity reasoning.²⁷

The following example, taken from Canadian sentencing legislation, is indicative of the concerns held by some about compensating for the effects of direct and indirect discrimination by allowing for potentially favourable treatment. In 1996 Parliament amended the *Criminal Code* by legislating various sentencing principles, one of which was incorporated into s. 718.2(e) which reads as follows:

718.2 A court that imposes a sentence shall also take into consideration the following principles:

...

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, *with particular attention to the circumstances of aboriginal offenders*.²⁸

²⁴ See Gilmore (n 4) 2 where the author used Canadian and American governmental statistics and compared the circumstances of 'Aboriginal-Canadian' and 'African-American' populations and found the former group experienced greater deprivations in almost every socio-economic category.

²⁵ See the discussion in Devon W Carbado, 'Race to the Bottom' (2002) 49 UCLA L Rev 1283, 1286-97. However, a 2016 study conducted by The Environics Institute for Survey Research entitled 'Canadian Public Opinion on Aboriginal Peoples' (Final Report, June 2016) at page 26 indicates:

Canadians are more likely than not to believe that Aboriginal peoples experience the same or more frequent discrimination in comparison with South Asians (70%) and Blacks (73%) in this country, but are more divided on whether this applies in the case of Muslims (47% say Aboriginal peoples experience the same or more, versus 46% who say it is Muslims who fare worse in Canada).

²⁶ For example, consider the words of Sharpe JA in *United States of America v Leonard*, 2012 ONCA 622 at para 60 where he warns against formal equality notions because 'insisting that Aboriginal defendants be treated as if they were exactly the same as non-Aboriginal defendants will only perpetuate patterns of discrimination and neglect that have produced a crisis of criminality and over-representation of Aboriginals in our prisons'.

²⁷ See the discussion regarding whether singling out Indigenous offenders for potentially preferential treatment (in sentencing) is morally justifiable in Alan Cairns, 'Seeing and Not Seeing: Explaining Misrecognition in the Criminal Justice System' (2002) 65 Sask L Rev 53, 59.

²⁸ *Criminal Code* (n 12) s 718.2(e) (emphasis added).

The section requires sentencing judges to use incarceration for any offender as a last resort, but then requires them to further scrutinize one particular race of people. Rather than using a diffused reference to the systemic and background factors that are relevant to any offender, only the circumstances of IP were seen as deserving of special commentary. The apparent inequity of the standard drew criticism from Stenning and Roberts:

If the kinds of factors that place many Aboriginal people at a disadvantage *vis-à-vis* the criminal justice system also affect many members of other minority or similarly marginalized non-Aboriginal offender groups, how can it be fair to give such factors more particular attention in sentencing Aboriginal offenders than in sentencing offenders from those other groups who share a similar disadvantage?²⁹

The answer is one that is applicable both in the context of sentencing as well as in the treatment of IP generally and, for the purposes of this thesis, the selection of a fair and representative jury. It involves two main considerations: colonialism and constitutional status.

2.3.1 Colonialism

Colonization can be conservatively defined as ‘a process through which one group takes control of another group’s lands and resources and maintains that group in a state of subordination’.³⁰ For Canadian IP, colonization, as they experienced it, was something far more destructive and contemplated, *inter alia*, acts of racism and rights extinguishment resulting in welfare dependency and wardship.³¹

It has been suggested that the ‘root causes of Aboriginal crime [are located] in the history of colonialism’.³² Thus, the unique experience that accompanied the Indigenous colonization process distinguishes them from other groups and other experiences even though today those other groups may appear to be equally disadvantaged. Being

²⁹ Stenning and Roberts (n 23) 158 (footnotes omitted).

³⁰ Sébastien Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law* (Carswell 2013) 10.

³¹ Gerald Taiaiake Alfred, ‘Colonialism and State Dependency’ (2009) 5 J Aboriginal Health 42, 43.

³² *Bridging the Cultural Divide* (n 18) 52.

subjected to longstanding processes designed to orchestrate cultural abandonment, which started shortly after European settlement,³³ sets IP apart. Rudin and Roach emphasize the need to appreciate the consequences of colonialism because without this essential knowledge ‘it will not be possible to address the fundamental question of how over-representation [in all aspects of the criminal justice system] can be stopped’.³⁴

While this chapter cannot possibly document every important event that is associated with the colonial movement in Canada since its inception, two notable occurrences will be touched upon to expose some of the efforts that have been made to persuade IP to assimilate into mainstream Canadian society and leave the vestiges of their culture behind: (1) The *Indian Act*,³⁵ and, (2) Residential Schools.

2.3.2 The *Indian Act*

The *Indian Act* can be traced to the development and subsequent breakdown in relations between colonialists and IP. As the lands that would become Canada were being settled, there was a mutual dependence between IP and Europeans that recognized both the equality of, and autonomy between, nations.³⁶ Basic survival needs in a vast and often inhospitable land necessitated the alliance.³⁷ Rounding out the relationship in early times was a recognition of the need for military prominence as colonization progressed, particularly given the acrimonious relations between French and English factions.³⁸ While Great Britain ultimately vanquished New France resulting in the French in 1763 ceding ‘all of its North American Territories to Great Britain with the exception of Louisiana and Saint Pierre and Miquelon’,³⁹ within approximately 100 years thereof two significant events occurred which shifted relations and responsibilities toward IP. The

³³ Such processes have now been in place for over 500 years (n 1).

³⁴ Jonathan Rudin and Kent Roach, ‘Broken Promises: A Response to Stenning and Roberts “Empty Promises”’ (2002) 65 Sask L Rev 3, 17.

³⁵ *Indian Act*, RSC 1985, c I-5.

³⁶ Grammond (n 30) 51.

³⁷ See *Bridging the Cultural Divide* (n 18) 95 where it was observed that ‘[t]he newcomers, far from their home ports and scattered in a vast land of which they had little practical knowledge of necessity had to develop friendly relations with at least some original inhabitants.’

³⁸ Grammond (n 30) 50.

³⁹ *ibid* 67.

first event would appear to be driven by monetary, as opposed to philosophical, considerations:

In 1858, British officials notified their Canadian counterparts that they were no longer interested in financing Indian administration. As a result, responsibility for the evolving system of Indian legislation, a growing administrative apparatus, and increased expenditures, was formally turned over to the Province of Canada in 1860. In effect, Canada was now on its own.⁴⁰

The second event occurred in 1867 when various provinces confederated to form the country of Canada⁴¹ without inviting IP ‘to participate in the political process that led to the creation of the Canadian federal structure’.⁴² Thus, the nation-to-nation relationship was waning significantly with the Fathers of Confederation unilaterally deciding that responsibility toward IP would be the preserve of the federal government:

The Constitution adopted in 1867 divided the totality of government powers between the federal Parliament and the legislative assemblies of the different provinces. Section 91(24) of the *Constitution Act, 1867* grants the federal Parliament jurisdiction over “Indians, and Lands reserved for Indians.”⁴³

As explained by Holmes, ‘[s]ince the inception of Indian legislation the Crown assumed legislative authority for determining who would be recognized as an Indian and thus be entitled to benefits conferred by treaty, by statute, and by departmental policy and practice.’⁴⁴ The first *Indian Act*,⁴⁵ so named,⁴⁶ came in 1876 although it was actually a consolidation of various pieces of earlier legislation pertaining to IP.⁴⁷ The philosophy

⁴⁰ John F Leslie, ‘The Indian Act: An Historical Perspective’ (2002) (Summer) Can Parl Rev 23, 24.

⁴¹ See the text in n 3 in ch 1.

⁴² Grammond (n 30) 90.

⁴³ *ibid.*

⁴⁴ Joan Holmes, ‘The Original Intentions of the Indian Act’ (Materials prepared for a conference held in Ottawa, Ontario hosted by the Pacific Business and Law Institute, 17-18 April 2002) 24 (unpublished).

⁴⁵ *Indian Act*, SC 1876, c 18.

⁴⁶ Earlier legislation under different titles also reflected the fundamental assimilative intentions of Parliament. Consider for example: *An Act to encourage the gradual civilization of the Indian tribes in this province, and to amend the laws respecting Indians*, SC 1857, 20 Vict, c 26 and *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act, 31st Victoria, Chapter 42*, SC 1869, c 6.

⁴⁷ See Jay Makarenko, ‘The Indian Act: Historical Overview’ (2008) 4 <<http://www.mapleleafweb.com/print/422>> accessed 20 December 2015 and Erwin Hanson, ‘The Indian

behind the statute ‘adopted an explicit vision of assimilation, in which Aboriginals would be encouraged to leave behind their Indian status and traditional cultures and become full members of the broader Canadian society’.⁴⁸ As explained by Makarenko, ‘Aboriginals were viewed as children or wards of the state, to which the government had a paternalistic duty to protect and civilize’.⁴⁹ It was thus ‘obvious that the original Indian Act was not created with the self-determination of First Nations communities in mind’.⁵⁰ Whether well-intentioned but ill-considered, or purposely insidious in its design, the original and subsequent versions of the statute were culturally destructive and fundamentally racist in nature. With the numerous amendments to the *Indian Act* over time,⁵¹ various governments reinforced a message of unworthiness that was implied by the enactment of assimilationist legislative agendas. Indeed, between 1885 and 1927 revisions to the *Indian Act* continued to maintain subjugating policies such as: prohibiting certain Indigenous ceremonies; placing limits on when traditional garb could be worn; providing for the removal of IP from reserves when deemed necessary; and, even controlling the solicitation of funds to finance Indigenous legal claims.⁵²

On the occasion of the fiftieth anniversary of the *Indian Act*, Deputy Minister of Indian Affairs Duncan Campbell Scott remarked that ‘our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question and no Indian Department’.⁵³ While later iterations of the *Indian Act* became less racially destructive,⁵⁴ by that time generations of IP had already had their culture significantly compromised.

Act’ (2009) 1 <http://indigenousfoundations.arts.ubc.ca/the_residential_school_system/> accessed 20 December 2015.

⁴⁸ Makarenko *ibid*.

⁴⁹ *ibid*.

⁵⁰ Frances Abele, ‘Like an Ill-Fitting Boot: Government, Governance and Management Systems in the Contemporary Indian Act’ (Research Paper for the National Centre for First Nations Governance, June 2007) 4.

⁵¹ See for example Sharon Helen Venne, *Indian Acts and Amendments 1868-1975: An Indexed Collection* (University of Saskatchewan Native Law Centre 1981).

⁵² Makarenko (n 47) 6.

⁵³ John Milloy, ‘Indian Act Colonialism: A Century of Dishonour, 1869-1969’ (Research Paper for the National Centre for First Nations Governance, May 2008) 8.

⁵⁴ For instance, in 1960 ‘Aboriginals received the right to vote federally without having to give up their Indian status’; in 1985 ‘women could no longer gain or lose Indian status as a result of marriage’; and, in 2000 ‘the Indian Act was amended to allow band members living off-reserve to vote in band elections and referenda’. See Makarenko (n 47) 8, 10.

2.3.3 Residential Schools

Residential Schools, as the name implies, involved an environment that included both education and accommodation. However, this total immersion approach to schooling was much less about curricular pursuits than it was about removing every last vestige of Indigenous character from the students in attendance.⁵⁵ Thus, '[r]esidential schools were more than a component in the apparatus of social construction and control.'⁵⁶ Rather, '[t]hey were part of the process of nation building and the concomitant marginalization of Aboriginal communities.'⁵⁷ Such institutions were particularly invidious given that their focus was on impressionable children and the destruction of familial and cultural connections:

Residential schools systematically undermined Aboriginal culture across Canada and disrupted families for generations, severing the ties through which Aboriginal culture is taught and sustained, and contributing to a general loss of language and culture. Because they were removed from their families, many students grew up without experiencing a nurturing family life and without the knowledge and skills to raise their own families. The devastating effects of the residential schools are far-reaching and continue to have significant impact on Aboriginal communities. Because the government's and the church's intent was to eradicate all aspects of Aboriginal culture in these young people and interrupt its transmission from one generation to the next, the residential school system is commonly considered a form of cultural genocide.⁵⁸

Remarkably, 'Indian residential schools operated in Canada between the 1870s and the 1990s.'⁵⁹ While amendments to the *Indian Act* instituted in 1884 'provided for the [formal] creation of Indian residential schools',⁶⁰ an amendment to the 1894 statute made

⁵⁵ As explained in *Bridging the Cultural Divide* (n 18) 314:

The school, as department and church officials conceived it, was a circle, an all-encompassing environment of re-socialization with a curriculum that comprised not only academic and practical training but the whole life of the child in the school. This constituted the basic design of the schools and was maintained with little variation, for most of the history of the system.

⁵⁶ *ibid* 310.

⁵⁷ *ibid*.

⁵⁸ Erin Hanson, 'The Residential School System' (2009) 1 <http://indigenousfoundations.arts.ubc.ca/the_residential_school_system/> accessed 6 November 2015.

⁵⁹ Anishinabek Nation, *Indian Residential School Commemoration Project* (2013) 1 <<http://www.anishinabek.ca/irscp-about-residential.asp>> accessed 16 January 2016.

⁶⁰ *ibid*.

‘attendance compulsory and imposed penalties on parents who refused to send their children to residential schools’.⁶¹ Overall, ‘[i]t is estimated that over 150,000 Indian, Inuit and Métis children between the ages of 4-16 attended Indian residential school.’⁶² Thus, the combination of operating time and total student population is significant.

A class action lawsuit was brought against the government of Canada and various church groups involved in the day-to-day running of the residential schools that was settled on May 8, 2006.⁶³ Part of the settlement required that sixty million dollars be reserved to establish a ‘Truth and Reconciliation Commission’ with a mandate to, *inter alia*:

- reveal to Canadians the complex truth about the history and the ongoing legacy of the church-run residential schools, in a manner that fully documents the individual and collective harms perpetrated against Aboriginal Peoples, and honours the resilience and courage of former students, their families, and communities;⁶⁴

The *Summary of the Final Report of the Truth and Reconciliation Commission of Canada* was released in 2015. It is beyond the scope of this chapter to chronicle its findings and recommendations. However, the lasting effects of the residential school experience are reminiscent of outcomes common to other colonizing initiatives:

The impacts of the legacy of residential schools have not ended with those who attended the schools. They affected the Survivors’ partners, their children, their grandchildren, their extended families, and their communities. Children who were abused in the schools sometimes went on to abuse others. Many students who spoke to the Commission said they developed addictions as a means of coping. Students who were treated and punished like prisoners in schools often graduated to real prisons. For many, the path from residential school to prison was a short one.⁶⁵

Not only does the history of colonial subjugation serve to identify the unique background of IP, it is also indicative of their longstanding presence on the North American continent.

⁶¹ Grammond (n 30) 188.

⁶² Anishinabek Nation (n 59) 1.

⁶³ *Indian Residential Schools Settlement Agreement* (May 8, 2006). At page 23, under the heading ‘3.03 Truth and Reconciliation Funding (1)’, it is stated that ‘Canada will provide sixty million dollars (\$60,000,000.00) in two instalments for the establishment of the Commission.’

⁶⁴ *TRC* (n 18) 27.

⁶⁵ *ibid* 183-84. A full review of the *Final Report* reveals that in addition to the loss of language and culture, corporal and sexual abuses were commonly perpetrated on students by staff.

This tenure of occupancy has also afforded them enhanced constitutional status as the next section explains.

2.3.4 The Constitutional Significance of ‘Aboriginal’ Peoples

While all Canadians enjoy the benefits that flow from the *Constitution Act* ⁶⁶ and, in particular, the *Canadian Charter of Rights and Freedoms* (‘*Charter*’),⁶⁷ ‘Aboriginal’⁶⁸ Peoples are afforded special constitutional status. Section 25 of the *Charter* and s. 35 of the *Constitution Act* read as follows:

- s. 25 The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
 - (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
 - (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.⁶⁹
- s. 35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed;
 - (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada;
 - (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired;
 - (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.⁷⁰

⁶⁶ *Constitution Act* (n 10).

⁶⁷ *Canadian Charter of Rights and Freedoms*, being Part 1 of the *Constitution Act, 1982*, enacted by the *Canada Act, 1982* (UK) c 11 (‘*Charter*’).

⁶⁸ The term ‘Aboriginal’ is used in this section when necessary to conform with the language used in the *Constitution*.

⁶⁹ *Charter* (n 67) s 25.

⁷⁰ *Constitution Act* (n 10) s 35.

While s. 35 of the *Constitution Act* does not self-define what are, in fact, Aboriginal rights, they ‘have been interpreted to include a range of cultural, social, political, and economic rights including the right to land, as well as to fish, to hunt, to practice one’s own culture, and to establish treaties’.⁷¹ As pointed out by McLachlin CJC, writing extra-judicially, s. 35 may ‘be regarded as a powerful weapon against the marginalization of Aboriginal peoples and a highly effective tool in the advancement of their actual, substantive equality’.⁷² Thus, while Aboriginal rights may not specifically contemplate jury selection and its associated procedures, the affording of special status to Aboriginals remains both substantively and symbolically important. Indeed, ‘[t]he reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35.’⁷³

Aboriginal rights, by definition, are race-specific. As such, they ‘must be viewed differently from Charter rights because they are rights held only by Aboriginal members of Canadian society’.⁷⁴ As emphasized by Lamer CJC:

In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, *which separates aboriginal peoples from all other minority groups in Canadian society* and which mandates their special legal, and now constitutional, status.⁷⁵

Importantly, in the minds of many the special entitlements of IP transcend constitutional construction. Indeed, the majority of the non-Indigenous Canadian public subscribes to the view that IP ‘have unique rights as the first inhabitants of the continent’.⁷⁶

⁷¹ Erin Hanson, ‘Constitution Act, 1982 Section 35’ (2009) 1 <http://www.indigenousfoundations.arts.ubc.ca/constitution_act_1982_section_35/> accessed 13 June 2014.

⁷² Beverly McLachlin, ‘Racism and the Law: The Canadian Experience’ (2002) 1 J L & Equality 7, 21.

⁷³ *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 52.

⁷⁴ *R v Van der Peet*, [1996] 2 SCR 507 at para 19.

⁷⁵ *ibid* para 30 (emphasis added).

⁷⁶ The Environics Institute for Survey Research (n 25) 14.

2.4 Conclusion

This chapter provides a brief snapshot of the unfortunate Indigenous experience in Canada, aspects of which have been described as ‘a national crime’.⁷⁷ By limiting the focus of the foregoing discussion to the over-incarceration of IP, certain prominent historical occurrences, and the unique constitutional status afforded their number, this chapter in abbreviated form sets the context to understand why IP as a group occupy a special position within the ranks of the Canadian citizenry. Their circumstances give all advocates of Indigenous justice standing to expose pressing issues and advance reform-based arguments, such as those relating to jury qualification and selection that appear in the chapters that follow.

⁷⁷ John S Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879 to 1986* (University of Manitoba Press 1999).

CHAPTER 3

SHOULD POTENTIAL JURORS BE DISQUALIFIED DUE TO THEIR CRIMINAL ANTECEDENTS AND WHAT IS THE IMPACT OF SUCH A POLICY ON INDIGENOUS PEOPLES?

Courts do not force jurisdictions to clarify or defend their proffered justifications for banning convicted felons from the venire. Rather they accept the inherent bias rationale *a priori*.¹

3.1 Introduction

A fair-minded and representative jury is most likely one that reflects a cross-section of the society in which the accused person resides.² Cross-sectional representation suggests a jury that is drawn from all walks of life.³ A milieu of inclusiveness should pervade. It is the collective life experience of the jury that portrays its strength and drives its deliberative process. However, with potential juror candidacy determined by a random selection process, the likelihood of being tried by one's peers will be remote.⁴ Randomness by definition suggests proceeding without a specific aim. Moreover, within the jury pool and the panels drawn from that reservoir of candidates will be those who have criminal records, despite measures being in place that are designed to exclude such individuals.⁵

In this chapter the question of whether a criminal record should disentitle a prospective juror from serving on a jury in Canada will be explored. Comparative experiences drawn from the USA and England will be used to help contextualize discussions about the past,

¹ James M Binnall, 'A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service?' (2014) 36 Law & Pol'y 1, 2. Note that the terms 'venire', 'array' and 'panel' are synonymous in the context of jury selection.

² See *R v Church of Scientology of Toronto* (1997), 33 OR (3d) 65 at paras 140-59 (CA).

³ See the comments of Morris LJ at para 53 of Home Office, *Report of the Departmental Committee on Jury Service* (Cmd 2627, 1965), wherein he states: 'A jury should represent a cross-section drawn at random from the community, and should be the means of bringing to bear on the issues that face them the corporate good sense of that community.'

⁴ *R v Find*, 2001 SCC 32 at para 20.

⁵ In Canada, out of an estimated population of 35,749,600 as of April 1, 2015, over 4.1 million of that number had a criminal record. See Statistics Canada, 'Canada's Population Estimates, First Quarter', *The Daily* (17 June 2015) 1, regarding the population statistic and the John Howard Society of Ontario, 'Help Wanted: Reducing Barriers for Ontario's Youth with Police Records' (2014) 14, regarding the criminal record statistic.

present and future of Canadian legislative and jurisprudential development in this important area.

Section 3.2 explores the historic rationales for juror disqualification due to criminal antecedents. These ineligibility theories will be juxtaposed with relevant principles of sentencing to see whether they can be reconciled. Finally, the concept of ‘character’ will be considered to see if it can provide any insight into whether juror integrity need be a condition precedent to jury service.

Section 3.3 will look to various legislative regimes that are designed to disqualify those with criminal records before they are compelled to attend court for jury service and also during the ultimate selection *voir dire*. The overall accuracy of criminal record-keeping systems will be investigated to determine if the state, at any given time, is actually capable of knowing who has been previously convicted. A discussion about the potential relationship between juror disqualification and wrongful convictions will occur to see if the former can influence the occurrence of the latter.⁶ As well, the notion of the representative juror is explored against the backdrop of Canadians with criminal records, particularly those of Indigenous heritage.

Section 3.4 considers state record suspension/pardon procedures and whether a judicially controlled clemency regime would be better suited to determine juror eligibility at first instance than the present government controlled model. The section concludes with an analysis of juridical responses to situations where the criminally convicted make their way on to a jury despite safeguards being in place. After assessing the various responses, the author engages a philosophy consonant with that espoused in the case of *R v Gladue* (*‘Gladue’*)⁷ to see whether the wisdom of that decision can help resolve the issue of juror

⁶ Although some may worry about the converse occurring, that being an unjustified acquittal, historically wrongful convictions have been the primary focus of concern. Known in some circles as ‘Blackstone’s Ratio’, Sir William Blackstone remarked that ‘it is better that ten guilty persons escape, than that one innocent suffer’. See 4 BI Comm 358.

⁷ *R v Gladue*, [1999] 1 SCR 688. The Supreme Court of Canada in this case underscored, *inter alia*, that sentencing judges are obliged to consider the unique systemic and other background factors that contributed to the Aboriginal offender coming before the court. The destruction of Aboriginal heritage and identity by the state since colonization has resulted in incalculable harm to such individuals who are most often in need of restorative justice measures to address their criminal law difficulties. By accommodating differences with the aid of substantive equality philosophies, meaningful justice is more likely to be achieved. Such

disqualification based on a criminal record, including any potential for constitutional relief.

3.2 The Historic Rationales for Juror Disqualification due to Criminal Antecedents

The famous phrase, ‘twelve good men and true’⁸ has always been the benchmark for the modern jury, adjusted only to remove the patriarchal gender reference. Drawn from a cross-section of society, it is hoped that the jury will act ‘as the conscience of the community’⁹ whose ultimate verdict will be ‘a reflection of the shared values of the community’¹⁰ based on the evidence. In pursuit of these goals, governments in Canada, England and the USA have generally required that juror candidacy be underpinned by a background devoid of criminal antecedents.¹¹ Indeed, ‘criminal convictions of some form almost universally disqualify a person from jury service’.¹²

Although conventional wisdom suggests that ‘a juror is presumed to be qualified and impartial, until the contrary is shown’,¹³ disqualifying legislation rejects such a presumption when it comes to certain of the criminally convicted. As explained by Binnall:

Civic restrictions on jury service are predominantly justified by the communitarian belief that the character flaws of ex-felons would corrupt the fact-finding process. Specifically, the majority of states and the federal government exclude ex-felons from jury service because they threaten probity, either because character defects hinder proper decision-making or

an approach arguably transcends sentencing and should be embraced by the criminal justice system during all of its stages.

⁸ Indeed, the phrase was referenced by Lord Simon in the 1982 House of Lords debates pertaining to the second reading of the Juries (Amendment) Bill [HL]. See HL Deb 17 November 1982, vol 436, cols 597-622 <<http://www.hansard.millbanksystems.com/lords/1982/nov/17/juries-amendment-bill-h1>> accessed 10 August 2015.

⁹ *R v Sherratt*, [1991] 1 SCR 509 at 523.

¹⁰ *R v Parks* (1993), 15 OR (3d) 324 at 326 (CA).

¹¹ See, for example: Ontario’s *Juries Act*, RSO 1990, c J3, s 4 (b); England and Wales’ Juries Act 1974, c 23, s 1 as amended by the Criminal Justice Act 2003, c 44, sch 1, pt 2, ss 5-8, and by the Criminal Justice and Courts Act 2015, c 2, pt 3, s 77 (1); and, America’s 28 USC § 1865 (b)(5) (2012).

¹² Lance Salyers, “Invaluable Tool vs Unfair Use of Jurors” - Criminal History Records in Voir Dire’ (1999) 56 Wash & Lee L Rev 1079, 1090.

¹³ *Holt v People*, 13 Mich 224, 228 (1865). For similar sentiments see *R v Cameron* (1995), 22 OR (3d) 65 at paras 11-15 (CA).

because ex-felons possess an “inherent bias” against the criminal justice system.¹⁴

‘Probity’ has been variously defined as ‘[m]oral excellence, integrity, rectitude, uprightness; conscientiousness, honesty, sincerity.’¹⁵ Such a high standard of collective principles is arguably unattainable in the main, if for no other reason than the general fallibility of humankind. Certainly many citizens not stigmatized by the mark of a criminal conviction may still lack probity while a great number of convicted persons may have integrity. Thus, it would seem that the theory of jury probity, although intuitively attractive, is nevertheless a dangerous bit of theorizing. Despite strongly held beliefs to the contrary,¹⁶ ‘[t]here is also no empirical evidence to support the contention that an ex-felon juror would threaten the probity of a jury through general defect of character or through inherent bias.’¹⁷ Indeed, the United States Court of Appeals for the District of Columbia has recognized that ‘felon status, alone, does not necessarily imply bias’.¹⁸

It is to be observed that a lack of empirical evidence does not by itself make an assertion unsound. Rather, the assertion is simply unproven. In certain circumstances uncovering reliable evidence may be impossible. Given the legally protected inscrutability of jury deliberations in Canada,¹⁹ it would be difficult to reliably disprove the following logic:

The Legislature could reasonably determine that a person who has suffered the most severe form of condemnation that can be inflicted by the state – a conviction of felony and punishment therefor – might well harbour a continuing resentment against “the system” that punished him and an equally unthinking bias in favor of the defendant on trial, who is seen as a fellow underdog caught in its toils. Because these antisocial feelings would often be consciously or subconsciously concealed, the Legislature could further conclude that the risk of such prejudice infecting the trial outweighs the possibility of detecting it in jury selection proceedings. The exclusion

¹⁴ James M Binnall, ‘EG1900 ... The Number They Gave Me When They Revoked My Citizenship: Perverse Consequences of Ex-Felon Civic Exile’ (2008) 44 Williamette L Rev 667, 671. See also Brian C Kalt, ‘The Exclusion of Felons from Jury Service’ (2003) 53 Am U L Rev 65, 73-74.

¹⁵ Kalt *ibid* 74, quoting from *The Oxford English Dictionary*.

¹⁶ See for example the words of Lawton LJ in *R v Mason* [1980] QB 881 (CA) 888-91.

¹⁷ Binnall (n 14) 675. Moreover, in 2014 Binnall published his own research results which suggested that not all felons can be grouped in the anti-state camp - see (n 1) 17-20.

¹⁸ *United States v Boney*, 977 F 2d 624, 633 (DC Cir 1992).

¹⁹ *Criminal Code*, RSC 1985, c C-46, s 649 states that it is a criminal offence in Canada, punishable on summary conviction, for a member of a jury to disclose ‘any information relating to the proceedings of the jury when it was absent from the courtroom that was not, subsequently disclosed in open court’.

of ex-felons from jury service thus promotes the legitimate state goal of assuring impartiality of the verdict.²⁰

Thus, much like proving ‘racial profiling’,²¹ proving partiality will rarely occur through direct means. However, a presumption of impartiality is open to rebuttal by engaging a challenge for cause or challenging a juror peremptorily. Although the criminally convicted may very well assume an anti-state posture for the aforementioned reasons, such a presumption would not only be unfair, it has been shown to be inaccurate on the various occasions when such offenders have made their way onto a criminal jury and cast their vote for conviction resulting in a unanimous verdict.²² Given that courts are not quick to interfere with such ‘tainted jury’ verdicts, as will be discussed later in this chapter, it may be that the ‘inherent bias theory is a convenience rather than a sincere belief’.²³ At the very least, it supports consideration of individually screening²⁴ the criminally convicted potential juror rather than engaging a wholesale disqualification regime.

Before leaving the topic of the historic rationales for juror disqualification due to criminal antecedents, it should be mentioned that there are many logical parallels that can be found in the jurisprudence pertaining to juror disenfranchisement for criminality.²⁵ The purity of the ballot box, the protection of democratic principles and the overall maintenance of social responsibilities compare easily with jury duty save for the fact that jury duty is a legal obligation while casting a vote is purely an optional exercise. At least in Canada, serving on a jury is not a right, but rather a civic opportunity, albeit a compelled one.²⁶ However, suffrage in Canada is a constitutionally protected right, regardless of the voter’s criminal past. Section 3 of the *Charter* declares that ‘[e]very citizen of Canada has the

²⁰ *Rubio v Superior Court*, 593 P 2d 595, 600 (Cal Super Ct 1979).

²¹ *R v Brown* (2006), 215 CCC (3d) 330 at para 44 (Ont CA).

²² See for example the case of *People v Miller*, 759 NW 2d 850, 860 (Mich 2008) where, in a first-degree criminal sexual conduct case, the accused was found guilty by a jury that included as one of its number a convicted felon whose convictions were of a sexual nature.

²³ Kalt (n 14) 108.

²⁴ *ibid.*

²⁵ See Alec C Ewald, “‘Civil Death’: The Ideological Paradox of Criminal Disenfranchisement Law in the United States” (2002) 5 Wis L Rev 1045.

²⁶ As explained by Paisley J in *Moss (Re)*, [2002] OJ No 4509 at para 8 (SCJ), ‘[j]ury [s]ervice is both a duty and a privilege.’ Furthermore, there is no mention of jury service being a right in any of the sections of the *Canadian Charter of Rights and Freedoms*, being Part 1 of the *Constitution Act*, 1982, enacted by the *Canada Act*, 1982 (UK), c 11 (‘*Charter*’).

right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.’²⁷ This constitutional imperative was confirmed in the case of *Sauvé v Canada (Chief Electoral Officer)*²⁸ where the appellant, a federal prison inmate, along with others, challenged the constitutionality of s. 51(e) of the *Canada Elections Act*.²⁹ The impugned section pronounced that:

51. The following persons are not qualified to vote at an election and shall not vote in an election:

...

(e) Every person who is imprisoned in a correctional institution serving a sentence of two years or more.³⁰

The state respondent conceded³¹ that s. 51(e) of the Act violated s. 3 of the *Charter* so the court immediately began an analysis of whether the restriction on voting rights was demonstrably justified under s. 1 of the *Charter*.³² Although the scope of this chapter does not allow for a fulsome consideration of the parallel concerns found in both juror disqualification and voter disenfranchisement philosophy, much of the analysis by the *Sauvé* court resonates in the area of jury selection practices. In particular, McLachlin CJC, writing for a narrow majority underscored that:

The theoretical and constitutional links between the right to vote and respect for the rule of law are reflected in the practical realities of the prison population and the need to bolster, rather than to undermine, the feeling of connection between prisoners and society as a whole.

...

To deny prisoners the right to vote is to lose an important means of teaching them democratic values and social responsibility.³³

²⁷ *Charter* *ibid* s 3.

²⁸ *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68.

²⁹ *Canada Elections Act*, RSC 1985, c E-2.

³⁰ *ibid* s 51(e).

³¹ *Sauvé* (n 28) para 6.

³² *Charter* (n 26) s 1 pronounces that: ‘The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’

³³ *Sauvé* (n 28) paras 38, 40. Ultimately the court concluded at para 64 that the infringing section of the *Canada Elections Act* was not saved under a s 1 *Charter* analysis and therefore was of no force or effect. Note that American and English courts maintain a view contrary to that of Canada and support the right of

Thus, it is the message of unworthiness that flows from exclusivity reasoning that appears to be in conflict with the more contemporary rationale that encourages the recovery and rehabilitation of offenders and the restoration of communal harmony.

3.2.1 Reconciling Sentencing Principles with Presumptive Disqualification Practices

Whenever a consequential disqualification flows from a criminal conviction, without the ability to address the disqualification at the time of sentencing, the spectre of ‘Star Chamber’³⁴ decision-making is conjured. In Canada, the potential for ancillary orders to be imposed as part of a criminal sentence is very real, with the list of such orders tied in obvious ways to the substantive offending behaviour, for example:

- Firearms prohibitions as a result of committing crimes of violence as well as certain firearms-related offences, drug-related offences and breaching certain court orders;³⁵
- DNA (deoxyribonucleic acid) databank orders compelling the production of a sample of an offender’s DNA for analysis and storage as a result of committing generally more serious crimes;³⁶
- Sex offender registration as a result of being convicted of various sexual offences;³⁷
- Driving prohibitions as a result of committing alcohol- or drug-related driving offences as well as for driving dangerously or while disqualified;³⁸
- Place and participation prohibitions as a result of sexually offending against children;³⁹ and,
- Ownership of animal or bird prohibitions as a result of cruel or injurious conduct in respect of such creatures.⁴⁰

the state to control suffrage. See generally *Richardson v Ramirez*, 418 US 24 (1974) and *Moohan v Lord Advocate* [2014] UKSC 67.

³⁴ The Star Chamber ‘left its name to later times as a synonym for secrecy, severity, and the wresting of justice’. See Edward P Cheyney, ‘The Court of Star Chamber’ (1913) 18 Am Hist Rev 727, 727.

³⁵ *Criminal Code* (n 19) ss 109 and 110.

³⁶ *ibid* s 487.051.

³⁷ *ibid* s 490.012.

³⁸ *ibid* s 259.

³⁹ *ibid* s 161.

⁴⁰ *ibid* s 447.1.

What is significant about the foregoing prohibitions is that they are, for the most part, ordered at the discretion of the court and for a duration, within statutory parameters, that the court deems fit.⁴¹ Importantly, the restrictions are announced in open court, after hearing the submissions of counsel, so that the offender is left in no doubt as to what civic privileges have been lost. The same cannot be said of jury disqualification. There is nothing in the way of an announcement that advertises the loss of the opportunity to sit on a jury in the future.⁴² Rather, the individual who has been found guilty may remain ignorant of their compromised status in Canada until such time as, literally by the luck of the draw, a jury service questionnaire is received in the mail and upon reading the information contained therein they realize they may be disqualified from jury duty.⁴³

Perhaps more concerning than the fact that many Canadians are unknowingly being disqualified each year from sitting on juries, potentially forever, is the irreconcilability of the practice with certain fundamental sentencing principles.⁴⁴ Since 1996⁴⁵ the *Criminal Code* has provided ‘a legislative statement of the aims of sentencing in Canadian law’,⁴⁶ found in s. 718,⁴⁷ which reads as follows:

⁴¹ *ibid* ss 113(1)(a) and (b) (where firearms are required for sustenance or employment); s 487.051(2) (the grossly disproportionate tests for primary designated DNA offences); s 487.051(3)(b) (the best interests of the administration of justice test for secondary designated DNA offences); ss 490.015(1) and 490.016(1) (the grossly proportionate to the public interest test, but only after a minimum of five years has elapsed since the order was made); s 320.18(2) in combination with s 732.1(3)(g.2) (allowing for the operation of a motor vehicle where an alcohol ignition interlock device has been installed); s 161(1) (no test enunciated); and s 447.1 (no test enunciated).

⁴² Although ignorance of the law is no defence (*ibid* s 19), it is submitted that it should become standard court practice, upon arraignment, to advise the accused person of the relevant section of the disqualifying provincial jury legislation, as well as the federal counterpart (*ibid* s 638(1)(c)). By doing so, certain defendants might opt for a trial, rather than a guilty plea resolution, in order to potentially preserve a subsequent opportunity, should they be acquitted, to experience jury service. See *R v Wong*, 2018 SCC 25 at para 17 where the court recognizes that different accused persons ‘may ascribe varying levels of significance to different collateral consequences, based on their idiosyncratic values and preferences’.

⁴³ For example, in the Regulation applicable to the Ontario *Juries Act*, that being RRO 1990, Reg 680, s 11, a document is sent out to prospective jurors entitled ‘QUESTIONNAIRE ABOUT QUALIFICATIONS FOR JURY SERVICE’. Question 6 of Section A of the questionnaire requires the potential juror to mark an ‘X’ indicating yes or no to the following question: ‘Have you been convicted of any criminal offence that can be prosecuted by way of indictment for which you have not been granted a pardon?’ Before responding to the question, the potential juror is instructed to see Section B of the questionnaire which attempts to define the nature of an indictable offence. As well, at the bottom of question 6 is the warning, ‘[t]he sheriff is authorized to carry out criminal record checks through the Canadian Police Information Centre (CPIC) to verify the information you provide.’

⁴⁴ It remains debateable as to whether a provincial or territorial juror disqualification scheme constitutes a penalty that augments the substantive penalty imposed through the authority of the *Criminal Code*. For example, in *Condo v Ontario (Registrar of Motor Vehicles)* (1999), OAC 111 at para 17 (DC), it was held that a provincial administrative licence suspension ‘does not involve “punishment” as that term is utilized

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) To denounce unlawful conduct and harm done to victims or to the community that is caused by unlawful conduct;
- (b) To deter the offender and other persons from committing offences;
- (c) To separate offenders from society, where necessary;
- (d) To assist in rehabilitating offenders;
- (e) To provide reparations for harm done to victims or to the community; and
- (f) To promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.⁴⁸

It is clear from an overall reading of subsections (d) through (f) above that Parliament was shifting much of its emphasis to that of offenders returning to law-abiding society, as is contemplated by general restorative goals.⁴⁹ The question then remains as to why the state will encourage the judiciary to use restraint when imposing penal sanctions and try to focus on restorative justice when possible, yet remain seemingly content to label the convicted as unsuitable for determining the guilt or innocence of fellow citizens? The inconsistency has caused some to suggest that an ‘impartial jury system will remain more theoretical than factual’.⁵⁰ Indeed, the rationale that suggests that many offenders are indelibly stamped as irredeemable, unless the state says otherwise, is accepted in the minds of some judges:

in the Charter’. However, in *R v Wiles*, 2005 SCC 84 at para 3 the court approved of a prosecution concession made on the appeal that ‘a weapons prohibition order constitutes “treatment or punishment” within the meaning of s. 12 of the *Charter*’. In considering a *Sex Offender Information Registry Act* order in *R v Redhead*, 2006 ABCA 84 at para 12 the court held that such an order did ‘not constitute a sentence’. Whether punitive or administrative in nature, what appears clear is that civil disqualifications incorporate a stigmatic component.

⁴⁵ Bill C-41, *An Act to Amend the Criminal Code (Sentencing) and Other Acts in Consequence Thereof*, 1st Sess, 35th Parl, 1995 (assented to 13 July 1995, SC 1995, c 22).

⁴⁶ Allan Manson and others, *Sentencing and Penal Policy in Canada* (2nd edn, Emond Montgomery 2008) 97.

⁴⁷ *Criminal Code* (n 19) s 718.

⁴⁸ *ibid.*

⁴⁹ *Gladue* (n 7) para 43.

⁵⁰ Michael A Johnston, ‘The Automatic Exclusion from Juries of Those with Criminal Records Should be Ruled Unconstitutional’ (2015) 17 CR (7th) 335, 354.

It cannot be said that such purity and efficiency is maintained by permitting juries to be composed of thieves, robbers, murderers, kidnappers, perjurers, rapists, drug dealers and others convicted of felonies simply because they successfully completed their terms of probation. Nothing in the Constitution contemplates the full restoration of the rights of felons other than by executive pardon.⁵¹

The foregoing passage underscores the concern that some may question the legitimacy of a jury if persons with serious criminal convictions were allowed to serve within the group. Indeed, later in this chapter the author adumbrates an approach to categorizing certain types of offenders with a view to requiring their closer scrutiny as potential jurors.⁵² However, it must also be remembered that the concepts of honesty and lying as behaviours are often tied to specific situations not connected to criminal antecedents.⁵³

The classic studies of Stanley Milgram⁵⁴ and Philip Zimbardo⁵⁵ established that situational influences such as the presence of group pressures and authoritative figures, among other variables, can so significantly impact on the conduct of individuals that their behaviour presents as being inconsistent with their personal values. Similarly, other research findings suggest that ‘honesty may be greater in individual relationships than when dealing with groups or institutions’.⁵⁶ Thus, with environmental influences being so relevant to the assessment of honesty and integrity, jury selection dynamics take on added significance. However, more recent research has posited that if people are to align themselves with an authority, they will have previously identified with, and believed in, the righteousness of the authority and the positions that it has held on pertinent issues.⁵⁷ Nevertheless, the jury panel as an influential group and the judge as a symbol of power align well with circumstances that could factor into and explain the answers given by potential jurors when questioned in the courtroom.

⁵¹ *RRE v Glenn*, 884 SW 2d 189, 193 (Tex Ct App 1994).

⁵² See text to n 272 – n 284 in ch 5.

⁵³ See the text pertaining to Doob and Kirshenbaum, as well as Green, in n 223.

⁵⁴ Stanley Milgram, ‘Behavioral Study of Obedience’ (1963) 67 J Abnorm Soc Psych 371.

⁵⁵ Craig Haney, Curtis Banks and Philip Zimbardo, ‘Interpersonal Dynamics in a Simulated Prison’ (1973) 1 Int’l J Crim & Pen 69. See also Stanley Milgram, ‘The Mind is a Formidable Jailer: A Pirandellian Prison’ *New York Times Magazine* (New York, 8 April 1973).

⁵⁶ T H Howells, ‘Factors Influencing Honesty’ (1938) 9 J Soc Psych 97, 101.

⁵⁷ S Alexander Haslam and Stephen D Reicher, ‘Contesting the “Nature” Of Conformity: What Milgram and Zimbardo’s Studies Really Show’ (2012) 10 PLoS Biol 1, 3.

Whether a pre-existing tendency or a circumstance-induced response, all people have the capacity to tell the truth or to deceive.⁵⁸ Sometimes described as the ‘Will’ and ‘Grace’ hypotheses, the former theorizes that ‘honesty results from the active resistance of temptation’ whereas the latter contemplates that ‘honesty results from the absence of temptation’.⁵⁹ Whichever proposition is subscribed to will still require looking beyond mere antecedents when trustworthiness is being assessed. Thus, historical views that suggest that jury rectitude necessarily correlates with jury honesty during empanelment proceedings are of limited, if not doubtful, value.⁶⁰

Mass and automatic disqualification, although attractive for its simplicity and uniformity, is otherwise significantly flawed. Particularly when dealing with first offenders as opposed to habitual criminals, ‘we should be cautious about judging an individual’s character by a single act, even an act of significant wrongdoing’.⁶¹ Such a rush to judgment often forecloses, or at least discourages, meaningful penitence. Instead, with dispirit often comes bitterness and an apathetic view towards change.⁶² Even more significant is the harmful stigmatizing that results from disqualification schemes:

... former convicts should not be relegated to second-class citizenship. A fair system of punishment is one in which the offender is subjected to specified penal restrictions, which bear a reasonable relation to the gravity of the crime, and which are operative only for a specified time. A corollary to this assumption is that civil disqualifications – which may take effect or continue even after completion of sentence – should be imposed parsimoniously, with appropriate restrictions of purpose, duration, and scope.⁶³

⁵⁸ Both honesty and deception are learned values. See Ken Petress, ‘Some Thoughts About Deception’ (2004) 3 I J Instruct Psych 334, 334.

⁵⁹ Zhi Xing Xu and Hing Keung Ma, ‘Does Honesty Result from Moral Will or Moral Grace? Why Moral Identity Matters’ (2015) 127 J Bus Ethics 371, 371.

⁶⁰ It is submitted that the better approach is to consider such issues through the lens of the informed observer, that is, by ‘right minded persons, applying themselves to the question and obtaining thereon the required information’. This was the test promulgated by the Supreme Court of Canada on the issue of reasonable apprehension of bias. See *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at 394.

⁶¹ Samuel H Pillsbury, ‘Learning From Forgiveness’ (2009) 28 Crim Just Ethics 135, 142.

⁶² Offenders can be discouraged by sentences that fail to achieve parity, dash hopes and otherwise lack justification. Such outcomes can cause bitterness and resentment. See generally *R v Dawdy* (1973), 12 CCC (2d) 477 (Ont CA).

⁶³ Andrew von Hirsch and Martin Wasik, ‘Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework’ (1997) 56 CLJ 599, 605.

The reality is that '[o]ffenders need communities, and communities need rehabilitated offenders: rehabilitation is enjoined on society not simply by their needs or deficits, but by their strengths, assets and potential contribution.'⁶⁴ Since 'compliance with the law is best secured by fostering beliefs in the fairness of the legal systems and in the legitimacy of legal actors',⁶⁵ an equitable system of juror disqualification should be pursued.

3.2.2 The Importance of Character

Character has been defined as '[t]he aggregate of the moral qualities which belong to and distinguish an individual person.'⁶⁶ Although used synonymously, the words 'character' and 'reputation' are really conceptually distinct. While both remain subjective constructs at their core, some see the former as being anchored more firmly in reality whereas the latter pertains merely to public perception.⁶⁷ The even greater difficulty is to divine what is perceived from what is real. For most people, there is often no practical difference. It is only through intimate knowledge of an actor that their acts can be reliably assessed in order to discern true character. As Yankah explains, to simply associate an action with a character trait, without more, is unsound:

Inferring character from criminal actions is unreliable and relying upon a single criminal act particularly uncertain. Often two identical acts spring from vastly different character traits. One man may steal to feed his family; another out of entirely malicious motives. Though the acts appear identical the respective characters are different. The act tells us nothing about the character.⁶⁸

While 'even a scarlet letter fades with time',⁶⁹ only a searching, non-partisan examination of the person will uncover whether that is indeed the case. A mere assumption regarding

⁶⁴ Peter Raynor and Gwen Robinson, 'Why Help Offenders? Arguments for Rehabilitation as a Penal Strategy' (2009) 1 Eur J Prob 3, 14.

⁶⁵ Andrew V Papachristos, Tracy L Meares and Jeffrey Fagan, 'Why Do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Gun Offenders' (2012) 102 J Crim L & Criminology 397, 401. See also generally Tom R Tyler, *Why People Obey the Law* (Princeton University Press 2006).

⁶⁶ Henry Campbell Black, *Black's Law Dictionary* (5th edn, West Publishing 1979) *sub verbo* 'Character'.

⁶⁷ See *State v Blake*, 249 A 2d 232, 235 (Conn 1968).

⁶⁸ Ekow N Yankah, 'Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment' (2004) 25 Cardozo L Rev 1019, 1037.

⁶⁹ Brian Manarin, 'Extraordinary Offenders in our Midst: An Evaluation of an American Interpretive Solution and its Application to Section 745(b) of Canada's Criminal Code' (2013) 22 Tul J Int'l & Comp

a person's lack of probity is unfounded without a reliable base of evidence that is contemporary with the time the judgment is being passed. Indeed, it would be a legal misdirection to instruct a jury that 'a person with a criminal record cannot be given the same credence as a witness without such a record'.⁷⁰ Therefore, while a criminal record may suggest bad character, it certainly is not dispositive of the issue.⁷¹ Conversely, the lack of a criminal record may suggest good character, although that assumption is also dubious. As was explained by the Court of Special Appeals of Maryland:

To be qualified as a juror, one need not have lived a blameless life, nor must a juror be "good". Mere suspicion that a person has committed a crime does not disqualify that person from jury service. While a juror need not be good, he or she must possess two essential virtues: 1) be without bias or prejudice for or against any litigant; 2) possess an open mind so that he or she may fairly and impartially consider the evidence and render a verdict thereon.⁷²

Two compelling and, perhaps ironic, examples of how the law and its governing bodies recognize the rehabilitation of character arise when a person with a law degree is allowed to be called to the Bar despite their criminal antecedents or when a formerly disbarred lawyer is re-admitted to the practice of law. The admittance or re-admittance of such individuals is a testament to the fact that the law recognizes that its transgressors, even as officers-of-the-court, are still on occasion able to restore the expected qualities of the position.⁷³ What is problematic is developing a clear and consistent definition of what constitutes good moral character:

The term "good moral character" has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect. However the term, by itself, is usually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect

L 63, 83. The 'scarlet letter' reference is drawn from Nathaniel Hawthorne's 1850 novel where a woman is stigmatized by being forced to wear a scarlet letter 'A' on her dress after being found guilty of adultery. See Nathaniel Hawthorne, *The Scarlet Letter* (Saddleback Educational Publishing 2011).

⁷⁰ *R v Titchner*, [1961] OR 606 at 613 (CA).

⁷¹ Indeed, even when an accomplice or otherwise unsavoury witness testifies for the prosecution, the question as to whether a jury should be warned about relying on such testimony without corroborating evidence is left to the trial judge. See generally *R v Vetrovec*, [1981] 1 SCR 811.

⁷² *Owens-Corning v Baltimore*, 670 A 2d 986, 1001 (Md Ct App 1996).

⁷³ For an understanding of how the governing bodies that regulate the licencing of lawyers consider the issue of character and rehabilitation see: *Respondent G v Solicitors Regulation Authority* (In the Matter of the Solicitors Act 1974, Case No 11319-2014, Application for Restoration to the Roll); *In re Application of Taylor*, 647 P 2d 462 (Or 1982); and *Law Society of Upper Canada v Schuchert*, [2001] LSDD No 63.

the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.⁷⁴

Perhaps what is even more ironic than the fact that felons and other criminals may be permitted to practice law is the fact that they may nevertheless be disentitled to sit on a jury. Thus, they can be trusted to prosecute, defend or otherwise litigate a case, but they may not sit in judgment over that very same case as an individual juror.⁷⁵ To some extent, the adversarial system promotes a zeal that distinguishes the advocate from the adjudicator. Nevertheless, ‘lawyers are primarily “officers of the court” and, like jurors, have obligations to society that often require detached analysis and dispassionate assessment’.⁷⁶ Furthermore, both lawyers and jurors must adhere to oath-driven obligations that include a duty to maintain certain confidences.⁷⁷ In that same vein, it has been pointed out that ‘the level of protection afforded the legal profession and the jury by their respective screening mechanisms is virtually identical, even when the potential participant is a convicted felon’.⁷⁸

The presumption that a person with a criminal record is unfit for future jury duty must be, at times, seen as inductively unsupportable. This is because it cannot be conclusively said that such people generally lack the requisite moral fibre and/or harbour a resulting bias against the government agency that prosecuted them. A hypothetical example may assist. A brother seeks out a man who had been sexually harassing his sister at her workplace and punches him in the nose. He has committed a crime. If the victim’s nose is broken as a result the crime may be labelled a felony. If the brother then turns himself in to the police, is charged, and pleads guilty at the first opportunity, he may do so out of a misguided sense of righteousness or chivalry. The fact that the charge was brought by the state may be absolutely irrelevant in his mind and any animosity flowing from being branded a felon may very well be focused on the complainant alone. The prosecutor’s

⁷⁴ *Konigsberg v State Bar*, 353 US 252, 262-63 (1957).

⁷⁵ See generally James M Binnall, ‘Convicts in Court: Felonious Lawyers Make a Case for Including Convicted Felons in the Jury Pool’ (2010) 73 Alb L Rev 1379.

⁷⁶ *ibid* 1399.

⁷⁷ Lawyers and jurors undergo ‘swearing in’ ceremonies that involve important promises and allegiances and an expectation that client-based (lawyers) and decision-based (jurors) issues will remain, almost without exception, private.

⁷⁸ Binnall (n 75) 1414.

role is rendered immaterial in the circumstances and not a source of ire. If anything, the state simply provided the forum for the brother to explain and perhaps showcase what might be seen by some as a noble, albeit illegal, act. Thus, at times the beliefs that are associated with criminal convictions appear both convenient and conjectural. As Binnall explains:

Without empirical support for the overarching presumptions made about those with a felony conviction record, courts and policymakers often categorize a vast population of individuals based on one common characteristic – the felon label. As a result, legal restrictions spawned from inaccurate generalizations target those that pose no greater risk to a jury than others who could legitimately taint the adjudicative process.⁷⁹

Thus, while bad character will always be a topic of importance in the human experience, inferring its presence as a result of a criminal conviction remains both conceptually dubious and prone to fundamentally unfair results. This is because three easily assailable suppositions appear to underpin the overall felon disqualification stance: ‘First, it must assume that criminal acts reveal bad character. Next it must assume that character is a fixed concept. And finally, justifying civic restrictions as protective, the State must assume that good character is essential to making proper civic decisions.’⁸⁰

Arguably a better metric of character is one that avoids taking any presumptuous position whatsoever and instead leaves the matter to be judicially determined. Armed with the information about the criminal antecedents of the potential juror, trial counsel and the presiding judge could then determine during jury selection whether any concerns are borne out. Some may question how a court is better positioned to assess character, given that the essence of the exercise requires nothing more than an individualized [and therefore subjective] assessment? However, the same criticism can be levied against any juridical decision.

⁷⁹ James M Binnall, ‘A Felon Deliberates: Policy Implications of the Michigan Supreme Court’s Holding in *People v. Miller*’ (2010) 87 U Det Mercy L Rev 59, 68. Indeed, empirical research while meagre, suggests that inherent bias exists in some but certainly not all convicted felons. See Binnall (n 1) 17-20.

⁸⁰ Binnall (n 14) 672.

Perhaps the reason to prefer a judicial calculus of character can be traced to the three particular strengths that are built into most common law systems of justice. Firstly, judicial actors are protected by their absolute independence such that their decisions are beholden only to what the law requires and what justice demands.⁸¹ Secondly, the rule of law ‘is a constitutional value, an ideal that influences how our laws are made and administered’.⁸² Hogg and Zwibel describe the rule of law as comprised of three constituent parts: ‘(1) a body of laws that are publicly available, generally obeyed, and generally enforced; (2) the subjection of government to those laws (constitutionalism); and (3) an independent judiciary and legal profession to resolve disputes about those laws.’⁸³ Thirdly, stemming from the laws and procedural rules is the lawyer’s ability to employ cross-examination, famously described by Wigmore as ‘the greatest legal engine ever invented for the discovery of the truth’.⁸⁴ Thus, while the refrain of some may understandably return to issues involving subjectivism, judicial analysis can justifiably be preferred over a state-controlled alternative.

3.3 Jury Service as Determined by the Provinces and Territories

Although a federal political state, there is a significant division of powers as between the provinces and territories, and the central government in Canada. The enumeration and description of the divided powers is found in ss. 91 and 92 of the *Constitution Act*.⁸⁵ For the purposes of the ensuing discussion, it is important to be aware of the following distinction:

Section 92(14) of the Constitution Act, 1867, enables the province to legislate for the administration of justice within the province so long as it does not infringe on matters of criminal procedure, reserved to the federal government by s. 91(27). Part of this provincial power includes the assembly of an array of potential jurors for the courts of criminal jurisdiction to use in accordance with the Criminal Code. This power, however, is largely an administrative task, as s. 92(14) itself implies. In the

⁸¹ See the discussion of ‘judicial independence’ in *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at paras 44-45.

⁸² Peter W Hogg and Cara F Zwibel, ‘The Rule of Law in the Supreme Court of Canada’ (2005) 55 UTLJ 715, 718.

⁸³ *ibid.*

⁸⁴ John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, vol 5 (3rd edn, Little, Brown and Company 1940) 29, para 1367.

⁸⁵ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, ss 91-92.

case of jury selection, the provincial power for the administration of justice stops and the federal power over criminal procedure begins when the judge's activity is not concerned with the assembly of an array of eligible citizens, but with the precautions necessary to ensure an impartial jury.⁸⁶

Thus, it is the responsibility of the provinces and territories to provide the pool of jury candidates from which, during in-court selection, a petit jury will be seated which will try the case in question.⁸⁷ What is apparent upon a perusal of the provincial and territorial jury legislation is how markedly inconsistent the disqualification schemes are in each part of the country in regard to the treatment of those with criminal antecedents. Although 'each province and territory in Canada has its own eligibility criteria for jurors',⁸⁸ and no doubt incorporate jurisdictional interests when setting standards, the incongruous focus of the lawmakers across the country remains hard to reconcile. Indeed, the mixed messaging speaks to the suspect logic behind juror qualification. It also allows for the argument that certain suitability standards may be better left to judicial resolution on a case-by-case basis. The following table illustrates the contrast.

3.3.1 Table One⁸⁹

| PROVINCE/TERRITORY | STATUTE TITLE | DISQUALIFYING STANDARD |
|---------------------|------------------|--|
| 1. British Columbia | <i>Jury Act</i> | Sections 3(1)(p)(q): 'convicted of a <i>Criminal Code</i> or <i>Controlled Drugs</i> |

⁸⁶ *R v Barrow*, [1987] 2 SCR 694 at para 30. In *R v Kokopenace*, 2015 SCC 28 at para 8 Moldaver J explained:

Drawing from the pool of eligible individuals, jury selection takes place in three stages:

1. The preparation of the jury roll, composed of individuals who are randomly selected from the community in each judicial district throughout Ontario.
2. The selection of names from the jury roll to make up the jury panels (also known as arrays) for court sittings. Jury panels act as the pools from which trial juries are selected.
3. The selection, from the jury panel, of the trial jury (also known as the petit jury) that will serve on a particular criminal trial.

⁸⁷ Brent Kettles, 'Impartiality, Representativeness and Jury Selection in Canada' (2013) 59 Crim LQ 463, 465.

⁸⁸ *R v Yumnu*, 2012 SCC 73 at para 45.

⁸⁹ See, in the order reflected in Table One: *Jury Act*, RSBC 1996, c 242, s 3(1)(p)(q); *Jury Act*, RSA 2000, c J-3, s 4(h)(j); *The Jury Act*, 1998, SS 1998, c J-4.2, s 6(h); *The Jury Act*, CCSM 2014, c J30, s 3(p)(q)(r); *Juries Act*, (n 11) s 4(b); *Jurors Act*, CQLR 2016, c J-2, s 4(j); *Jury Act*, SNB 1980, c J-3.1, s 3(r); *Juries Act*, SNS 1998, c 16, s 4(3); *Jury Act*, 1991, SNL 1991, c 16, s 5(m)(n); *Jury Act*, RSPEI 1988, c J-5.1, s 5(i); *Jury Act*, RSNWT 1988, c J-2, s 5(a); *Jury Act*, RSY 2002, c 129, s 5(a); *Consolidation of Jury Act*, RSNWT 1988, c J-2, s 5(a), as enacted for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28.

| | | |
|-----------------|---------------------|---|
| | | <i>and Substances Act</i> (Canada) offence that has not been granted a pardon or record suspension under the <i>Criminal Records Act</i> (Canada); or currently charged with an offence under the <i>Criminal Code</i> or <i>Controlled Drugs and Substances Act</i> (Canada)’. |
| 2. Alberta | <i>Jury Act</i> | Sections 4(h)(j): ‘convicted of a criminal offence for which a pardon has not been granted; or are currently charged with a criminal offence’. |
| 3. Saskatchewan | <i>The Jury Act</i> | Section 6(h): ‘persons who are legally confined in an institution’. |
| 4. Manitoba | <i>The Jury Act</i> | Sections 3(p)(q)(r): ‘a person convicted of an indictable offence, unless he or she has been pardoned; or a person convicted within the previous five years of an offence for which the punishment could be a fine of \$5,000 or more or imprisonment for one year or more, unless he or she has been pardoned; or a person charged within the previous two years with an offence for which the punishment could be a fine of \$5,000 or more or imprisonment for one year or more where the person has not been acquitted, the charge has not been dismissed or withdrawn and a stay of proceedings has not been entered in respect of the trial for the offence’. |

| | | |
|--------------------------|-------------------|--|
| 5. Ontario | <i>Juries Act</i> | Section 4(b): ‘has been convicted of an offence that may be prosecuted by indictment, unless the person has subsequently been granted a pardon’. |
| 6. Quebec | <i>Jurors Act</i> | Section 4(j): ‘persons charged with or convicted of a criminal act’. |
| 7. New Brunswick | <i>Jury Act</i> | Section 3(r): ‘persons convicted of an offence under the <i>Criminal Code</i> (Canada), the <i>Food and Drugs Act</i> (Canada) or the <i>Narcotic Control Act</i> (Canada) unless they have obtained a pardon’. |
| 8. Nova Scotia | <i>Juries Act</i> | Section 4(e): ‘a person who has been convicted of a criminal offence for which the person was sentenced to a term of imprisonment of two years or more’. |
| 9. Newfoundland | <i>Jury Act</i> | Sections 5(m)(n): ‘a person charged with an indictable offence; or a person who has within 5 years of the taking of the jury list, unless sooner pardoned, served a period of imprisonment or other detention for an indictable offence without the option of a fine’. |
| 10. Prince Edward Island | <i>Jury Act</i> | Section 5(i): ‘a person convicted within the previous five years of an offence for which the punishment could have been a fine of \$3,000 or more or a sentence of imprisonment exceeding twelve months, unless pardoned’. |

| | | |
|---------------------------|----------------------------------|--|
| 11. Northwest Territories | <i>Jury Act</i> | Section 5(a): ‘has been convicted of an offence for which he or she was sentenced to a term of imprisonment exceeding one year, not having subsequently been granted a free pardon’. |
| 12. Yukon Territory | <i>Jury Act</i> | Section 5(a): ‘persons who have been convicted of an offence against an Act of Parliament for which a term of imprisonment exceeding 12 months was imposed and who have not been pardoned by the government of Canada for this offence’. |
| 13. Nunavut Territory | <i>Consolidation of Jury Act</i> | Section 5(a): ‘has been convicted of an offence for which he or she was sentenced to a term of imprisonment exceeding one year, not having been subsequently granted a free pardon’. |

Depending on where a citizen of Canada resides can be dispositive of jury duty eligibility. Only the province of Saskatchewan is willing to allow a person with a criminal record, of any type, to serve on a jury, as long as they are not ‘legally confined in an institution’.⁹⁰ By comparison, the remaining provinces and territories of Canada have sent conflicting messages through their respective jury legislation. Reference to Table One shows that the various statutes take divergent views on the importance of the following issues: charges versus convictions;⁹¹ *Criminal Code* offences versus offences against any Act of Parliament; potential versus actual sentences; custodial versus non-custodial sentences; mere criminal versus indictable offences (ie. those which are the equivalent of a felony);

⁹⁰ *The Jury Act*, 1998, SS 1998 ibid s 6(h).

⁹¹ Note that in Canada certain sentences, after a finding of guilt is registered, are not to be considered convictions. If granted either an absolute or conditional discharge by the court ‘the offender shall be deemed not to have been convicted of the offence’ - *Criminal Code* (n 19) s 730(3).

and, pardons versus free pardons.⁹² Such ‘crazy-quilt’⁹³ approaches to juror disqualification are not unique to Canada. In the USA, ‘[t]hough the federal government and a majority of States permanently disqualify a convicted felon from jury service, other jurisdictions employ less drastic legislation.’⁹⁴ Given that ‘legislative attitudes towards felon jury exclusion are often fluid’,⁹⁵ the shifting views tend to make ‘consistency an uncommon occurrence’.⁹⁶ However, the orthodox approach in the USA remains draconian, with only the state of Maine unobservant of felon exclusion practices in its juror selection legislation.⁹⁷

Given the presumption that criminally convicted jurors would be in league to some degree with an accused person on trial, thus making guilty verdicts less likely, a simple and intuitively attractive ‘natural experiment’ is contemplated. Comparing the jury conviction and acquittal numbers (if they exist) for Saskatchewan or Maine with other closely configured provinces or states to see if there are any controlled-for-population quantitative differences would be a starting point upon which to build more sophisticated statistical research. Indeed, using the neighbouring province of Manitoba as a comparator with Saskatchewan would be convenient not only for its proximity, but also because it tends to admit a similar percentage of Indigenous offenders to custody each year amongst its overall prison population.⁹⁸ Should the data further allow for the scrutiny of jury-adjudicated verdicts, if Saskatchewan juries were shown to convict less often, the expected tendencies of criminally convicted jurors would appear *prima facie* confirmed. If the converse was seen to occur, then the data on an equally basic level would tend to dispel the inherent bias notion.⁹⁹

⁹² A ‘free pardon’ in Canada is a formal recognition that a person was erroneously convicted of an offence – see the Parole Board of Canada, *Royal Prerogative of Mercy Ministerial Guidelines* (31 October 2014) <<http://www.pbc-clcc.gc.ca/prdons/rpmm-eng.shtml>> accessed 14 November 2015. See also *ibid* s 748(3) which indicates that ‘[w]here the Governor in Council grants a free pardon to a person, that person shall be deemed thereafter never to have committed the offence in respect of which the pardon is granted.’

⁹³ Binnall (n 14) 669.

⁹⁴ Binnall (n 79) 62.

⁹⁵ *ibid*.

⁹⁶ *ibid*.

⁹⁷ Binnall (n 1) 5. See also Me Rev Stat Ann tit 14 § 1211 (2017).

⁹⁸ For example, in the year 2014-15, IP in Saskatchewan and Manitoba made up, respectively, 77 and 76 percent of the total custodial admissions for those two provinces. See Julian V Roberts and Andrew A Reid, ‘Aboriginal Incarceration in Canada since 1978: Every Picture Tells the Same Story’ (2017) 59 CJCCJ 313, 322, Table 4.

⁹⁹ See the text to n 188 in ch 5 regarding the counterintuitive survey results on the use of peremptory challenges in England.

What is apparent from the wide divide in approaches to felonious potential jurors, from seeing their past as being inconsequential on the one hand to viewing the convicted offender as forever stigmatized and unworthy on the other, leaves room for logical discussion. The immediate problem is that the disqualification of jurors with certain criminal antecedents is done, for the most part, by state officials far from the court house. Thus, in order for those who have convictions remaining on their criminal records to retain their juror eligibility status, two things need to happen: (1) governmental vetting and exclusion of criminal juror candidates must either cease or be revamped; and (2) more latitude must be granted to in-court juror selection processes.

3.3.2 How the *Criminal Code* Controls the Presence of the Criminally Convicted on the Petit Jury

Section 638(1)(c) of the *Criminal Code* reads as follows: ‘A prosecutor or an accused is entitled to any number of challenges on the ground that a juror has been convicted of an offence for which he was sentenced to death or to a term of imprisonment exceeding twelve months.’¹⁰⁰ What is immediately obvious is that the section involves some old notions and implications. In 1976 Canada abolished capital punishment.¹⁰¹ Thus, any person who had been sentenced to death before the abolition date, and remained alive, obviously benefitted by having their sentence commuted to a less severe sanction by the government of the day. Assuming that group to be small in number, and getting even smaller with each passing year, it is the other group of offenders, those who have received a jail sentence of more than a year in duration, that remain the truly vulnerable. However, as compared to many of the provincial or territorial jury statutes, s. 638(1)(b) appears to be a much more lenient standard for determining juror acceptability.

One way of looking at the relationship between provincial or territorial juror disqualification legislation and that of the *Criminal Code* is that the latter acts as a check and balance on the former, should criminally convicted potential jurors slip through the nets that were originally cast. Others see the provincial/territorial bulwark as not only

¹⁰⁰ *Criminal Code* (n 19) s 638(1)(c).

¹⁰¹ Correctional Service Canada, ‘Abolition of the Death Penalty 1976’ (2012) 1 <www.csc-scc.gc.ca/text/pblct/rht-drt/08-eng.shtml> accessed 17 October 2015.

unnecessary, but contrary to the paramount concerns of the federal government regarding matters pertaining to criminal procedure:

The express intention of Parliament for removing potential jurors based on their criminal record is realized through a very specific procedure, which inexorably flows from s. 91(27) of the *Constitution Act*, 1867. If the procedure does not result in a finding that the challenge is true, the result is a presumption of impartiality and indifference, which can only be overridden by other sections of the *Code*. The *Juries Act*, however, frustrates this intention by disqualifying citizens with a criminal record without having to follow the procedure envisioned by Parliament. The *Code's* failure to render all convicts ineligible outright ought to be interpreted as a permissive omission. That permissive omission is democratically inclusive, as it contemplates a large proportion of people with criminal records as being eligible jurors.¹⁰²

Given that such difficulties can arise on occasion in federalist states such as Canada and the USA, it is important to at least consider the experiences of England with its unitary approach to governance, and how eligibility for jury service standards compare in that country to those in the two North American countries. Section 1 of the *Juries Act* 1974,¹⁰³ in subsection 3 thereof, references Schedule 1 of the statute for a list of those persons who are disqualified from serving on juries. In Part 2 of Schedule 1, paragraphs 5 through 8 disqualify the following individuals for either the time a charge is before the courts, for life or for ten years, as generally described below:

- A person who is on bail in a criminal proceeding;
- Disqualification for life: a person who is imprisoned, detained or in custody for life; detained at Her Majesty's pleasure; detained for public protection; sentenced to an extended sentence; and, imprisoned or detained for five years or more;
- A person who at any time in the previous ten years was convicted of offences related to offences relating to research by jurors; sharing research with other jurors; engaging in prohibited conduct; or disclosing a jury's deliberations (or equivalent offences relating to jurors at inquests or relating to members of the Court Martial);

¹⁰² Johnston (n 50) 352-53.

¹⁰³ *Juries Act* 1974 (n 11) s 1.

- A person who at any time in the previous ten years was sentenced to: imprisonment or detention; suspended sentence of imprisonment or suspended order for detention; subject to a community order, community rehabilitation order, a community punishment order, a community punishment and rehabilitation order, a drug treatment and testing order, a drug abstinence order, a service community order, or an overseas community order, all depending on the United Kingdom country in question and whether or not the person serves in the Armed Forces.¹⁰⁴

One may argue that disqualification from jury service in England appears less encompassing than in Canada, however still more forgiving than what is found in the American justice system.¹⁰⁵ However, what is common in Canada, England and the USA is that there appears to be a pronounced hostility towards those that are alleged to, or have in fact, transgressed the law. It is an *animus* that shows itself in a way that arguably has the potential to destroy self-image and self-respect because of its presumptive nature. As Roberts explains:

In addition to removing the opportunity to participate in an inclusionary activity, automatic exclusions have expressive power. They send to convicted individuals a message of “you do not belong” – and in many instances “you will *never* belong” – that is at odds with the demand that one “reenter.” The labeling and stigmatizing involved in this kind of exclusion interferes with efforts at reentry. In addition, it sends a message to the broader community that reinforces, instead of challenging, perceptions with those with convictions as “other,” and indeed as a dangerous other.¹⁰⁶

With such a mindset, the state preoccupation and focus remains simply on establishing the existence of outstanding charges or convictions rather than going further and exploring what such antecedents actually mean for the individual *qua* juror.

On rare occasions, the jury panel that is summoned to court may be exhausted by the selection process before a petit jury is totally seated. In such circumstances, the courts of Canada, the USA and England are empowered to make up the deficit by ordering that

¹⁰⁴ Criminal Justice Act 2003 (n 11) sch 1, pt 2, ss 5-8.

¹⁰⁵ 28 USC (n 11) § 1865 (b)(5) disqualifies any person who ‘has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored’.

¹⁰⁶ Anna Roberts, ‘Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions’ (2013) 98 Minn L Rev 592, 612 (emphasis in original).

‘talesmen’¹⁰⁷ be assembled, from in and around the vicinity of the court, so that the jury selection *voir dire* can continue until the requisite number are seated. Although ‘the law with regard to talesmen is very obscure’,¹⁰⁸ when talesmen are ordered by the court the lack of selection orthodoxy that flows from the process arguably reduces the concern that might otherwise be maintained regarding the criminal antecedents of potential jurors. As the talesmen are assembled *ex improviso*, there will be no vetting of their backgrounds by the parties to the litigation and thus any type of considered challenge option may be rendered illusory. Any criminal record checks done on talesmen may not be as comprehensive as would otherwise have been the case had they been summoned via normal channels.

Section 642(1) of the *Criminal Code* governs the talesman phenomenon in Canada and reads as follows:

642(1) If a full jury and any alternate jurors considered advisable cannot be provided notwithstanding that the relevant provisions of this Part have been complied with, the court may, at the request of the prosecutor, order the sheriff or other proper officer to summon *without delay* as many persons, *whether qualified or not*, as the court directs for the purpose of providing a full jury and alternate jurors.¹⁰⁹

Although one would expect that a prudent court would give the sheriff the time to do criminal record checks on talesmen,¹¹⁰ the fact that s. 642(1) includes the caveat that such individuals are to be summoned ‘without delay’ and ‘whether qualified or not’, arguably suggests that expedience may tend to displace any concerns over having criminals on juries.¹¹¹ Although talesmen may still be subject to challenges for cause and peremptory challenges,¹¹² the unique procedure that applies to their empanelment bespeaks

¹⁰⁷ See *Black’s Law Dictionary* (n 66) *sub verbo* ‘Talesman’ which explains that such a person is ‘summoned to act as a juror among the by-standers in the court’. The references to the talesman process can be found in Canada at *Criminal Code* (n 19) s 642(1); in the USA at 28 USC (n 11) § 1866(a) (amended 1968 Pub L 90-274); and in England in the Juries Act 1974 (n 11) s 6.

¹⁰⁸ *R v Solomon* [1958] 1 QB 203 (CA) 206.

¹⁰⁹ *Criminal Code* (n 19) s 642(1) (emphasis added). Note that s 642(2) states ‘[j]urors may be summoned under subsection (1) by word of mouth, if necessary.’

¹¹⁰ For the English experience, see the Juries Act 1974 (n 11) s 6. Although the formal title of ‘talesman’ is not used, s 6 specifically calls for consideration of qualifications, excusals and challenges when the exceptional procedure is engaged.

¹¹¹ *Criminal Code* (n 19) s 642(1).

¹¹² *ibid* s 642(3).

practical,¹¹³ as opposed to philosophical, concerns. In a small way, a call for talesmen also brings into question whether criminal antecedents need always be given heightened consideration when attempting to select an impartial jury.

3.3.3 The Accuracy of Criminal Record Data

In order to engage the disqualification process due to criminal antecedents, obviously a criminal record must exist and be retrievable in some form. Although there are various ways of recording a criminal conviction, from handwritten endorsements on informations and indictments, to local, regional and provincial data inputting by various police services, the gold standard of Canadian criminal record-keeping systems is the Canadian Police Information Centre ('CPIC') system, overseen by Canada's national police service, the Royal Canadian Mounted Police ('RCMP'). The RCMP explain that:

CPIC is an integrated database (repository) where specific law enforcement data can be entered, electronically queried and ultimately shared with law enforcement partners in their crime prevention and crime fighting roles. From an operational perspective, the RCMP controls the infrastructure, which comprises CPIC including mainframe computers, and data storage devices located at RCMP Headquarters in Ottawa. However, custody and control of the personal information entered on CPIC is deemed to be the sole domain of the agency making the entry.¹¹⁴

Like any database, the information found therein is only as accurate and as current as are the inputting skills and work ethic of the personnel that staff the system. Not only do inputting delays result in the imposition of less than appropriate sentences (i.e. sentences that may have been different had the court been aware of the offender's full record), such delays can also directly impact on the composition of a jury. Without accurate criminal record data, more *prima facie* disqualified jurors remain in the pool of eligibility. Indeed, if there are significant inputting backlogs and the state is aware of the delays, an argument can be made that lawmakers are not as concerned about the adulteration of juries, caused by the potential presence of the criminally convicted, as the government would otherwise have society believe.

¹¹³ See the discussion of talesmen in *R v Rowbotham* (1988), 41 CCC (3d) 1 at 14-15 (Ont CA).

¹¹⁴ Canada Police Information Centre, 'Privacy Impact Assessments' (2005) 2-3 <<http://www.rcmp-grc.gc.ca/pia-efvp/cpic-cpic-eng.htm>> accessed 21 September 2015.

In April of 2000 the Office of the Auditor General released its Report on, *inter alia*, ‘the extent to which the RCMP has the capacity, structures and procedures to respond effectively and efficiently to the needs of clients in the next decade’.¹¹⁵ As found by the Auditor General:

The backlog is unacceptable.

7.86 Although criminal history records are invaluable and readily accessible, they are not current; a significant backlog of information is waiting to be processed. There are delays of more than two months in entering records of new criminals and new crimes of “old” criminals into the system, and some files have taken over five months. The RCMP has not set targets for acceptable levels of service.

7.87 The reason for the backlog is a lack of available funds to hire staff to speed up the processing of records.¹¹⁶

Since the Auditor General’s Report of 2000, the unreliability and datedness of Canada’s only national criminal conviction registry has steadily become worse. In *R v Horne* (*‘Horne’*),¹¹⁷ a 2009 sentencing case, the court made the following observations about the CPIC dilemma:

The difficulties encountered here reflect systemic problems arising from the inability to obtain reliable, up-to-date information concerning the prior criminal records for accused appearing before the criminal courts. The Crown acknowledges that there is apparently a backlog of over a year-and-a-half’s worth of data awaiting entry into the computer system maintained by the Canadian Police Information Centre (“CPIC”). In the meantime, Crown Attorneys and, ultimately, sentencing courts are left without some of the most important facts needed to make appropriate, informed decisions about the cases they must deal with.¹¹⁸

Years after *Horne*, the CPIC appears to have maintained its unsatisfactory inputting pace since ‘[t]he most recent data from the RCMP indicates that in 2013 there were some

¹¹⁵ Report of the Auditor General of Canada, *Royal Canadian Mounted Police - Services for Canada’s Law Enforcement Community* (April 2000) 7-29 <http://www.oag-bvg.gc.ca/internet/English/part_oag_200004_07_e_11194.html> accessed 24 March 2016.

¹¹⁶ *ibid* 7-19.

¹¹⁷ *R v Horne* (2009), 98 OR (3d) 501 (CJ).

¹¹⁸ *ibid* para 2. See also the comments of Durno J in *R v Bacchus*, 2012 ONSC 5082 at paras 102-18 regarding the significance of clerical inputting errors on the CPIC system.

400,000 criminal records that had yet to be added to the CPIC database.’¹¹⁹ Although the RCMP at one time said that the backlog should be cleared by March of 2017,¹²⁰ the accumulated history to that date on the issue invited skepticism. Indeed, the RCMP was later reported to ‘need until 2020 to finish uploading nearly half-a-million backlogged files’.¹²¹ Moreover, as suggested earlier, it also invites a more relaxed view on whether the potential for criminals on juries is officially seen as a problem. The *laches* of the federal government in expediting the CPIC inputting rate would appear to support this argument.

It will be recalled that criminal record checks may be augmented by self-reporting in the form of questionnaires sent to potential jury panel members.¹²² The difficulty is that despite the purported clarity of the instructions for the completion of the questionnaire, certain recipients will misconstrue what is being asked of them notwithstanding the *bona fides* of their efforts.¹²³ Others may quickly answer the questions without resort to the guiding instructions. Still others will knowingly give false information on the form. Suffice it to say that the concept of self-reporting has its drawbacks. Thus, the combination of CPIC limitations and questionnaire shortcomings makes for a screening procedure that is susceptible to various forms of breach and compromise. As a result, the solution may be to resolve issues involving criminal antecedents through a fulsome *voir dire*, where the skills of counsel and judicial wisdom can combine for a more accurate elicitation of the salient background facts on prospective jurors.

¹¹⁹ Bridgette Bureau, ‘RCMP database remains out of date, police and prosecutors say’ (*CBC News*, 10 March 2015) 2 <<http://www.cbc.ca/news/politics/rcmp-database-remains-out-of-date-police-and-prosecutors-say-1.2989397>> accessed 23 June 2015.

¹²⁰ Amy Minsky, ‘Budget slashed for “critical” RCMP database suffering backlog’ (*Global News*, 30 April 2015) 9 <<http://www.globalnews.ca/news/1971155/budget-slashed-for-critical-rcmp-database-suffering-backlog/>> accessed 23 June 2015.

¹²¹ Douglas Quan, ‘Big backlog for Canada’s criminal-records database’ *National Post* as reproduced in the *Windsor Star* (Windsor, 8 September 2017) 4.

¹²² Questionnaire (n 43) Q6. It should be noted that when a sheriff conducts a criminal record check, at least in the province of Ontario, they do so randomly and cover only about ten percent of the names on the panel list. Thus, the state initiated vetting procedure is obviously inadequate on its own. See *Yumnu* (n 88) paras 60-61.

¹²³ In *United States v Ippolito*, 10 F Supp 2d 1305, 1312 (MD Fla 1998) the court observed that ‘[t]he amorphous realm of law, legal terms, and legal classifications offers an especially treacherous obstacle to accuracy and leaves ample opportunity for error and inaccuracy to coexist peaceably with honesty.’ Similar sentiments are offered by Moldaver J in *Yumnu* *ibid* para 49.

3.3.4 Wrongful Convictions and the Depletion of the Ranks of the Jury

Any system involving human endeavour can make mistakes unknowingly.¹²⁴ The potential for error often increases when the decision-maker is purposely kept ignorant of certain facts that would have been valuable in the deliberative process. As Roberts explains:

. . . the sizeable and growing body of research into the characteristics of wrongful conviction cases indicates that jurors have, in many cases, failed to understand central aspects of the criminal justice system. This lack of understanding undermines the unquestioning exclusion of those with firsthand experience of the system.¹²⁵

The old adage that ‘it takes one to know one’ is apt because it suggests that at times it may be wise to augment ‘the common sense of the uninitiated’¹²⁶ with the experiences of those who have themselves gone through the criminal justice system. Individuals who maintain a belief system that embraces, for instance, the unlikelihood of a police conspiracy or the incomprehensibility of a false confession to a crime exemplify why mainstream notions about crime and its investigation can potentially result in a conviction that is wrongful and thus a miscarriage of justice. Although there is ‘no consistent definition of what constitutes a wrongful conviction’,¹²⁷ Roach suggests that they ‘are not limited to cases of proven or factual innocence, and include both cases where there have been unfair trials or where the reliability of the conviction is in serious doubt’.¹²⁸ Thus, a qualitative analysis of the evidence may expose it as unworthy of weight, but this can only occur if the jury knows what to look for when the evidence is introduced to them. Reliance on counsel and the court to expose the evidentiary failings is often not enough.

¹²⁴ Michael Naughton, ‘The Scale of Wrongful Convictions’ *The Guardian* (London, 28 July 2002) 2 <<http://www.theguardian.com/uk/2002/jul/28/ukcrime.prisonsandprobation>> accessed 7 September 2015.

¹²⁵ Roberts (n 95) 594.

¹²⁶ *ibid* 607.

¹²⁷ Kent Roach, ‘Wrongful Convictions in Canada’ (2012) 80 U Cin L Rev 1465, 1471.

¹²⁸ *ibid*. See the similar comments of Lord Bingham in *R (on the application of Mullen) v Secretary of State for the Home Department* [2004] UKHL 18 [4].

The Association in Defence of the Wrongfully Convicted ('AIDWYC') isolated six causes of wrongful convictions:

1. Eyewitness Identification Error: eyewitnesses are the leading cause of wrongful convictions;
2. False Confessions: when the innocent admit guilt;
3. Tunnel Vision: focusing on one suspect to the exclusion of all others;
4. Systemic Discrimination: racism, gender bias and socioeconomic status;
5. Evolution of and Errors in Forensic Science: the conflict [*sic*] the justice system's quest for finality and the ever changing nature of science;
6. Professional Misconduct: how lawyers, police and forensic experts contribute to causing a wrongful conviction.¹²⁹

When considering systemic discrimination and racism issues, AIDWYC points out that 'there is good reason to believe that Aboriginal people are wrongfully convicted at rates higher than their non-Aboriginal counterparts'.¹³⁰ While no specific statistics are cited to back up the bald assertion, it would appear that basic extrapolation would support the contention given the general overrepresentation of IP in the criminal justice system.¹³¹ Indeed, from compiled lists of wrongfully convicted Indigenous offenders in Canada and Australia, Roach too has underscored the relationship between wrongful conviction numbers and the small population base relative to the overall inhabitants of either country.¹³² He goes on to explain:

The conclusion that Indigenous people are over-represented among the wrongfully convicted in Australia and Canada is important. It is yet another indication of repeated findings that the criminal justice system fails

¹²⁹ AIDWYC – The Association in Defence of the Wrongfully Convicted, 'Causes of Wrongful Convictions' 2-6, <<http://www.aidwyc.org/education/causes-of-wrongful-convictions/>> accessed 7 September 2015. Academic literature would appear to echo the AIDWYC concerns. See the experiences in England and the United States in Lissa Griffin, 'The Correction of Wrongful Convictions: A Comparative Perspective' (2001) 16 Am U Int'l L Rev 1241. Additionally, related contributing factors are discussed in Dianne L Martin, 'Distorting the Prosecution Process: Informers, Mandatory Minimum Sentences, and Wrongful Convictions' (2001) 39 Osgoode Hall LJ 513.

¹³⁰ AIDWYC *ibid* 5.

¹³¹ *Gladue* (n 7) paras 58-65.

¹³² Kent Roach, 'The Wrongful Conviction of Indigenous People in Australia and Canada' (2015) 17 Flinders LJ 203, 226.

Indigenous people. Nevertheless findings of Indigenous over-representation among the wrongfully convicted should not be surprising. To some extent they simply reflect the gross over-representation of Indigenous people among prisoners in both countries. It also likely reflects the role of the conscious or unconscious stereotypes that associate Indigenous people with crime as well as cultural and economic difficulties and challenges that Indigenous people will face in obtaining access to justice.¹³³

A holistic approach to the wrongful conviction battle is warranted since, ‘the issue has become how the system can be improved to limit and correct these mistakes, so that the government may rebuild public confidence in the system’.¹³⁴ One way to achieve this is to recognize that experience makes for a better sounding board against which analytical skills can be deployed. Informed analysis makes for more accurate conclusions, thus reducing the ever present chance of error. Jury deliberation, though vital, will be potentially ineffective if the discussion points lack an exchange of lived experience. As pointed out by Schehr:

Our warehouse of stored knowledge about the world around us provides us with the context necessary to gain understanding and to effectively interact with it. But our past is also a limitation, in that we are constituted by a limited array of interactions which sometimes can function to exaggerate differences and thereby construct obstacles (eddies) to our ability of fully knowing the other. Meaning can only come from experiencing the world firsthand through meaningful interactions with the other. But how is that to be accomplished? The answer is through dialogue.¹³⁵

By embracing a philosophy of inclusivity rather than exclusivity, more life knowledge will find its way into the jury room. More knowledge about life has the potential for achieving a better brand of justice, by opening up more avenues for awareness and discussion. Although securing trustworthy juries and avoiding lingering juror bias remain important goals, working towards just results may require that legislators rethink their immutable stance regarding who may sit on a jury. Certain ex-offenders will be

¹³³ *ibid* 224. However, consider the fact that in England, Black, Asian and Minority Ethnic groups, while overrepresented in the criminal justice system, are not disproportionately convicted by juries. See Cheryl Thomas, ‘Ethnicity and the fairness of jury trials in England and Wales 2006-2014’ [2017] Crim LR 860.

¹³⁴ Jerome M Maiatico, ‘All Eyes on Us: A Comparative Critique of the North Carolina Innocence Inquiry Commission’ (2007) 56 Duke LJ 1345, 1350.

¹³⁵ Robert Schehr, ‘Shedding the Burden of Sisyphus: International Law and Wrongful Conviction in the United States’ (2008) 28 BC Third World LJ 129, 144.

possessed of a seasoned and discerning eye that could help stave off a possible wrongful conviction in certain cases. While any civilized society can still expect, but never tolerate, wrongful convictions, that same society will remain reliant ‘on the actions of those who have the authority to determine a defendant’s legal guilt’.¹³⁶ Appropriately informing those actions remains the challenge.

3.3.5 The Criminally Convicted as a Cross-Section of Society

It is important to know what percentage of Canadians have been convicted of crimes. It is important because the figure arguably speaks to the degree of policing to which the citizenry is subjected.¹³⁷ It may also speak to the decisions made by prosecutors to bring cases to trial rather than exercising their discretion to do otherwise.¹³⁸ As well, the national number indicates how representative those with criminal records are of Canadian society as a whole.

As of April 1, 2015 Canada’s population was estimated to be 35,749,600,¹³⁹ up approximately five million from the 30,750,087 inhabitants estimated for Canada in 2001.¹⁴⁰ The fastest growing segment of the Canadian population is that of its IP.¹⁴¹ As of 2016 the population of IP was reported to be 1,673,785¹⁴² or approximately five percent of the overall population.¹⁴³ Although there do not appear to be any accessible statistics as to the percentage of Indigenous Canadians who have criminal records, the national number for all Canadians is known. As of 2001, about 3.3 million men and women had been convicted of a criminal offence.¹⁴⁴ In 2009, that figure was estimated

¹³⁶ Samuel R Gross and Michael Shaffer, ‘Exoneration in the United States, 1989-2012: Report by the National Registry of Exonerations’ (June 2012) 6.

¹³⁷ When more police resources are focused on a particular segment of society it increases the likelihood of uncovering more crime. See the text in n 21 in ch 2.

¹³⁸ See Griffen (n 129) 1256-59 and Martin (n 129) 519-21.

¹³⁹ Statistics Canada (n 5) 1.

¹⁴⁰ Correctional Service Canada, *Basic Facts about Federal Corrections 2001 Edition* (Public Works and Government Services Canada 1999) 13.

¹⁴¹ Employment and Social Development Canada, *Canadians in Context - Aboriginal Population/Indicators of Well-being in Canada* (2011) 2 <<http://www.well-being.esdc.gc.ca/misme-iowb/.3ndic.1t.4r@-eng.jsp?iid=36>> accessed 25 September 2015.

¹⁴² Statistics Canada, ‘Aboriginal peoples in Canada: Key results from the 2016 Census’ *The Daily* (25 October 2017) 1 <<http://www.statcan.gc.ca/daily-quotidien/171025/dq171025a-eng.htm>> accessed 8 May 2018.

¹⁴³ *ibid.*

¹⁴⁴ Correctional Service Canada (n 140) 13.

by the RCMP to be approximately 3.8 million Canadians.¹⁴⁵ Thus, in recent times it can be said that approximately ten percent of all Canadians have been convicted of a crime.¹⁴⁶ The vast majority of those with criminal records are not incarcerated¹⁴⁷ and thus are available to participate in pro-social affairs. Yet they are prohibited from representing society in a civic function that, with the exception of suffrage, has been described as the ‘most significant opportunity to participate in the democratic process’.¹⁴⁸

Achieving a representative jury is an important goal. However, representativeness is impossible to achieve because what it suggests is too vast in its possibilities and too subjective in its interpretation.¹⁴⁹ Consequently, ‘representativeness is about the process used to compile the jury roll, not its ultimate composition’.¹⁵⁰ The court must simply ensure that there is the potential for a ‘representative cross-section of society, honestly and fairly chosen’.¹⁵¹

There are three essential ingredients that safeguard jury roll representativeness during its compilation:

1. The use of source lists that draw from a broad cross-section of society;
2. Random selection from those sources; and,
3. The delivery of notices to those who have been randomly selected.¹⁵²

¹⁴⁵ Public Safety Canada, *Corrections and Conditional Release Statistical Overview* (December 2013) 107 <<http://www.publicsafety.gc.ca>>accessed 18 October 2015.

¹⁴⁶ That ten percent figure has been referenced as far back as the year 2000. See the John Howard Society of Alberta, ‘Understanding Criminal Records’ (2000) 1. See also the John Howard Society of Ontario (n 5) 14 where the Society postulated that in 2015 ‘[o]ver 4.1 million Canadians (roughly 20% of the adult male population) have a record of criminal conviction.’

¹⁴⁷ See Mia Dauvergne, ‘Adult Correctional Statistics in Canada, 2010/2011’ (Statistics Canada catalogue no 85-002x, Juristat 2012) 6 where the author explains:

In 2010/2011, there were about 38,000 offenders in custody on any given day (Table 4). Of these, 36% were serving a federal sentence, 29% were serving a provincial sentence and 34% were being held on remand. Less than 1% of adults in custody were on another type of temporary detainment, such as an immigration hold or parole suspension.

¹⁴⁸ *Powers v Ohio*, 499 US 400, 406 (1991).

¹⁴⁹ *Brown* (n 21) para 22. See also *Church of Scientology of Toronto* (n 2) paras 146 -52.

¹⁵⁰ *Kokopenace* (n 86) para 40.

¹⁵¹ *Sherratt* (n 9) 524.

¹⁵² *Kokopenace* (n 86) para 40.

It has been argued that a jury roll that is representative ‘would be one that would also include those convicted of indictable offences’.¹⁵³ But for their statutory disqualification, they would maintain their eligibility for serving on a jury as do ‘disreputable persons who have not been convicted of an indictable offence’.¹⁵⁴ Thus, there would appear to be a profound philosophical divide in candidacy standards that is difficult to reconcile. Not only does an absolute prohibition standard for those possessed of certain types of criminal records smack of illogic, such a stance potentially dilutes (by ten percent) any jury roll.¹⁵⁵ Moreover, the petit jury as a result becomes further homogenized.

If one out of every ten persons in Canada has a criminal record, and Indigenous Canadians are overrepresented in every aspect of the criminal justice system, from arrest to conviction,¹⁵⁶ then an argument can be made that previously convicted IP represent a ‘discrete and insular minority’¹⁵⁷ deserving of special equality rights considerations when it comes to jury service opportunities. Section 15 of the *Charter* reads as follows:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.¹⁵⁸

Does a law that disqualifies an entire class of persons from the opportunity to provide their services on a jury, because of the accumulation of a criminal record, no matter how minor or dated, and no matter how extensive subsequent redemptive efforts have been, violate the equality rights enshrined in the *Charter*? There is reason to believe that the current regime is vulnerable to such an attack. Indeed, at least in the state of California, there has been recognition that being incarcerated and generally stigmatized are the

¹⁵³ Kettles (n 87) 466.

¹⁵⁴ *ibid* 484.

¹⁵⁵ While ten percent of all Canadians have a criminal record, it should be noted that various other disqualifiers such as age, type of employment and infirmity further reduce the size of the pool of candidates.

¹⁵⁶ *Gladue* (n 7) paras 58-69.

¹⁵⁷ See *United States v Carolene Products Co*, 304 US 144, 153 n 4 (1938).

¹⁵⁸ *Charter* (n 26) s 15.

common experiences of ex-felons that ‘have tended to unify the group by giving its members a shared perspective on life in our society’.¹⁵⁹ It must be remembered that being characterized as a criminal is a significant marking of a human being that is, save for it being erased by the state via a pardoning procedure, an immutable and largely disadvantageous societal badge. As a consequence of having been convicted of a crime, the criminal actors are grouped accordingly and are discriminated against by the state for that common characteristic. An apt definition of discrimination was crafted by McIntyre J when he explained that:

... discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.¹⁶⁰

The perceived characteristics of the criminally convicted, as discussed earlier in this chapter, are what the state embraces to justify their discriminatory mandate for disqualifying such citizens from jury service. Importantly, the perceived characteristics are not validated by a robust body of empirical evidence.¹⁶¹ Thus, the surmises of governments in this regard appear to be policy-driven in pursuit of juries that would actually be, given the criminally convicted numbers, unrepresentative of greater society. Whether the state’s interest in keeping those with criminal records off juries can be ‘demonstrably justified in a free and democratic society’¹⁶² will be explored later in this

¹⁵⁹ *Rubio* (n 20) 598. Consider 598-99 where Mosk J explains that to constitute an overall ‘cognizable group’, not only must there be shared life experiences due to the group membership, it must also be shown ‘that no other members of the community are capable of adequately representing the perspective of the group assertedly excluded’. The court ultimately concluded that other groups, such as formerly incarcerated misdemeanants, former youthful offenders that had been incarcerated by a Youth Authority and those who were once institutionalized against their will on account of a mental disorder could ‘adequately represent the viewpoints’ of ex-felons on juries.

¹⁶⁰ *Law Society of British Columbia v Andrews*, [1989] 1 SCR 143 at para 37.

¹⁶¹ *Binnall* (n 1) 17-20.

¹⁶² *Charter* (n 26) s 1. Before a s 1 *Charter* analysis can be engaged, a s 15 *Charter* (equal protection and equal benefit of the law without discrimination) breach must be found. The test for determining whether discrimination exists under s 15 was articulated in *Miron v Trudel*, [1995] 2 SCR 418 at para 142:

... the equality analysis under s. 15(1) involves a two-step process. First, the claimant must show that the law treats the claimant unequally in relation to another person. Second,

chapter when judicial responses to the felon-juror phenomenon are considered in more detail.

3.4 The Significance of the State's Prerogative to Pardon the Criminally Convicted

A 'pardon' has been defined as '[a]n act of grace, proceeding from the power intrusted with the execution of the law, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.'¹⁶³ Although there are various types of pardons,¹⁶⁴ the ensuing discussion is not concerned about categorization, rather its focus is on the fact that pardons are granted at the pleasure of the government of the day. As such, whenever state decisions are made the spectre of unprincipled political motivation cannot be discounted.

The primary governing legislation involving pardons in Canada is the *Criminal Records Act* ('CRA').¹⁶⁵ The term 'pardon', as of March 13, 2012, was replaced by the less forgiving phrase 'record suspension'.¹⁶⁶ A record suspension is a determination made by the Parole Board of Canada ('PBC'), the effect of which is defined in s. 2.3 of the CRA:

- 2.3 A record suspension
 - (a) is evidence of the fact that
 - (i) the Board, after making inquiries, was satisfied that the applicant was of good character, and
 - (ii) the conviction in respect of which the record suspension is ordered should no longer reflect adversely on the applicant's character; and
 - (b) unless the record suspension is subsequently revoked or ceases to have effect, requires that the judicial record of the conviction be kept separate and apart from the other criminal records and removes any disqualification or obligation to

the claimant must show that the denial results in discrimination and was made on the basis of one of the grounds enumerated in s. 15(1) or an analogous ground.

¹⁶³ *Black's Law Dictionary* (n 66) *sub verbo* 'Pardon'.

¹⁶⁴ *ibid.*

¹⁶⁵ *Criminal Records Act*, RSC 1985, c C-47 ('CRA').

¹⁶⁶ *ibid* ss 2(1), 4.1(1).

which the applicant is, by reason of the conviction, subject under any Act of Parliament – other than section 109, 110, 161, 259, 490.012, 490.019 or 490.02901 of the *Criminal Code*, subsection 147.1(1) or section 227.01 or 227.06 of the *National Defence Act* or section 36.1 of the *International Transfer of Offenders Act*.¹⁶⁷

Thus, by virtue of CRA s. 2.3(b) a record suspension returns a previously convicted offender back into the ranks of eligibility for jury duty, subject to certain statutory waiting periods which will be discussed next.

In order for a convicted person to be in a position for record suspension consideration, certain specified periods of time must have elapsed between the expiration of the terms of the conviction¹⁶⁸ and the application itself. The relevant time periods are five years¹⁶⁹ in the case of summary conviction offences and ten years¹⁷⁰ in the case of indictable offences.

‘Good conduct’ for the purposes of a record suspension encompasses a wide range of ‘behaviour that is consistent with and demonstrates a law-abiding lifestyle’.¹⁷¹ Even the presumption of innocence is held in abeyance when one applies for a record suspension such that all information, including mere allegations, may be considered by the PBC.¹⁷² With regard to the generally more serious indictable offences, the PBC is also obliged to assess ‘whether the pardon or record suspension would provide a measurable benefit to the applicant, would sustain the applicant’s rehabilitation into society, and would not bring the administration of justice into disrepute’.¹⁷³ Certain persons are ineligible for a record suspension due to the nature of their criminal record, either because of its length

¹⁶⁷ *ibid* ss 2.3(a)(i), (a)(ii) and (b). Note that the exception sections mentioned in the last lines of subsection (b) that reference the *Criminal Code*, *National Defence Act* and *International Transfer of Offenders Act*, have no application to jury service.

¹⁶⁸ Note that a ‘sentence’ includes imprisonment, a period of probation and the payment of any fine – *ibid* s 4(1).

¹⁶⁹ *ibid* s 4(1)(b).

¹⁷⁰ *ibid* s 4(1)(a).

¹⁷¹ See Parole Board of Canada, *Decision-Making Policy Manual for Board Members* (2nd edn, No 12 - 2018) c 13.1, para 11 <<https://www.canada.ca/en/parole-board/corporate/publications-and-forms/decision-making-policy-manual-for-board-members.html>> accessed 16 July 2018. Curiously, the Parole Board does not further define ‘good conduct’.

¹⁷² *ibid* c 13.1, para 12. See also *Conille v Canada (Attorney General)*, 2003 FCT 613 at paras 28-30.

¹⁷³ *ibid* c 13.1, para 10.

or its content. Individuals who have committed three [or more] indictable offences where each offence resulted in a sentence of imprisonment for two years or more, are excluded from record suspension candidacy.¹⁷⁴ Additionally, offenders who have committed CRA Schedule 1 sexual offences¹⁷⁵ are also permanently banned from jury service eligibility, unless the factual matrix of the crime or crimes for which they were convicted was such that:

- 4(3) (a) the person was not in a position of trust or authority towards the victim of the offence and the victim was not in a relationship of dependency with him or her;
- (b) the person did not use, threaten to use or attempt to use violence, intimidation or coercion in relation to the victim; and,
- (c) the person was less than five years older than the victim.¹⁷⁶

The financial costs associated with pursuing the suspension of a criminal record will be significant for many individuals. As of 2014, the base cost of the application processing fee in Canada was \$631.00.¹⁷⁷ Other expenditures such as obtaining copies of the applicant's fingerprints, criminal record, court documentation, including proof of the payment of a fine and/or a restitution order, can send the figure much higher. Should the applicant choose to engage the services of a firm specializing in the pursuit of record suspensions or hire legal counsel for the same end, the total cost could result in a substantial outlay of money. Thus, for many there is a financial disincentive in pursuing what is still an uncertain end. For those who should attempt to navigate the byzantine application process¹⁷⁸ on their own, frustration and attrition may derail the best intentions of the convicted person.

The foregoing general analysis of the record suspension system in Canada allows for a better understanding of the viability of the option. Given that the procedure contemplated

¹⁷⁴ CRA (n 154) s 2.4(2)(b).

¹⁷⁵ *ibid* Schedule 1. These offences can all be generally described as sexual in nature.

¹⁷⁶ *ibid* s 4(3)(a)-(c).

¹⁷⁷ Parole Board of Canada, *Record Suspension Guide* (June 2014) 1.

¹⁷⁸ *ibid*. See also the Pardons Canada website at <<http://www.pardons.org>> accessed 9 April 2016, to better appreciate the complexities involved in suspending a criminal record.

by the CRA, for all practical purposes,¹⁷⁹ is the only legitimate way for those with criminal records to re-qualify for potential jury service, the question remains whether a more streamlined and judicially controlled model might be worth considering? Indeed, with judicial involvement the person's individual status as a previously convicted offender need not even be disturbed. The jury legislation in question need only be tweaked to include the words 'or with the approval of the court' after the standard caveat found in most provincial and territorial statutes that disqualify convicted individuals unless they have received some form of pardon.

The judicial approval option and the constitutional challenge possibility on an equality rights argument will be discussed shortly. Before doing so, however, situations where the criminally convicted have actually made it on to a jury will be explored to ascertain whether politicians and judges really consider such scenarios as fatal to the proper administration of justice.

3.4.1 Present and Future Judicial Responses to the Criminally Convicted Juror Scenario

In Canada, when a criminally convicted person makes their way on to a petit jury, participates in the deliberative process and helps to bring in a verdict, the situation is relegated to the status of a procedural irregularity not worthy of appellate intervention. Section 671 of the *Criminal Code* reads as follows:

671. No omission to observe the directions contained in any Act with respect to the *qualification*, selection, balloting or distribution of jurors, the preparation of the jurors' book, the selection of jury lists, or the drafting of panels from the jury lists, is a ground for impeaching or quashing a verdict rendered in criminal proceedings.¹⁸⁰

¹⁷⁹ See Table One (n 89) regarding which provinces and territories specifically refer to pardons or record suspensions as exceptions to criminal disqualification. Further, see *Criminal Code* (n 19) s 638(1)(c) where the challenge for cause for criminal antecedents ground is silent on the issue of pardons. However, CRA (n 165) s 2.3(b) indicates that the granting of a record suspension 'removes any disqualification or obligation to which the applicant is, by reason of the conviction, subject under any Act of Parliament'. Thus, the section would appear to contemplate and apply to *Criminal Code* s 638(1)(c).

¹⁸⁰ *Criminal Code* (n 19) s 671 (emphasis added).

Arguably the messaging behind the section, in addition to its implicit recognition of the importance of finality and scarce resource preservation, is that if the jury was able to render a verdict based on the evidence, the group must have been able to function as designed. The functionality of the jury was not corrupted from within and its purity remained without taint. Any lingering bias that may have been brought to the deliberative process by the impugned juror must have been resolved during the ebb and flow of the sequestered discussions. The wisdom of the jury prevailed despite the legislative safeguards built into the empanelment and selection processes having failed.¹⁸¹ Essentially, the original concern over the potential destabilizing effect of those with criminal antecedents making their way on to a jury is removed by the production of a decision on whether or not the accused person is guilty.

In the USA, responses to felon-on-jury scenarios assume often dramatically inconsistent stances, from an unwavering rejection of such verdicts,¹⁸² to more permissive positions that consider whether a remedy is even necessary without the objecting party establishing considerably more than a felon's mere presence on the jury.¹⁸³ The latter approach requires the court to determine whether the presence of the criminally convicted juror revealed any prejudice that impacted on the fairness of the trial.¹⁸⁴ Certainly the speed with which an objection is raised will be important based on when the information was first received. Indeed, there have been times where a defence counsel has waited for a verdict to be rendered before complaining, having been content up to that point to allow the felon-juror to remain on the jury. As was explained by Sedgwick J in the early twentieth century:

Great latitude is allowed the defendant upon the *voir dire* examination to enable him to ascertain whether there is any ground for objecting to the juror. He cannot waive an objection of this nature, and, after taking his chances of an acquittal before the jury selected, insist upon an objection which he should have raised upon the impaneling of the jury, and, if he

¹⁸¹ For similar sentiments see generally *Montreal Street Railway Company v Normandin* [1917] AC 170 (PC) and *R v Stewart*, [1932] SCR 612.

¹⁸² See generally *Amaya v State*, 220 SW 98 (Tex Crim App 1920) and *Perez v State*, 973 SW 2d 759 (Tex Ct App 1998).

¹⁸³ See generally *Manning v Boston Elevated Railway Company*, 73 NE 645 (Mass 1905) and *State v Baxter*, 357 So 2d 271 (La 1978).

¹⁸⁴ *Commonwealth v Aljoe*, 216 A 2d 50, 55 (Pa 1966) and *Mighty v Commonwealth*, 438 SE 2d 495, 497 (Va Ct App 1993).

makes no effort to ascertain whether a juror offered is qualified to sit, he must be held to have waived the objection. Any other rule would introduce uncertainty into a jury trial which would be intolerable.¹⁸⁵

The same logic that drives convicted juror disqualification appears to be in place for prospective jurors who are merely facing charges, even though they are still far from being proven guilty beyond a reasonable doubt. Because of jury probity concerns, the presumption of innocence is essentially rendered illusory by virtue of an unproven assertion made by the state:

A person charged with a crime retains the presumption of innocence and may, of course, find himself among the tiny minority of defendants who escape conviction. But, given the high conviction rates – we know that almost 90 percent of those charged with felonies plead guilty and that about 80 percent of those who go to trial get convicted – the chances that an accused felon will slip through the net are indeed slim. The important point is, though, that simply being charged with a crime says something about a person, something which is material to his ability to serve as a juror. After being charged, and before conviction, there will already have been a finding – by a judge or a grand jury – of probable cause to believe that the person charged committed the crime. Based on that finding, it is rational to conclude that there is probable cause to believe that the person may not respect the law. It is rational to believe that such a person may not take seriously his obligation to follow the law as a juror is sworn to do.¹⁸⁶

However, should the merely charged person slip through the cracks, avoid detection and become part of a seated jury, their disqualified status, like that of the convicted juror, will not necessarily compromise any verdict that is rendered.¹⁸⁷ In such circumstances, American courts will often inquire as to whether there was a reasonable possibility that the juror in question was prejudiced against the accused person.¹⁸⁸ Thus, whatever the disqualifying legislative presumptions may be, they appear to wane in importance at the post-verdict stage. Ironically, the initial presumption regarding the impugned juror appears to shift back to one of adherence to the juror's oath, a result initially thought to be extremely unlikely given the stereotypes associated with the criminally convicted.

¹⁸⁵ *Turley v State*, 104 NW 934, 936 (Neb 1905).

¹⁸⁶ *United States v Barry*, 71 F 3d 1269, 1273 (7th Cir 1995).

¹⁸⁷ *Thompson v State*, 300 So 2d 301, 303 (Fla Dist Ct App 1974).

¹⁸⁸ *ibid.*

Seemingly, the conduct and lifespan of a trial has the ability to render harmless an error which is initially seen, in theory, to be highly prejudicial. Indeed, appellate courts no longer are ‘citadels of technicality’¹⁸⁹ when they review trial decisions. The American jurisprudence maintains that ‘a rule of automatic reversal has applied to an increasingly limited class of constitutional violations, thus becoming the exception and not the rule of appellate review’.¹⁹⁰ In Canada, the *Criminal Code* provides for a curative proviso for errors of law and procedural irregularities which, respectively, do not cause any substantial wrong or miscarriage of justice, or do not cause the appellant to suffer prejudice.¹⁹¹ The errors that engage curative proviso consideration are those that are minor and immaterial to the verdict as well as those that are serious and would justify a new trial were it not for the otherwise overwhelming nature of the evidence.¹⁹²

American case law focuses on whether the error was part of the trial dynamic or went to the very structure of how a trial must proceed to ensure fundamental fairness.¹⁹³ While the former lends itself to harmless error findings, the latter is more likely to be seen as reversible error.¹⁹⁴ Suffice it to say that, regardless of the test used, the power to set aside or uphold a conviction when a juror with a criminal record or a pending charge has participated in bringing forth a verdict remains vested with appellate courts and even trial courts if exercised before the jury is discharged. Moreover, it would appear that principle can be supplanted by pragmatism and the recognition of the reliability of the collaborative efforts of jurors.

In recent times there has been a rethinking of the logic that justifies disqualifying certain people from jury service because of an apprehension that their way of life suggests unrelenting bias. A prime example occurred in England where s. 1 of the Juries Act 1974¹⁹⁵ was amended by Schedule 33 of the Criminal Justice Act 2003.¹⁹⁶ Although a ban on the criminally convicted was maintained, the amendment resulted in the inclusion

¹⁸⁹ *Kotteakos v United States*, 328 US 750, 759 (1946).

¹⁹⁰ *State v LaMere*, 2 P 3d 204, 211 (Mont 2000).

¹⁹¹ *Criminal Code* (n 19) ss 686(1)(b)(iii) and (iv).

¹⁹² See generally *R v Khan*, 2001 SCC 86 and *R v Sarrazin*, 2011 SCC 54. However, recall the text to n 180 which indicates that s 671 of the *Criminal Code* (n 19) is dispositive of the criminal-on-jury issue.

¹⁹³ *LaMere* (n 190) 211.

¹⁹⁴ *ibid* 210-11.

¹⁹⁵ Juries Act 1974 (n 11) s 1.

¹⁹⁶ Criminal Justice Act 2003 (n 11) sch 33.

of others who had traditionally been left off the eligibility list.¹⁹⁷ The result of the lifting of the ineligibility ban for all but the age-restricted, mentally disordered and criminally convicted suggests a recognition that the potential for bias is simply too remote to be generalized any longer. The gamut of eligibility in England now knows few bounds, with police officers, lawyers and even members of the judiciary available for jury duty. The logic behind the statutory change was spawned by the recommendations of Auld LJ in his ground-breaking 2001 study entitled *A Review of the Criminal Courts of England and Wales* ('Auld Review').¹⁹⁸ In addressing the alleged impartiality concerns regarding prosecutors and police officers, Lord Auld professed doubt as to why the 'risk of prejudice of that sort should be any greater than in the case of many others who are not excluded from juries and who are trusted to put aside any prejudices they may have'.¹⁹⁹ As it relates to police officers, and therefore perhaps other groups of 'suspect' individuals, the following words appear apposite:

Law enforcement officers are sworn to uphold the laws of the state, which laws include the provision of a fair trial to each and every defendant. If a law enforcement officer testifies under oath during voir dire that he can be a fair and impartial juror, the trial judge has the discretion to determine whether that officer is speaking the truth. The disqualification of all law enforcement officers from service on a jury disregards whether or not the judge, whose rulings on challenges for cause are given great deference in all other instances, accepts the officer as a fair and impartial juror. We find that such a disqualification amounts to an irrebuttable presumption of untrustworthiness in law enforcement officers and is an affront to police officers in this state.²⁰⁰

Similar to the above statement, the Auld Review also underscored that 'it would be for the judge in each case to satisfy himself that the potential juror in question was not likely to engender any reasonable suspicion or apprehension of bias'.²⁰¹ This residual judicial oversight is important because not only does it recognize the government's desire for

¹⁹⁷ Juries Act 1974 (n 11) s 1. See also Peter Hungerford-Welch, 'Police officers as jurors' [2012] Crim LR 322 for a discussion about the compatibility issues surrounding police officers on juries and the right to a fair trial.

¹⁹⁸ Lord Auld, *A Review of the Criminal Courts of England and Wales* (September 2001) ch 5, para 30.

¹⁹⁹ *ibid.*

²⁰⁰ *State v Ballard*, 747 So 2d 1077, 1079 (La 1999).

²⁰¹ Auld (n 198) ch 5, para 30.

more inclusive juries, but it also preserves the historical safeguards against bias.²⁰² As such, it is submitted that juror disqualification for criminal antecedents need not occur given the fact that the gate-keeping function of the court remains firmly in place. In Canada this approach would indicate to all criminal offenders, and particularly Indigenous offenders, that the goals of restorative and rehabilitative sentencing are real and not simply hollow political rhetoric.

Finally, if statutory revisions are not likely, despite the efforts of those who see the present disqualifying legislative schemes to be unfair to the criminally convicted, then the equality argument referenced earlier in this chapter²⁰³ would need to be reconsidered on the backdrop of a s. 1²⁰⁴ *Charter* analysis. Assuming that the state's differential treatment of convicted persons, beyond the sentence itself (i.e. the additional jury service disqualification), is a matter outside the control of the convicted person,²⁰⁵ then the burden of justifying the equality right infringement would shift to the state. Certainly, in even the most liberal of societies some limitations on the rights of the subject can be justified. In Canada, the various rights that are enshrined in the *Charter* are 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.²⁰⁶ Two broad criteria are essential for a justification analysis, those being 'the legitimacy of the objective and the proportionality of the means'.²⁰⁷ The justification analysis can be further broken down into the constituent parts of each criterion:

²⁰² *R v Abdroikof* [2007] UKHL 37 [51]. Also compare the decision of the England and Wales Court of Appeal, Criminal Division in *R v Khan (Bakish Alla)* [2008] EWCA Crim 531 with that of the European Court of Human Rights, on further appeal, in *Hanif and Khan v United Kingdom* App nos 52999/08 and 61779/08 (ECtHR, 20 December 2011).

²⁰³ See text to n 157 - n 162.

²⁰⁴ *Charter* (n 26) s 1.

²⁰⁵ See Dale Gibson, 'Analogous Grounds of Discrimination Under the Canadian Charter: Too Much Ado About Next to Nothing' (1991) 29 *Alta L Rev* 772, 775 where the author points out that '[n]ot all grounds listed in s. 15(1) of the Charter are beyond the control of those to whom they apply.' Thus, while the commission of a crime is deemed by the law to be a matter of choice, as is the record of conviction that may flow from it, the subsequent branding of such individuals can often unfairly define their personhood. Note as well that the discrimination considerations listed in s 15 of the *Charter* are not exhaustive. See *Andrews* (n 160) paras 6, 38. However, see the decision of *R v McKitka* (1987), 35 BCLR 16 at para 20 (PC) where Diebolt J finds that a criminal record is not a personal characteristic over which individuals have no control and consequently does not engage equality concerns under s 15 of the *Charter*.

²⁰⁶ *Charter* (n 26) s 1.

²⁰⁷ See generally *R v Oakes*, [1986] 1 SCR 103 and, more particularly, *Sauvé* (n 28) para 7.

1. The objective must relate to concerns which are pressing and substantial in a free and democratic society;
2. A proportionality test must be employed, which will vary depending on the circumstances, resulting in a balancing of societal and individual or group interests. The proportionality test has three important components: the measures adopted must be carefully designed to achieve the objective in question and must not be arbitrary, unfair or based on irrational considerations [rational connection test]; the means, even if rationally connected to the objective must minimally impair the right or freedom in question [minimal impairment test]; and, the effects of the limiting measures must be proportional to the identified objective with an expectation that the more deleterious the effects of the measure, the more important the objective must be [proportionate effect test].²⁰⁸

The government objectives, although not clearly stated in the legislative enactments in question, are not seriously in dispute given their historical recognition. Keeping a jury pure of adulteration and free of intractable bias are concerns that will always be pressing and substantial in a country which constitutionally guarantees trial by jury in certain circumstances.²⁰⁹ Thus, it is hard to argue that the statutory provisions are not, at least *prima facie*, reasonable limitations of *Charter* rights. However, the more demanding and multi-staged proportionality test exposes various weaknesses to the argument that the criminally convicted can never be jurors unless their prior misdeeds have been officially forgiven through a state-orchestrated pardoning procedure of some sort.

There does not appear to be any obvious rational connection between the deprivation of a jury service opportunity and either respect for the law or a logical extension of the crime sanction paradigm. By denying the criminally convicted the privilege of being able to sit in judgment they are symbolically outcast from society, potentially for the remainder of their lives, irrespective of what they have done to improve themselves after they have paid their debt to society. As von Hirsch and Wasik explain, ‘the duration of the risk has to be considered. For how long can the forecast of risk be sustained with a modicum of confidence? Disqualifications of indefinite duration should always be deemed suspect’.²¹⁰ Indeed, such stances taken by the state may be seen by some as contradictory

²⁰⁸ Edward Greenspan, Marc Rosenberg and Marie Henein (eds), *Martin’s Annual Criminal Code 2015* (Canada Law Book 2015) 1815-16.

²⁰⁹ See the text to n 33 in ch 1.

²¹⁰ von Hirsch and Wasik (n 63) 611.

of restorative efforts and thus hypocritical. As McLachlan CJC explained, albeit in the context of a voting rights case:

Denying citizen law-breakers the right to vote sends the message that those who commit serious breaches are no longer valued as members of the community, but instead are temporary outcasts from our system of rights and democracy. More profoundly, it sends the unacceptable message that democratic values are less important than punitive measures ostensibly designed to promote order. If modern democratic history has one lesson to teach it is this: enforced conformity to the law should not come at the cost of our core democratic values.²¹¹

Although suffrage rights are enshrined in the *Charter*,²¹² and jury service rights are not, the above passage underscores the importance of attempting to return stability to society by focusing on rehabilitative measures.

A minimal impairment assessment of the laws which deny jury entry to those with criminal records, or even those facing criminal charges, exposes the legislation as blunt and overbroad in nature. There is no difference between those who are caught in the net of criminality, regardless of the crime or alleged crime that has been committed. In many jurisdictions the shoplifter and the murderer are impossibly put on the same footing without any attempt by the state to reconcile or correlate the disparate degrees of moral culpability.

Finally, the proportionate effect test exposes the dubious value of denying the now ten percent of the Canadian population that has a criminal record the opportunity to serve the country as jurors, given the need for representativeness. This is particularly so for IP who are more likely to have criminal records due to their overrepresentation in the criminal justice system. As in the realm of voter disenfranchisement debates, the present disqualification practice ‘is more likely to erode respect for the rule of law than to enhance it, and more likely to undermine sentencing goals of deterrence and rehabilitation than to further them’.²¹³

²¹¹ *Sauvé* (n 28) para 40.

²¹² *Charter* (n 26) s 3.

²¹³ *Sauvé* (n 28) para 58.

Given the foregoing assessment of the overall proportionality of the means that would limit the equality rights of the impugned jurors, a s. 1 *Charter* justification seems unlikely to succeed. This is particularly so given that there continues to be an increase in the percentage of criminally convicted individuals in Canada.²¹⁴ As the *Gladue* philosophies²¹⁵ regarding IP continue to take hold in areas other than sentencing law,²¹⁶ it stands to reason that courts should be more amenable to equality rights challenges brought by this discrete and insular group. Both government and Indigenous interests, as a result of repeated Supreme Court of Canada pronouncements, should be more ready to align than ever before.²¹⁷

3.5 Conclusion

Prospective juror disqualification practices in Canada vary tremendously as between its provinces and territories.²¹⁸ Thresholds for rendering individuals ineligible are often based on allegations made as opposed to convictions entered and even when a conviction is required for a statutory regime to be called into action, extremely minor offences will satisfy the standard.²¹⁹ It is not hard to argue that certain types of criminal behaviour, upon conviction, will at least *prima facie* militate against sitting on a jury. Indeed, there is no doubt that certain individuals would compromise the purity of a jury and exhibit a virulent form of anti-state bias. Yet the broad-stroke manner in which legislation excludes the criminally convicted lacks consideration of individual characteristics. One might even argue that expediency drives the process as much as philosophical concerns about juror probity. The result is that the administration of justice suffers because certain

²¹⁴ There are at least two decisions that have dealt with the argument that since IP are convicted provincially in disproportionate numbers, they will likely be underrepresented on jury panels due to being disqualified. However, the shortfalls were not seen as materially affecting panel representativeness. See *R v Teerhuis-Moar*, 2007 MBQB 165 at paras 86-97 and *R v McCarthy*, [2010] AJ No 1646 at paras 26-29 (QB). It would appear that the statistical data in those cases was lacking and, as a result, any precedential value flowing from the decisions was significantly devaluated.

²¹⁵ See text in n 7.

²¹⁶ For example: *R v Bain*, [2004] OJ No 6147 at para 12 (SCJ) regarding bail; *R v Sim* (2005), 78 OR (3d) 183 at paras 12-30 (CA) regarding criminal responsibility; *Frontenac Ventures Corp v Ardoch Algonquin First Nation* (2008), 91 OR (3d) 1 at paras 54-63 (CA) regarding civil contempt hearings; *R v Robinson* (2009), 261 CCC (3d) 184 (Ont SCJ) regarding change of venue; and, *R v Ippak*, 2018 NUCA 3 at paras 84-100 regarding *Charter* violations and the admissibility of evidence.

²¹⁷ Indeed, in *R v Ipeelee*, 2012 SCC 13 at paras 80-87 the Supreme Court of Canada reiterated the need for courts to consider the unique circumstances attributable to IP before passing sentence.

²¹⁸ See Table One (n 89).

²¹⁹ *ibid.*

otherwise qualified individuals are dismissed by a political system that seems content to maintain stigmas.

Blanket exclusionary practices lack refinement. While they are effective in their all-encompassing nature, they suffer from a short-sightedness that leaves no room for exception. In contrast, the court is well-equipped to scrutinize the candidacy of jurors during the *voir dire* process with the aid of questions put by the lawyers. It is submitted that while a case-by-case analysis of the criminal antecedents of any prospective juror is the most fair procedure to advance, there is also a need for guidelines to be set so that a consistency of approach (as opposed to result) is maintained. Drawing upon jurisprudence that speaks to the character of witnesses, including accused persons, when assessing testimonial credibility is a helpful resource.²²⁰ I recommend looking at three general categories of offending behaviour: crimes of dishonesty; crimes that impact on the administration of justice; and, crimes of moral turpitude. While these are subjective constructs as far as what they envision, and thus will at times involve some overlap, they will nevertheless assist a court in what in particular to look out for when jury selection begins.

Crimes of dishonesty, or *Crimen Falsi*, pertain to any ‘offence which involves some element of deceitfulness, untruthfulness, or falsification bearing on witness’ propensity to testify truthfully’.²²¹ Martin references offences such as fraud, forgery, embezzlement, bribery, and perjury as falling into this category.²²² Certainly theft by its very nature is also a contemplated type of crime in this regard.²²³

²²⁰ See generally *R v Vetrovec*, [1982] 1 SCR 811 (regarding concerns associated with the testimony of accomplices and other disreputable witnesses) and *R v Corbett*, [1988] 2 SCR 670 (regarding when a court will permit the prosecution to cross-examine an accused person on a previous criminal record and the offences most likely to be regarded as reflecting adversely on a person’s honesty and integrity).

²²¹ *Black’s Law Dictionary* (n 66) *sub verbo* ‘*Crimen Falsi*’.

²²² Christopher E Martin, ‘Narrowing the Doorway: What Constitutes a *Crimen Falsi* Conviction under Revised Military Rule of Evidence 609 (a)(2)?’ (2010) (September) *Army L* 35, 36.

²²³ See *Gordon v United States*, 383 F 2d 936, 940 (DC Cir 1967). However, it should be emphasized that a conviction for a crime of dishonesty, such as stealing, does not necessarily empirically correlate with a tendency to lie. See Anthony N Doob and Hershi M Kirshenbaum, ‘Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act Upon an Accused’ (1972-73) 15 *Crim LQ* 88, 89 and Stuart P Green, ‘Deceit and the Classification of Crimes: Federal Rule of Evidence 609 (A)(2) and the Origins of *Crimen Falsi*’ (2000) *J Crim L & Criminology* 1087, 1119.

Crimes that impact the administration of justice have the potential or tendency to undermine the correctness of decision-making processes. In turn, the reputations of those processes may be questioned as a result. A non-exhaustive list of offences that fall into this category would include bribery and perjury (again), obstructing justice,²²⁴ disobeying a court order, fabricating evidence, giving contradictory evidence and intimidating a justice system participant.

Finally, there could be a category reserved for turpitudinous offenders, those ‘who cross the invisible moral boundary that is beyond the limit of even “ordinary” criminals’.²²⁵ While ‘[i]t is not really possible to set out an exact list of crimes that will fall into this category’,²²⁶ certain considerations would come to the fore, such as: the degree of moral blameworthiness of the offender; the gravity of the offence²²⁷ including the degree of harm inflicted on the victim; the presence of planning and deliberation; whether the offence was one of specific intent; and, whether the individual was a serial offender.

The above-described categories would help a court in initially deciding which potential jurors should be subjected to closer scrutiny as to their candidacy. Rounding out the considerations would include taking note of the number of prior convictions that have been amassed and how current they are in relation to the time of jury selection.²²⁸

The end result of an individualized assessment may well be a finding that the prospective juror is entirely inappropriate to sit on a jury due to an unreformed and ongoing pro-criminal lifestyle. However, it is also quite possible that a criminally convicted potential juror can bring the requisite impartiality to the adjudicative task and contribute to a just verdict.

²²⁴ The court in *R v Williams*, 2016 ONCA 937 at para 13 stated that ‘[o]bstruction of justice goes to the very heart and foundation of our criminal justice system.’

²²⁵ Peter Sankoff, ‘*Corbett* Revisited: A Fairer Approach to the Admission of an Accused’s Prior Criminal Record in Cross Examination’ (2006) 51 Crim LQ 400, 455.

²²⁶ *ibid.*

²²⁷ Note that in *R v Saroya* (1994), 76 OAC 25 at para 110 the Ontario Court of Appeal, in deciding whether the accused should have been cross-examined on his criminal record, remarked ‘attempted murder is such a serious offence that, in itself, it may be taken to indicate that the prospect of a conviction for perjury is unlikely to keep the witness in line’.

²²⁸ Sankoff (n 225) 456-59.

CHAPTER 4

DOES THE ‘CHALLENGE FOR CAUSE’ PROCEDURE WORK FAIRLY AND EFFECTIVELY FOR INDIGENOUS PEOPLES WHEN ATTEMPTING TO EXPOSE PARTIALITY?

Our courts have become increasingly aware that bias often deceives its host by distorting his view not only of the world around him, but also of himself. Hence although we must presume that a potential juror is responding in good faith when he asserts broadly that he can judge the case impartially, further interrogation may reveal bias of which he is unaware or which, because of his impaired objectivity, he unreasonably believes he can overcome.¹

4.1 Introduction

The ability to bring measured objectivity to the task of adjudication, such that preconception and lingering partiality is rendered inoperative, can be considered a foundational goal for any trier of fact. While judges are not immune from reasonable apprehension of bias accusations,² the articulation of their judgments and their conduct during a trial are matters of public record and thus open to the closest of scrutiny. In contrast, the general verdict of a jury is largely impenetrable. Beyond a curt expression as to whether criminal liability has been proven beyond a reasonable doubt, jurors need not otherwise account for their verdict.³ Thus, certain checks and balances have been incorporated into the jury selection process that have the potential to expose juror partiality before the empanelment process is complete.

After an initial vetting of the application by the trial judge,⁴ the *Criminal Code* provides that ‘a prosecutor or an accused is entitled to any number of challenges on the ground that . . . (b) a juror is not indifferent between the Queen and the accused’.⁵ There is no practical distinction between a juror that is ‘not indifferent’ and one who is ‘not

¹ *People v Williams*, 628 P 2d 869, 873 (Cal 1973).

² See generally *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369.

³ See Kevin Crosby, ‘Jury Independence and the General Verdict: A Genealogy’ (PhD thesis, University of Leicester 2013) 1, where the author explains that the general verdict is a type of decision where ‘the jury finds a person “guilty” or “not guilty”, without further explanation’.

⁴ See *R v Sherratt*, [1991] 1 SCR 509 at para 43 where the court explains that ‘[i]f the trial judge is satisfied that there is some “foundation” to the challenge, then the trial of the truth proceeds.’

⁵ *Criminal Code* RSC 1985, c C-46, s 638(1)(b).

impartial’.⁶ The anchoring concept, which drives the challenge procedure, is one of trial fairness.⁷ As has been recognized, ‘the existence of the challenge for cause process demonstrates that in some situations, other safeguards for ensuring impartial verdicts rendered on the evidence presented in the case are insufficient and must be supplemented’.⁸

In this chapter, the overall effectiveness of challenging a prospective juror’s ability to bring indifference to their judicial role will be explored. In addition to investigating and analyzing the Canadian experience in this regard, American and English encounters with parallel issues will be discussed with a view to seeing whether those jurisdictions can offer insights that may improve on the present Canadian model.

Section 4.2 will explain the mechanics of the challenge for cause procedure, as developed by the common law, so that the reader understands how it has traditionally worked in practice. From there a discussion will be embarked upon regarding the conservatism that is associated with the process in Canada. While rooting out partiality is a goal that is mandated by the *Criminal Code*, the apparent opposition by the courts to innovation or change to the inquisitional processes that are associated with the cause challenge is explored. Certain presumptions of law are identified and assessed for their validity. In particular, the practice of ‘judicial cleansing’ that is engaged in throughout the trial is considered as to whether it is a suitable proxy for the direct questioning of those who are summoned for jury duty.

Section 4.3 begins by looking at the doctrine of judicial notice as an instrument of change to the otherwise labour intensive evidentiary foundation that traditionally needed to be built before a cause challenge was allowed. From there the section moves on to address certain of the skills that are typically associated with competent courtroom advocacy so as to evaluate their importance when potential juror cause challenges are exercised. Counsel’s unique knowledge of the brief and capacity for intuitive questioning is juxtaposed with the role of the presiding trial judge. Issues such as time management

⁶ See *R v Hubbert* (1975), 11 OR (2d) 464 at para 25 (CA), aff’d [1977] 2 SCR 267.

⁷ *R v Barrow*, [1987] 2 SCR 694 at para 25.

⁸ David M Tanovich, David M Paciocco and Steven Skurka, *Jury Selection in Criminal Trials* (Irwin Law 1997) 86.

and the degree of protection that should be afforded to prospective jurors and their privacy interests are critically analyzed.

Section 4.4 initially investigates the topic of jury inscrutability and whether the perceived need to keep the ultimate deliberative process secret justifies more front-end scrutiny during the empanelment procedure. From there a discussion about disproportionate Indigenous representation in the criminal justice system occurs, focusing on solution-based dialogue. With the goal being the reduction of the number of IP that end up in prison, changes to the way juries are selected in Canada are considered with a view to reducing the chances of partiality-driven verdicts. Finally, a review of juridical and academic commentary on the topic of jury selection effectiveness is chronicled to highlight where advances have been made and where improvements are still required.

4.2 The Tradition of Challenge for Cause

The modern jury embraces the concept of neutral arbitration.⁹ Foreknowledge as to the evidence and bias or prejudice as to its interpretation is seen as being antithetical to a fair trial. While absolute neutrality and a complete lack of opinion are practically unachievable, '[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.'¹⁰

Although various factors can support a challenge for cause due to partiality,¹¹ the scope of the following discussion will be restricted to racial bias, in particular when focused against IP. Challenges born out of a concern for partiality were 'originally classified as . . . (3) *propter affectum*, on account of partiality, as where circumstances were such as

⁹ Roger D Moore in, 'Voir Dire Examination of Jurors: I. *The English Practice*' (1928) 16 Geo LJ 438, 438-39 explains that this was not always the case:

The institution of the jury which has contributed mightily to the health of the common law by "constantly bringing the rules of law to the touchstone of contemporary common sense", has not always been a cross-section of the community sifted and selected for impartiality and lack of personal knowledge concerning disputed facts. Originally composed of men called together as neighbors of litigant parties, its function changed gradually from that of accusatory witnesses to that of discriminating judges.

¹⁰ *Irwin v Dowd*, 366 US 717, 723 (1961).

¹¹ For example, pre-trial publicity as discussed in *R v Vermette*, [1988] 1 SCR 985 at para 21.

to warrant suspicion for bias or partiality'.¹² However, bridging the gap between suspicion and proof was not an easy task. Indeed, it appeared to be an elaborate affair:

When the opposite side pleads to the challenge, two triers are appointed by the court; either two coroners, two attorneys, or two of the jury, or indeed any two of the jury, or indeed any two indifferent persons [. . .] The truth of the matter alleged as [*sic*] cause of challenge must be made out by witnesses to the satisfaction of the triers. The challenging side first addresses the triers and calls his witnesses; then the opposite side addresses them, and calls witnesses if he sees fit; in which case the challenger has a reply. The judge then sums up to the triers who give their decision.¹³

Although challenge for cause remains an option in England¹⁴ and the USA,¹⁵ only Canada retains the use of lay triers to determine the truth of the challenge,¹⁶ with the other two nations content on reserving that function for the trial judge.¹⁷ While the strengths and weaknesses of the triers- versus judge-determined partiality approach are not addressed in any detail in this chapter, what is important to consider is whether the challenge process allows for the development of a suitable amount of evidence from which a reliable decision can be made. Without evidence, decisions lack validity and become conjectural in nature. Indeed, without evidence it is advisable not to decide at all and submit that there is no case to answer.¹⁸

As is the case throughout this thesis, the reader comes to realize that when comparative examples are drawn from England and the USA, their respective experiences often occupy opposite ends of a continuum. A minimalist approach to juror scrutiny is adopted in England whereas in America the converse mentality applies and searching juror examinations are commonplace.¹⁹ Indeed, in England cause challenges are 'rarely used'.²⁰ One reason for the difference is that direct questioning of potential jurors in the context of a *voir dire* to uncover disqualifying partiality occurs *ab initio* in the USA,²¹

¹² Moore (n 9) 441.

¹³ *ibid* 443, citing Roscoe, *Criminal Evidence* (13th edn 1908) 180.

¹⁴ Juries Act 1974, c 23, s 12(1)(a).

¹⁵ 28 USC § 1870 (2012).

¹⁶ *Criminal Code* (n 5) s 640(2).

¹⁷ Juries Act (n 14) s 12(1)(b) and USC (n 15) § 1870.

¹⁸ In Canada an application is argued before the trial judge for a directed verdict of acquittal.

¹⁹ As explained by Francis J in *State v Manley*, 54 NJ 259, 273 (1969) 'it became the prevailing view in this country that a party could examine prospective jurors without having any previous knowledge concerning them, for the purpose of deciding upon the exercise of peremptory or cause challenges'.

²⁰ Richard Buxton, 'Challenging and discharging jurors – 1' [1990] Crim LR 225, 230.

²¹ In *Rosales-Lopez v United States*, 451 US 182, 188 (1981) White J underscored that:

while in England the challenger must first introduce evidence *aliunde*, that is, from a source other than the impugned juror, to support the cause of the challenge.²² Consequently, as explained by Lord Parker CJ in *R v Chandler*:

... before any right to cross-examine the juror arose, the defendant would have to lay a foundation of fact in support of his ground of challenge. It is no good his saying: "I think this man is antagonistic," or calling somebody to say, "I do not think he likes processions, he thinks they are unreasonable." There must be a foundation of fact creating a *prima facie* case before the man can be cross-examined.²³

Canadian jurisprudence supports the British approach of insulating potential jurors from questioning until stand-alone evidence has been introduced which overcomes a prescribed threshold. Various described as an 'air of reality'²⁴ or 'realistic potential'²⁵ for partiality test, the court will concern itself with whether the ground of alleged partiality could 'create that partiality which would prevent a juror from being indifferent as to the result'.²⁶ The initial threshold, that being whether the cause question or questions will be allowed to be put to each individual juror candidate, contemplates a 'minimal standard'²⁷ given that an air of reality test 'is the lowest burden recognized in the law of evidence'.²⁸

The American belief is that the best method of exposing those who cannot set aside their personal inclinations is to simply ask them. As Moore explains, the potential juror as a witness is a tremendous source of valuable information:

Inasmuch as questions put for the purpose of challenge for cause readily show upon their face their purpose to disclose personal knowledge of the

Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.

²² There is no preliminary questioning of a juror before a challenge is instigated. See generally *R v Stewart* (1845) 1 Cox 174 and *R v Dowling* (1848) 7 St Tr (NS) 381.

²³ *R v Chandler (No 2)* [1964] 2 QB 322 (CA) 338. In Canada, a realistic potential for the existence of partiality remains the threshold consideration 'for challenges based on bias, regardless of the origin of the apprehension of partiality'. See *R v Williams*, [1998] 1 SCR 1128 at para 14.

²⁴ *Sherratt* (n 4) para 63.

²⁵ *ibid* para 65.

²⁶ *ibid* para 64. See also the discussion by Galligan JA in *R v Cameron* (1995), 22 OR (3d) 65 at 69-70 (CA).

²⁷ *R v Pheasant* (1995), 47 CR (4th) 47 at para 8 (OCGD).

²⁸ Tanovich, Paciocco and Skurka (n 8) 96.

facts at issue, an unqualified opinion, pecuniary interest, religious beliefs and conscientious scruples in certain instances, unwillingness to be governed by the established rules of evidence, certain relationships in which bias is conclusively presumed, membership on the grand jury which returned the indictment or on a petit jury previously returning a verdict in the same case, or certain disqualifications fixed by statute, no purpose would generally be served by requiring such independent showing to be made with regard to them.²⁹

The modern day procedure for cause challenges was consolidated by the Ontario Court of Appeal in *R v Hubbert* ('*Hubbert*') which was ultimately approved of by the entirety of the Supreme Court of Canada.³⁰ The gist of the procedure is as follows:

1. Once the judge has ruled that the trial of the challenge may proceed, the party making the challenge may call the proposed juror as a witness without first calling other evidence to establish a prima facie case;
2. It is not helpful to characterize the questioning of the juror as "examination in chief" (with its attendant limitations) or "cross-examination" (which, it has been suggested, must of necessity be of its true nature). What is important is that the questioning be relevant, succinct and fair. The party making the challenge may call other evidence.
3. The "other party" may also question the juror, on the same terms, and may call other evidence. With leave of the trial judge, the challenging party may call evidence in reply.
4. In the trial judge's discretion, closing addresses by counsel, and his or her own charge to the triers on the issue is also within the realm of contemplation.
5. The test for indifference as between the accused and the Queen is on a balance of probabilities. The triers may decide the issue on the spot, or retire to a jury room to deliberate.³¹

Two things become readily apparent from the *Hubbert* procedure: (1) the challenge for cause process can be quite involved, resulting in a fulsome hearing akin to a mini-trial; and, (2) the procedural rules are of common law construction, vested with the capacity to adjust as required. Certainly accommodating change 'to assure the appropriate growth

²⁹ Roger D Moore, 'Voir Dire Examination of Jurors: II. *The Federal Practice*' (1928) 17 Geo LJ 13, 27.

³⁰ *Hubbert* (n 6).

³¹ *ibid* paras 39-44 (CA).

and adaptation of the law'³² is an axiom of longstanding heritage, understood to occur incrementally.³³

4.2.1 Establishing the Cause in the Face of Systemic Safeguards

It has been said that '[p]resumptions - and the concomitant burdens of proof necessary to overcome them - appear virtually everywhere in the law.'³⁴ The ubiquity of legal presumptions suggests that they are creations of accommodation and pragmatism:

The presumption of law has been said to be an artificial presumption which the law creates whereby one fact is presumed to exist if another fact is proved, although the proven fact is not itself direct evidence of the presumed fact. The basis in policy for such presumption is generally the common experience of mankind experiencing a customary or probable relationship between the proven fact and the presumed fact, or simply a rule of convenience or public policy. The classic illustration of a presumption of law is that of death after seven years' absence.³⁵

Like their English counterparts, the Canadian system of jury selection 'starts from the presumption that jurors are capable of setting aside their views and prejudices and acting impartially between the prosecution and the accused upon proper instruction by the trial judge on their duties'.³⁶ On the other hand, 'the American system . . . treats all members of the jury pool as presumptively suspect'.³⁷ It is a curious contrast of philosophies regarding the relative proclivities of each nation's citizenry. However, the presumption of juror impartiality is not born out of a belief in the superior rectitude and discipline of a particular national quality or character. Rather, the presumption is anchored in certain bedrock protections that are perceived to safeguard the trial process, including:

- (i) the juror's oath or affirmation, intended to bind the conscience of the jurors including those who might otherwise be disposed to decide the matter based on assumptions and preconceptions including racial biases,

³² *United States v Wood*, 299 US 123, 144 (1936).

³³ See generally *Myers v Director of Public Prosecutions* [1965] AC 1001 (HL) and *Ares v Venner*, [1970] SCR 608.

³⁴ Antonio E Bernardo, Eric Talley and Ivo Welch, 'A Theory of Legal Presumptions' (2000) 16 JLEO 1, 1-2.

³⁵ Raymond I Geraldson, 'Effect of Presumptions' (1942) 26 Marq L Rev 115, 116.

³⁶ *R v Find*, 2001 SCC 32 at para 26. See also *R v Connor and another*; *R v Mirza* [2004] UKHL 2 [32].

³⁷ *ibid Find*. Despite such suspicions, the Constitution of the USA actually 'presupposes that a jury selected from a fair cross section of the community is impartial'. See *Lockhart v McCree*, 476 US 162, 184 (1986).

- (ii) the seriousness of the jury's task and the solemnity of the occasion,
- (iii) the judge and counsel's opening address regarding the gravity of the jury's task,
- (iv) jury instructions cautioning against resort to preconceptions or biases, including racial biases, in arriving at their verdict that bring to the surface at a crucial point, the danger of allowing racial biases to influence the verdict,
- (v) the rules of evidence and process underlining that their verdict depends on the evidence and the law, not upon anyone's personal views,
- (vi) jury instructions [*sic*] how to deliberate including not deciding on the basis of their personal, individual views of the evidence and the law and to listen to each juror's views, evaluate their own inclinations in light of those views and the judge's instructions,
- (vii) that they are told that they can only convict if each juror is satisfied beyond a reasonable doubt of the accused's guilt, and
- (viii) the diffused impartiality produced by melting twelve diverse and individual perspectives into a single decision-making body and the dynamics of jury deliberation.³⁸

The foregoing protections are the ingredients that collectively will 'judicially cleanse'³⁹ a jury and thus maintain the impartiality presumption, until sufficient evidence refutes what will otherwise be accepted as a given. The contrary position of the Americans, despite having all the same safeguards in place, suggests a much less confident, if not pessimistic view of whether the system can self-sustain neutrality without more. As a result, the American system contemplates 'a preliminary voir dire process, whereby prospective jurors are frequently subjected to extensive questioning, often of a highly personal nature, to guide the respective parties in exercising their peremptory challenges and challenges for cause'.⁴⁰ This means that, subject to the controls of the trial judge, American jury candidates will themselves inform the evidentiary inquiry, whereas in Canada an initial extra-juror threshold must first be overcome.

³⁸ *R v Douse* (2009), 246 CCC (3d) 227 at para 42 (Ont SCJ).

³⁹ See *R v Parks* (1993), 15 OR (3d) 324 at para 59 (CA) where Doherty JA discusses how certain attitudes 'will prove more resistant to judicial cleansing'.

⁴⁰ *Find* (n 36) para 26.

Establishing an air of reality or realistic potential that there is partiality lurking amongst the jury panel will require an applicant to establish: (1) that a widespread bias exists in the community; and (2) that some jurors may be incapable of setting aside this bias, despite trial safeguards, to render an impartial decision.⁴¹

While in everyday parlance, the words ‘bias’ and ‘partiality’ are used synonymously, they should not be conflated when attempting to determine whether a juror is indifferent. As explained by Doherty JA in *R v Parks* (‘*Parks*’):

Partiality cannot be equated with bias. Questions that seek to do no more than establish that a potential juror has beliefs, opinions or biases which may operate for or against a particular party cannot establish partiality. A diversity of views and outlooks is part of the genius of the jury system and makes jury verdicts a reflection of the shared values of the community. It is inevitable that with diversity come views which can be described as biases or prejudices for or against a party to the litigation. Those biases will take various forms and be of varying degrees. Some biases, such as the presumption of innocence, are crucial to the rendering of a true verdict. Others, by their very nature, will be irrelevant to the case in point. Those biases that can be set aside when a person assumes his or her role as a juror are also irrelevant to the partiality of the juror. A juror’s biases will only render him or her partial if they will impact on the decision reached by that juror in a manner which is immiscible with the duty to render a verdict based only on the evidence and an application of the law as provided by the trial judge.⁴²

Given the foregoing, it can be seen that ‘partiality has both an attitudinal and behavioural component’.⁴³ The former focuses on the existence of a material bias while the latter concerns itself with the potential effects the bias will visit upon the trial process.⁴⁴

4.2.2 Should the Test for Establishing the Cause Threshold be Relaxed?

It is clear that to a certain extent the Canadian challenge for cause system is faith-based in that the presumption of jury compliance to instructions, to a respect for the solemnity of the occasion and to a belief in the communal transformative processes engaged by group deliberation, will satisfy the needs of justice. However, it is equally clear that ‘[i]f

⁴¹ *ibid* para 32.

⁴² *Parks* (n 39) para 36.

⁴³ *ibid* para 35.

⁴⁴ *Find* (n 36) para 33.

judicial cleansing were a complete answer to the preconceptions and predispositions of jurors, there would be no need for s. 638(1)(b) [the challenge for cause for partiality section of the *Criminal Code*].⁴⁵ Thus, while the standard of proof to engage a challenge is not onerous,⁴⁶ a closer look at some of the reasons behind the present standard may justify loosening the prescribed degree of scrutiny.

One of the historic mainstays of the adversarial system is the incorporation of the oath or solemn affirmation into proceedings as an initial protection against the introduction of suspect evidence.⁴⁷ Both witnesses and jurors are subjected to the same requirement, with the former swearing or affirming to tell the truth about what they had earlier observed and the latter giving their assurances that they will try the guilt or innocence of the accused person based only on the evidence adduced at trial and the law as it is given to them. As explained by Binnie J on behalf of a unanimous Supreme Court of Canada:

Our collective experience is that when men and women are given a role in determining the outcome of a criminal prosecution, they take the responsibility seriously; they are impressed by the jurors' oath and the solemnity of the proceedings; they feel a responsibility to each other and to the court to do the best job they can; and they listen to the judge's instructions because they want to decide the case properly on the facts and the law. Over the years, people accused of serious crimes have generally chosen trial by jury in the expectation of a fair result. This confidence in the jury system on the part of those with the most at risk speaks to its strength.⁴⁸

Notwithstanding the professed utility of the ceremonial assurances, '[t]oday, an increasingly secular society simply attaches less significance to taking an oath.'⁴⁹ Indeed, '[t]here can be little doubt that the taking of an oath is frequently no more than a meaningless ritualistic incantation for many witnesses.'⁵⁰ For the most part, the best that can be hoped for is that it might conjure a sense of civic duty. As Lamer CJC explained: 'While the oath will not motivate all witnesses to tell the truth . . . its administration may serve to impress on more honest witnesses the seriousness and significance of their

⁴⁵ *Williams* (n 23) para 24.

⁴⁶ See the discussion of the 'air of reality' test in the text to n 28.

⁴⁷ Regarding oaths and solemn affirmations, see the *Canada Evidence Act*, RSC 1985, c C-5, ss 13-16.1.

⁴⁸ *R v Spence*, 2005 SCC 71 at para 22.

⁴⁹ *R v KGB*, [1993] 1 SCR 740 at para 140.

⁵⁰ *ibid.*

statements, especially where they incriminate another person in a criminal investigation'.⁵¹

In addition to the waning importance of the oath in general, there are many examples of the willingness of prospective jurors to lie in order to be selected and once seated to continue to indicate by their actions that they feel no compunction to respect their duty. The USA provides a number of illustrations in its jurisprudence of jurors who betrayed their oath. The ease of uncovering examples likely has to do with the fact that, unlike in Canada⁵² and England,⁵³ American law does not *per se* prohibit jurors from discussing their deliberations outside the jury room unless specifically prohibited from doing so by the trial judge.⁵⁴ Typically during questioning in the selection *voir dire*, while under oath, the would-be juror fails to provide relevant and potentially disqualifying information or outright fabricates an answer.⁵⁵ What is clear from the decisions that discuss jurors who abdicate the responsibilities that flow from the oath is that the overall fact-finding body is compromised:

There is a distinction not to be ignored between deceit by a witness and deceit by a talesman. A talesman when accepted as a juror becomes a part or member of the court. The judge who examines on the *voir dire* is engaged in the process of organizing the court. If the answers to the questions are wilfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only. His relation to the court and to the parties is tainted in its origin; it is a mere pretense and sham. What was sought to be attained was the choice of an impartial arbiter. What happened was the intrusion of a partisan defender.⁵⁶

A recent Canadian case further underscores the callous disregard for the oath that is sometimes exhibited by a juror. In *R v Dowholis*, aggravated sexual assault and forcible confinement allegations perpetrated by an HIV-positive man were such that '[t]rial

⁵¹ *ibid* para 89.

⁵² *Criminal Code* (n 5) s 649.

⁵³ Contempt of Court Act 1981, s 8.

⁵⁴ *Pena-Rodriguez v Colorado*, 137 S Ct 855, 869-870 (2017).

⁵⁵ See for example *United States v Eubanks*, 591 F 2d 513 (9th Cir 1979) where on a conspiracy to distribute heroin prosecution, the juror during *voir dire* failed to reveal that he had two sons serving prison terms for heroin-related crimes and *State v Akins*, 867 SW 2d 350 (Tenn Ct App 1993) where a juror in an alcohol-related driving fatality, despite persistent questioning by both counsel, failed to disclose that she had worked in an alcohol and drug rehabilitation program.

⁵⁶ *Clark v United States*, 289 US 1, 10 (1933) (internal citation omitted). Note in this case the term 'talesman' is used generically to mean a juror selected in the orthodox fashion.

counsel requested and was granted the right to challenge the prospective jurors for cause on the basis of potential bias against homosexuals.⁵⁷ The potential juror in question indicated that he had no such bias and was selected, ultimately being made the foreperson. However, during the trial and even after guilty verdicts were rendered, the juror appeared on a Toronto radio show and comported himself in the following fashion:

On September 20, 2013, while the trial was underway, the juror appeared on the programme and spoke with hosts Dean Blundell and Billie Holiday. They all made derogatory comments about sexual activity between men. The three laughed and mocked the juror's oath. The juror returned to the program on September 30, 2013, after the trial had ended and the jury had found the appellant guilty. There was more laughter about the participants in the trial, more derisive comments about the lifestyle of the participants, and discussions about the jury's deliberations and the sentence likely to be imposed.⁵⁸

Although it is attractive to rationalize that the incidence of juror lying is miniscule in the grand scheme of trial by jury, certain studies and authors suggest the frequency is high, with some research indicating 'that approximately twenty-five percent of jurors fail to reveal material information during voir dire'.⁵⁹ Whether an answer is inaccurate due to prevarication or oversight may be an important qualification to the figures, but what remains clear is that the oath is far from a fail-safe invention. Certainly for some, performing the oath is unimportant formalism, while for others it seizes the conscience, at least superficially.⁶⁰ While beyond the scope of these writings, it is important to note that the concept of 'jury nullification' arguably licences the abandonment of the juror's oath when deemed necessary by the triers of fact.⁶¹

A somewhat related topic to oath-taking is the taking of instructions by the jury as given by the judge. Again, a positive inclination is resorted to in order to make the law a workable authoritative body capable of being applied by all. Scalia J explained:

⁵⁷ *R v Dowholis*, 2016 ONCA 801 at para 5.

⁵⁸ *ibid* para 11.

⁵⁹ Robert G Loewy, 'When Jurors Lie: Differing Standards for New Trials' (1995) 22 Am J Crim L 733, 734 citing Richard Seltzer, Mark A Venuti and Grace M Lopes, 'Juror Honesty During Voir Dire' (1991) 19 Crim Just 451, 455. It should be mentioned, however, that an answer that is not factually true may not constitute advertent falsity. Poor memory often explains what is easily labelled a lie.

⁶⁰ *KGB* (n 49) para 140.

⁶¹ See Auld LJ, *A Review of the Criminal Courts of England and Wales* (September 2001) 175-176; Kevin Crosby, 'Controlling Devlin's jury: what the jury thinks and what the jury sees online' [2012] Crim LR 15, 16-17; and, Crosby (n 3) 92-103.

The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.⁶²

Judicial instructions typically apply not only to the law, but also to how a jury may (and may not) use the evidence it has heard as limited by the constraints of the law.⁶³ Certainly some legal concepts are so inordinately complex that even lawyers find the principles difficult to understand. Jurors may only hear the principle explained but a few times before they are called upon to deliberate. Thus, the presumption that jurors ‘attend closely [to] the particular language of the trial court’s instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them’⁶⁴ is at best a lofty goal and at worst a complete fiction. Presumptions of convenience and expedience would appear to do more harm than good in such circumstances because they engender a false sense of propriety and correctness. Indeed, courts have been known at times to be dismissive of the presumption proposition as a naïve assumption that ‘all practising lawyers know to be unmitigated fiction’.⁶⁵

While Hand J described the limiting instruction as a ‘recommendation to the jury of a mental gymnastic [*sic*] which is beyond, not only their powers, but anybody’s else’,⁶⁶ Frank J was even more critical in stating that it ‘is a kind of “judicial lie”’: It undermines a moral relationship between the courts, the jurors, and the public; like any other judicial deception, it damages the decent judicial administration of justice’.⁶⁷ Similarly, Knazan J, writing extra-judicially, worried about the unconscious processing of knowledge and how that factored into the instructional mix:

When the judge or jury member has some evidence in mind, and is trying in good faith to follow a direction to disregard it, or to restrict its use, the direction may sometimes accomplish its purpose. When the information is

⁶² *Richardson v Marsh*, 481 US 200, 211 (1987). See also *R v Corbett*, [1988] 1 SCR 670 at paras 38-47.

⁶³ Consider, for example, the qualified use instruction that will accompany an assessment of an accused person’s criminal record. See *Corbett* *ibid* para 38.

⁶⁴ *Francis v Franklin*, 471 US 307, 324 n 9 (1985).

⁶⁵ *Krulewitch v United States*, 336 US 440, 453 (1946). See also *Bruton v United States*, 391 US 123, 135 (1968). The research of Dennis J Devine and others in ‘Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups’ (2001) 7 *Psych Pub Pol & L* 622, 699 suggests that ‘[j]urors often do not make decisions in the manner intended by the courts, regardless of how they are instructed.’

⁶⁶ *Nash v United States*, 54 F 2d 1006, 1007 (2d Cir 1932).

⁶⁷ *United States v Grunewald*, 233 F 2d 556, 574 (2d Cir 1956).

in the unconscious, or the forbidden uses are occurring at an unconscious level, then the direction is indeed asking the impossible.⁶⁸

Appellate opinions suggest that there can be an uneasy acceptance of a jury's presumptive adherence to judicial instructions.⁶⁹ Jurors building 'cognitive walls'⁷⁰ in response to the edicts of judges may seem unlikely on an intuitive level, yet judges sitting alone are deemed to be able to accomplish the feat. If it were otherwise, both bench and jury trial systems would be fundamentally flawed. Rather than perpetuating the 'pious fictions indulged by the courts',⁷¹ perhaps the better path would be to return to a more realistic approach:

Jury instruction and self-instruction may evolve from "Do not use this evidence for this purpose" to "it is inevitable that this evidence will influence you to some degree in the prohibited sense, but strive not to let it play a major role in your verdict." An instruction that honestly confronts the trier's human limitations might in fact advance the purpose of the instruction, because it may seem easier to carry out. The problem that it may be prejudicial remains, but at least there is no pretence that sophisticated mental operations that may not even work or be possible are taking place. This may, over time, lead to less preoccupation with split uses, fewer mental acrobatics and better focus on the issues for determination.⁷²

The Supreme Court of Canada in *R v Williams* ('Williams') came to the conclusion that it would not be 'correct to assume that jurors who harbour racial prejudices falling short of extreme prejudice will set them aside when asked to serve on a jury'.⁷³ Racial prejudice and its underlying stereotyping remains too insidious in nature to succumb to acts of judicial cleansing.⁷⁴ Thus, despite the platitudes that support the use of measured judicial instructions it has been conceded that racism falls into an exceptional category. This may in part be due to the recognition that racist values are learned and embedded

⁶⁸ Brent Knazan, 'Putting Evidence out of Your Mind' (1999) 42 Crim LQ 501, 511.

⁶⁹ Compare *Bruton* (n 65) where the United States Supreme Court set aside a defendant's conviction on a joint trial despite the jury being properly instructed to disregard a co-defendant's confession that was also inculpatory of the other defendant, with *Corbett* (n 62) where the Supreme Court of Canada upheld a murder conviction where the jury was allowed to hear about the accused's previous murder conviction given that the trial court gave appropriate limiting instructions.

⁷⁰ Kimball R Anderson and Bruce R Braun, 'The Legacy of John Wayne Gacy: The Irrebuttable Presumption that Juries Understand and Follow Jury Instructions' (1995) 78 Marq L Rev 791, 801.

⁷¹ *Jackson v Denno*, 378 US 368, 382-83 n 10 (1964).

⁷² Knazen (n 68) 512.

⁷³ *Williams* (n 23) para 20.

⁷⁴ *ibid* para 21.

from an early age.⁷⁵ As a result, '[t]he deeper and more ingrained the prejudice, the more difficult it may be to control.'⁷⁶ In recognition of the potential intractability of the problem, a unanimous Supreme Court of Canada concluded:

Racial prejudice and its effects are as invasive and exclusive as they are corrosive. We should not assume that instructions from the judge or other safeguards will eliminate biases that may be deeply ingrained in the subconscious psyches of jurors. Rather, we should acknowledge the destructive potential of subconscious racial prejudice by recognizing that the post-jury selection safeguards may not suffice. Where doubts are raised, the better policy is to err on the side of caution and permit prejudices to be examined. Only then can we know with any certainty whether they exist and whether they can be set aside or not. *It is better to risk allowing what are in fact unnecessary challenges, than to risk prohibiting challenges that are necessary.*⁷⁷

Ultimately the notion of the diffused impartiality of the jury as a collective force may be more metaphor than actuality. While a pigeon-holed analysis of the overall strength of the judicial cleansing model can be somewhat unfair given that it is the totality of the safeguards which is calculated to prevail, perhaps the indicia are not what they are claimed to be. As has been pointed out earlier in this chapter, the potential for juror partiality, whether intentional or unknowing, is what justifies the challenge for cause procedure. Stripped to its most fundamental, the procedure is nothing less than an admission by Parliament that it cannot guarantee an indifferent jury. With that admission is the companion acknowledgement that a perfect trial cannot be assured as the failings of humankind detract from giving any such warranties.⁷⁸ Indeed, it is conceded that

⁷⁵ See for example: Beverly Daniel Datum, 'Talking about Race, Learning about Racism: "The Application of" Racial Identity Development Theory in the Classroom' (1992) 62 Harv Educ Rev 1, 13; Phyllis A Katz, 'Racists or Tolerant Multiculturalists? How Do They Begin?' (2003) 58 Am Psych 897, 907; and, Paul T Clarke, Heather Heavin and Keith Walker, 'Racist Parenting and the Best Interests of the Child: A Legal and Ethical Analysis' (2010) 109 CJEAP 1, 16-20.

⁷⁶ *Spence* (n 48) para 36.

⁷⁷ *Williams* (n 23) para 22 (citations omitted and emphasis added). The United States Supreme Court has expressed similar sentiments. See for example *Aldridge v United States*, 283 US 308, 314-15 (1931) where the majority emphasized:

The argument is advanced on behalf of the Government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.

⁷⁸ See *R v Harrer*, [1995] 3 SCR 562 at para 45 where the court remarks:

At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused's point of view. Nor must it be conflated

certain of the jury panel number will conceal disqualifying information from the court and cross the Rubicon without detection.⁷⁹ American case law documenting the dishonest juror phenomenon is common enough to make its occurrence beyond reasonable dispute. Thus, one may question why there is such a judicial push-back against introducing more scrutiny into the selection process? Certainly the views held by the Honourable Sir Patrick Devlin, when he sat as a Judge of the High Court of Justice of England over 50 years ago, provide less-than-satisfactory logic, doubtful even in its day:

There may be . . . a jurymen who is so predisposed to one side or the other as to make him by common consent an unfit judge; what is done to detect and eradicate such a man? The answer is that nothing is done and that unless his predisposition happens by chance to be known to the parties or their solicitors, he will undoubtedly serve on the jury. We can defend the obsolescence of the challenge only by claiming that such people are rare and that individual prejudices become so diluted in the jury-room that they count for little in the end.⁸⁰

Rather than resigning a jury to a fate that inexorably concedes the likelihood that partial jurors will be in their midst, the impartiality goal would appear to demand the use of the cause challenge and, if that failed, to keep the peremptory challenge in reserve (assuming that it would be used properly).⁸¹ Such a mindset, at least in the USA, is part of the well-established and firm belief that ‘the failure of a juror to honestly answer material questions propounded to him on voir dire examination constitutes bad faith requiring his disqualification from serving on the jury in the case’.⁸² Of course, the ‘honest answer’ entitlement is predicated on the assumption that the juror understands the question being asked of him or her, whether emanating from the lawyer or the court.⁸³ Considerations

with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused (citation omitted).

⁷⁹ *United States v Vargas*, 606 F 2d 341, 346 (1st Cir 1979). See also Martin F Kaplan and Lynn E Miller, ‘Reducing the Effects of Juror Bias’ (1978) 36 J Pers & Soc Psych 1443, 1443 where the authors point out that ‘the assumption of “tabula rasa” in selected jurors would be naïve’.

⁸⁰ Patrick Devlin, *Trial by Jury* (Stevens & Sons Ltd 1956) 34.

⁸¹ The use of challenges contemplates beginning with cause challenges (if any are brought) and finishing with peremptory challenges (until they are exhausted). See *R v Katoch*, 2009 ONCA 621 at paras 45-51. However, see *Criminal Code* (n 5) s 634(1) which states that ‘[a] juror may be challenged peremptorily whether or not the juror has been challenged for cause pursuant to section 638.’

⁸² *Minis v Jackson*, 330 So 2d 847, 848 (Fla Dist Ct App 1976). See also *Martin v Mansell*, 357 So 2d 964, 967 (Ala 1978).

⁸³ Jerome Frank in his work, *Courts on Trial: Myth and Reality in American Justice* (Princeton University Press 1973) 116 remarked about jurors:

. . . often they cannot understand what the judge tells them about the legal rules. To comprehend the meaning of many a legal rule requires special training. It is inconceivable

such as the ‘temporal remoteness of the matter inquired about, the ambiguity of the question propounded, the prospective juror’s inadvertence or willfulness in falsifying or failing to answer, the failure of the juror to recollect and the materiality of the matter inquired about’⁸⁴ all impact on the veracity of the juror’s answer. Ultimately, assuming comprehension and accepting bald assurances from potential jurors is likely ill-advised:

The almost universal test proposed to ascertain whether the juror entertains a bias or prejudice against the prisoner is to inquire whether he has formed or expressed an opinion as to his guilt or innocence. To remain satisfied with his categorical reply, whether in the affirmative or negative, in a case that has attracted general attention, might do injustice to the prisoner or to the government [. . .] The duty of the examining authority, instead of ceasing when the citizen, in either case, has made his general claim to exemption, may more properly be said to have then really begun.⁸⁵

It is important to realize that in Canada there would appear to be no appeal of the decision of the triers who determine a cause challenge.⁸⁶ Assuming that the procedural expectations reflected in *Hubbert*⁸⁷ as well as those found in the *Criminal Code*⁸⁸ are complied with, the triers’ decision becomes dispositive of the partiality issue, save for a peremptory challenge being exercised thereafter. Thus, without a suitably evocative set of questions being asked of the prospective juror, the triers will not be furnished with enough information to accurately determine the truth of the cause. As a result, bizarre findings can be made:

Upon reading the answers of nine persons in respect of whom the triers found the challenge to be true, I am unable to ascertain any proper basis for the finding that they could not be impartial. Some challenges were found true although the prospective jurors had clearly answered the questions in the negative. Others, rather than clearly answering no, used other language which indicated that their verdict would be impartial. Some challenges were found to be true, when the prospective juror hesitated to a minor extent in answering the questions. Most of them were able to say why they had

that a body of twelve ordinary men, casually gathered together for a few days, could, merely from listening to the instructions of the judge, gain the knowledge necessary to grasp the true import of the judge’s words.

⁸⁴ *Martin* (n 82) 967, quoting from *Freeman v Hall*, 238 So 2d 330, 335-36 (Al 1970).

⁸⁵ *United States v Barber*, 21 Supreme Court, DC 456 (1898) as cited in Moore (n 29) 22.

⁸⁶ It is important that triers be properly instructed as to their function and how they should go about their task procedurally. See *R v Douglas* (2002), 62 OR (3d) 583 at paras 6-17 (CA). Once that is done by the court, the triers decision is solely theirs to make and is not subject to appeal. See *R v Rose* (1973), 12 CCC (2d) 273 at 280 (Que CA).

⁸⁷ See text to n 31.

⁸⁸ *Criminal Code* (n 5) ss 640(2)-(4).

hesitated and I can find no basis for finding the challenges to be true based on the way they expressed themselves.⁸⁹

Ultimately, the presumption-driven, judicially-cleansed jury selection model has significant shortcomings which call into question its effectiveness and propriety. While the presumptions are rebuttable, justice might be better served in the realm of jury selection by embracing a standard that is devoid of preconception. A better approach would be to require that each prospective juror pass an indifference muster rather than simply being afforded that designation without more.

4.3 The Doctrine of Judicial Notice as an Instrument for Change

For good reason the law is a conservative device that may orchestrate change, typically in measured, incremental and circumscribed steps.⁹⁰ Significant justice system resources will be expended examining the issue in question before a law is altered. The failed arguments that can be charted to the point where change is seen to begin are the costs that are associated with a system which otherwise prides itself on its predictability. It took a long time for the Canadian justice system to concede that it suffered from the same racist attitudes that plagued society at large.⁹¹ Thus, when Doherty JA in *Parks*, after reviewing materials on the topic, recognized an ‘ever-developing awareness of the extent of racism’⁹² impacting juries selected in Metropolitan Toronto involving black accused persons, it came as a shock only to those woefully out of touch with current affairs. For many, particularly ‘many blacks [who] perceive the criminal justice system as inherently racist’,⁹³ the words of Justice Doherty must have seemed far too long in coming. Nevertheless, in short order the Ontario Court of Appeal took its lead from *Parks* and, in a series of subsequent cases, no longer required challenge for cause applicants, where

⁸⁹ *R v Williams* (1996), 134 DLR (4th) 519 at para 81 (BCCA). The passage referenced by the British Columbia Court of Appeal was taken from the trial transcript of the first trial that ended in a mistrial. The cause challenge applicant wanted to use the findings from the triers at the first trial as evidence that some of the jury panelists at the second trial would likely not be impartial.

⁹⁰ See for example *R v Mann*, 2004 SCC 52 at paras 17-18 regarding the development of the law pertaining to investigative detention.

⁹¹ See generally: Nova Scotia, *Royal Commission on the Donald Marshall, Jr, Prosecution* (Nova Scotia 1989); Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Law Reform Commission of Canada 1991); and, Ontario, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Queen’s Printer for Ontario 1995).

⁹² *Parks* (n 39) para 88.

⁹³ *ibid* para 92.

they were members of a visible racial minority, to formally prove that a widespread bias existed against them in the community which certain potential jurors would be incapable of disregarding.⁹⁴ The doctrine of judicial notice came to the fore nationally, perhaps out of an attrition-realized need to obviate what was often a labour-intensive yet judicially required evidentiary threshold. As McLachlin J, as she then was, observed in *Williams*:

In the case at bar, the accused called witnesses and tendered studies to establish widespread prejudice in the community against aboriginal people. It may not be necessary to duplicate this investment in time and resources at the stage of establishing racial prejudice in the community in all subsequent cases. The law of evidence recognizes two ways in which facts can be established in the trial process. The first is by evidence. The second is by judicial notice.⁹⁵

Although formal judicial recognition of the history of prejudice against all visible minorities has now been in place in Canada for approximately 20 years, valuable time was lost building the evidentiary foundation that now supports the acknowledgment. It is, of course, impossible to measure what might have been had Justice Doherty's 'pioneering analysis'⁹⁶ in *Parks* come earlier than it did. Nevertheless, the experience gained since then should serve to edify those who would otherwise be inclined to strenuously litigate related challenge for cause issues in the future. As Finlayson JA observed in *R v Koh*, 'any opposition to extending the opportunities in which challenges for cause may be undertaken is more than countered by the salutary effects that these challenges have both on an individual trial and with respect to the criminal justice system as a whole'.⁹⁷ However, it would appear that the next frontier, offence-based cause challenges, is getting mired in a similarly strict evidence-based model that bedeviled racial prejudice cause challenges for many years. This is of particular concern because prejudices associated with the nature of the charge often become racialized.

⁹⁴ See generally: *R v Wilson* (1996), 29 OR (3d) 97 (CA); *R v Koh* (1998), 42 OR (3d) 668 (CA); and, *R v DC* (1999), 139 CCC (3d) 258 (Ont CA).

⁹⁵ *Williams* (n 23) para 54. The court further on in the same paragraph explained:

Judicial notice is the acceptance of a fact without proof. It applies to two kinds of facts: (1) facts which are so notorious as not to be the subject of dispute among reasonable persons; and (2) facts that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy (citation omitted).

⁹⁶ *Spence* (n 48) para 42. However, note the recognition of racial discrimination made by the United States Supreme Court over a century before *Parks* was released in *Strauder v West Virginia*, 100 US 303, 305-10 (1879). See also the general discussion on juror racism in Peter Herbert, 'Racism, Impartiality and Juries' (1995) 145 NLJ 1138.

⁹⁷ *Koh* (n 94) para 43.

4.3.1 Challenges for Cause Based on the Nature of the Offence Being Alleged

The stereotypes associated with, for example, the drunken Indian, the black pimp or the oriental opiate trader have achieved high recognition status due, in part, to the exploitative efforts of certain crime novelists, various music videos, television shows and cinematic depictions as well as the insensitive folklore of generations.⁹⁸ Rationalizing that particular races or ethnicities of people commit certain types of crimes is an additional layer of prejudicial thought with which Canadian courts have had to contend along with the revulsion that is said to be associated with the mere allegation of certain types of offences. In particular, those accused of sexual offending are said to be disadvantaged by a bias unique to the assertion.⁹⁹ This is even more the case where prospective jurors specially identify with the offence given their own antecedents. The supporting logic which justifies asking more searching questions of jury panelists is explained by the Pennsylvania Superior Court:

We think it is clear that a natural adjunct to the accused's right to probe for prejudice is the right to inquire into past victimization among the jurors of crimes similar to those with which the defendant is accused. Thus, a defendant charged with robbery has the right to ask the veniremen whether they or any member of their families have ever been the victim of robbery. Similarly, the accused, on trial for aggravated assault, may ask the potential jurors if they have been the victim of a crime in the nature of an assault.¹⁰⁰

The intersection between racial prejudice, race-stereotypic crime beliefs and the desire to exercise challenges based on the nature of the offence has currency in American jurisprudence. As previously mentioned, unlike in Canada or in England, 'all American jurisdictions . . . allow petit jurors, after trial, to publicly disclose in any public forum

⁹⁸ See generally: Laurence French and Renita Bertoluzzi, 'The Drunken Indian Stereotype and the Eastern Cherokees' (1975) 2 *Appalachian J* 332; Richard A Oehling, 'Hollywood and the Image of the Oriental, 1910-1950 – Part 1' (1978) 8 *Film & History* 33; Allen Carey-Webb, 'Racism and "Huckleberry Finn": Censorship, Dialogue and Change' (1993) 82 *Eng J* 22; Mary Beth Oliver, 'Portrayals of crime, race, and aggression in "reality-based" police shows: A content analysis' (1994) 38 *J B & E Media* 179; Aviva Orenstein, 'Propensity or Stereotype?: A Misguided Evidence Experiment in Indian Country' (2009) 19 *Cornell J L & Pub Pol'y* 173; and, Cynthia D Bond, 'Laws of Race/Laws of Representation: The Construction of Race and Law in Contemporary American Film' (2010) 11 *Tex Rev Ent & Sports L* 219.

⁹⁹ See for example *Gonzales v Thomas*, 99 F 3d 978, 987 (10th Cir 1996) where the court recognized a presumption of bias in a rape prosecution where the potential juror had been victimized by a similar crime. As well, consider Richard L Wiender, Audrey T Feldman Wiender and Thomas Gusso, 'Empathy and Biased Assimilation of Testimonies in Cases of Alleged Rape' (1989) 13 *Law & Hum Behav* 343, 351.

¹⁰⁰ *Commonwealth v Fulton*, 413 A 2d 742, 743 (Pa Super Ct 1979). For similar reasoning see *United States v Ramsey*, 726 F 2d 601, 604 (10th Cir 1984).

(including on social media, in the newspapers, and throughout the community) any statement made during deliberations'.¹⁰¹ Thus, where partial jurors have occasionally associated a particular crime to a particular race, their ill-conceived logic can later be open for scrutiny should they wish to place it in the public domain. A few examples will illustrate the less than phenomenal occurrence:

- during jury deliberations in a case where a Hispanic man was accused of raping a Caucasian woman, a juror expressed the opinion that the accused was guilty because 'spics screw all day and night'.¹⁰²
- during jury deliberations in a case where a Native American defendant was accused of assaulting a Bureau of Indian Affairs Officer with a dangerous weapon, the foreman told the other jurors that 'he used to live on or near an Indian Reservation, [and] that "[w]hen Indians get alcohol, they all get drunk," and when they get drunk, they get violent'.¹⁰³
- during jury deliberations in a case where a Black man was accused of, *inter alia*, keeping a place of prostitution a juror stated '[I]et's be logical; he's a black and he sees a seventeen year old white girl -- I know the type.'¹⁰⁴

In Canada, with the assistance of expert evidence, challenges for cause have been granted allowing reference in the question not only to the race of the accused, but also to whether the offence is seen as being tied to the race in question. The crime-race interrelationship was explored in the case of *R v Morgan* where Trafford J considered, *inter alia*, the following survey evidence of Toronto residents:

Nearly half (45 per cent) of those surveyed believe that there is a link between ethnicity and criminal activity. A slim majority (51 per cent) dispute this. Those most likely to believe that there is a link between crime and race tend to be older than 55, more affluent, and Tory voters. Those respondents who agree there is a link between race and crime, 45 per cent of the total survey sampled, were asked two additional questions about which groups tend to be more active in crime and why. A plurality (46 per cent of this group or 21 per cent of the entire survey sample) volunteered Jamaicans, Trinidadians, etc. as being a group more likely to be involved in crime. A further 19 per cent (9 per cent of the total sample) cited blacks in general. Ten per cent of this group (5 per cent of the entire sample) said

¹⁰¹ *Brief for Petitioner*, in the Supreme Court of the United States, *Miguel Angel Peña Rodriguez v State of Colorado*, No 15-606, June 23, 2016, 35.

¹⁰² *Commonwealth v Laguer*, 571 NE 2d 371, 375 (Mass 1991).

¹⁰³ *United States v Benally*, 546 F 3d 1230, 1231 (10th Cir 2008).

¹⁰⁴ *Shillcutt v Gagnon*, 827 F 2d 1155, 1159 (7th Cir 1987).

Asians in general, and eight per cent (or 4 per cent of the total sample) mentioned Vietnamese.¹⁰⁵

Finding overall that the statistical and expert evidence was reliable, Trafford J was persuaded to allow, in addition to the standard *Parks* question,¹⁰⁶ one further inquiry: ‘Do you have any beliefs or opinions about black Jamaican men and the commission of crimes, particularly crimes involving drugs, that would prevent you from judging the accused in this case without bias, prejudice or partiality?’¹⁰⁷ Similar cause challenges have been fashioned to address race and general criminality as well as other particular crimes.¹⁰⁸ The Indigenous experience in this area has also recognized the existence of the race-crime stereotype.¹⁰⁹ Certainly the comments of the Supreme Court of Canada in *R v Gladue* (*‘Gladue’*) not only support the argument that IP offend disproportionately, they indicate that the figures defy serious debate:

These findings [the excessive imprisonment of Aboriginal Peoples] cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem.¹¹⁰

Purely offence-based challenges involving the prosecution of allegations of sexual assault, untethered to a visible minority accused person, saw initial trial successes in the province of Ontario.¹¹¹ Buoyed by Supreme Court of Canada commentary that the reasonable potential for partiality threshold was to be given ‘a reasonably generous approach’¹¹² and that bias may arise from ‘the nature of the crime itself’,¹¹³ inroads were

¹⁰⁵ *R v Morgan* (1995), 42 CR (4th) 126 at para 4 (OCGD).

¹⁰⁶ *Parks* (n 39) paras 16 and 18 where the permitted question was ‘[w]ould your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the person charged is black and the deceased is a white man?’ Of course, in drug prosecutions typically there is no direct victim. Thus, the *Parks* question would simply end with the words ‘the person charged is black’.

¹⁰⁷ *Morgan* (n 105) para 10. In this case the accused was a Jamaican black man charged with drug offences.

¹⁰⁸ See for example *R v Brown* (2002), 166 CCC (3d) 570 (Ont CA) (black males and their involvement in the commission of criminal offences, particularly drug offences) and *R v McLeod*, 2005 ABQB 846 (black Jamaican men as a group and violence).

¹⁰⁹ *Williams* (n 23) para 58 and *R v Thorne*, [2003] 1 CNLR 283 at paras 5-22 (Sask QB).

¹¹⁰ *R v Gladue*, [1999] 1 SCR 688 at para 64.

¹¹¹ *Find* (n 36) para 74.

¹¹² *Williams* (n 23) para 32.

¹¹³ *ibid* para 10.

being achieved with the assistance of social science expert opinion and the retrospective consideration of the findings of triers in past cases.¹¹⁴

The emotive nature of sexual abuse was argued to be such that it was more repellant to society than other offences and, as such, should be given special cause challenge status. Moldaver JA, as he then was, in dissent in *R v K(A)* on the challenge for cause issue, observed that ‘sexual assault trials tend to be emotionally charged, particularly in cases of child abuse, where the mere allegation can trigger feelings of hostility, resentment and disgust in the minds of jurors’.¹¹⁵ Numerous Ontario trial courts had found that certain potential jurors did indeed hold these views.¹¹⁶ However, when McLachlin CJC was called upon to revisit the offence-based challenge comments that she made in *Williams*, she pointed out that until *R v Find* (‘*Find*’) the Supreme Court of Canada had not directly considered this kind of bias.¹¹⁷ Clearly what the Chief Justice was emphasizing was that although the crime-based challenge had been alluded to earlier, the concept had not yet been given the court’s direct and considered approval. For that to occur, reliable supporting evidence would have to be marshalled:

A party may displace the presumption of juror impartiality by calling evidence, by asking the judge to take judicial notice of the facts, or both. In addition, the judge may draw inferences from events that occur in the proceedings and may make common sense inferences about how certain biases, if proved, may affect the decision-making process.¹¹⁸

Any notion that there was some form of Pan-Canadian contempt for those merely accused of sexual offending was quickly despatched with by the Chief Justice. As she explained, ‘[c]ertainly these assumptions are not established beyond reasonable dispute, or documented with indisputable accuracy, so as to permit the Court to take judicial notice of them.’¹¹⁹ Thus, she concluded that while widespread victimization may be a factor to be considered, standing alone it fails to establish widespread bias that might lead jurors to discharge their task in a prejudicial and unfair manner. The survey materials, case law,

¹¹⁴ *Find* (n 36) paras 74-75.

¹¹⁵ *R v K(A)* (1999), 45 OR (3d) 641 at para 188 (CA).

¹¹⁶ *Find* (n 36) para 74.

¹¹⁷ *ibid* para 38.

¹¹⁸ *ibid* para 46.

¹¹⁹ *ibid* para 59. See *R v Borne*, 2018 ONSC 3733 where it was argued (unsuccessfully) that widespread social movements such as ‘#MeToo’ were tainting jury candidates in sexual assault cases.

and learned writing sources considered by the court ultimately fell short of establishing the standard of widespread bias as did the opinion evidence on generic prejudice which was found to lack scientific validity. As such, at least on the evidence produced in *Find*, offence-based cause challenges involving allegations of sexual offending missed the required mark. However, the door of opportunity was not forever closed:

It follows that even if widespread bias were established, we cannot safely infer, *on the record before the Court*, that it would lead to unfair, prejudicial and partial juror behaviour. This is not to suggest that an accused can never be prejudiced by the mere fact of the nature and circumstances of the charges he or she faces; rather, the inference between social attitudes and jury behaviour is simply far less obvious and compelling in this context, and more may be required to satisfy a court that this inference may be reasonably drawn. The nature of offence-based bias, as discussed, suggests that the circumstances in which it is found to be both widespread in the community and resistant to the safeguards of trial may prove exceptional. *Nonetheless, I would not foreclose the possibility that such circumstances may arise.* If widespread bias arising from sexual assault was established in a future case, it would be for the court in that case to determine whether this bias gives rise to a realistic potential for partial juror conduct in the community from which the jury pool is drawn. I would only caution that in deciding whether to draw an inference of adverse effect on jury behaviour the court should take into account the nature of the bias and its susceptibility to cleansing by the trial process.¹²⁰

Before leaving the topic of challenges based on offence type, it should be noted that judges have the power to excuse potential jurors for reasons of hardship.¹²¹ Indeed, preliminary instructions to the panel include reference to the charges before the court in an effort to uncover if the offence topic will cause undue concern as the following example indicates:

- (1) The offence(s) alleged is (are) (specify nature of charge)
- (2) If you or someone you know has ever been accused of any offence of this nature, or a victim of such an offence, or otherwise involved in a similar offence or experience, for example, by being involved in providing services or programs for victims or witnesses of similar

¹²⁰ *ibid* para 108 (emphasis added).

¹²¹ *Criminal Code* (n 5) s 632(c) reads as follows:

The judge may, at any time before the commencement of the trial, order that any juror be excused from jury service, whether or not the juror has been called pursuant to subsection 631(3) or (3.1) or any challenge has been made in relation to the juror, for reasons of personal hardship or any other reasonable cause that, in the opinion of the judge, warrants that the juror be excused.

(alleged) offences, please raise your hand and come to the front of the courtroom.

- (3) We do not wish to embarrass anyone by asking questions about personal matters. At the same time, we need to know about these things, because they may make it too difficult for you to perform jury duty in this case. If you come forward, I will discuss your situation with you.¹²²

It would appear that under the guise of personal hardship concerns, the court is accomplishing what has yet to be consistently achieved under offence-based challenge jurisprudence. While asking preliminary questions of the jury panel to expose obvious partiality and cases of severe individual circumstances would hardly be seen as improper, going further tends to render both cause and peremptory challenges superfluous. As emphasized by Bisson JA in *R v Guérin*:

The purpose of this preliminary exercise must not, however, be the systematic take-over by the judge of the criteria governing the acceptance, or the refusal, of the prospective juror. For to do so, the judge would thereby appropriate to himself the power which Parliament has confided in the two jurors, or appointees, who are to try the issue (s. 569(2), *Criminal Code*).¹²³

Consequently, unless the practice is discontinued or otherwise formally challenged, it would appear that offence-based challenges in all but name may continue to be employed through the proxy of the court itself.

4.3.2 The Role of Courtroom Advocacy in Jury Selection

Assuming that a realistic potential of partiality has been proven to the satisfaction of the trial judge, there remain various considerations regarding how the topic of racial prejudice will be broached with those summoned for jury duty. What will be the form and content of the proposed question or questions? Must the questions be scripted or should a dynamic exchange of information be encouraged? Who should be the questioner, counsel, the court or both? When do time limitations become both useful and necessary? Should the individual cause challenge procedure be done privately, with the

¹²² David Watt, *Watt's Manual of Criminal Jury Instructions* (2nd edn, Carswell 2014) 12-13.

¹²³ *R v Guérin* (1984), 13 CCC (3d) 231 at 245 (Que CA). Note that now *Criminal Code* (n 5) s 640 governs.

remainder of the panel excluded, or in plain view of all? Once the interrogation of the prospective juror is completed, how should the triers go about determining indifference? These and other questions make challenges for cause at times uncertain endeavours that may prove to be less than effective in exposing partiality. Perhaps both the strength and the weakness of the process is due in part to the significant discretion that is vested in the presiding judge.¹²⁴

While it is the province of the court to determine the form and content of the proposed cause questions,¹²⁵ from an advocacy point of view there remains much to be considered regarding how the inquiries are posed. The orthodox method in Canada is to have a predetermined question asked repeatedly by counsel for the applicant as each new potential juror is called.¹²⁶ The phrasing of the question is such that it encourages a ‘yes’ or ‘no’ answer. On the backdrop of a meagre one-word reply the triers must make their determination on the issue of indifference. While a mechanistic and controlled style of asking questions lends itself to a consistency of approach not open to the abuses that sometimes accompany the adversarial process, that style also seems inimical to skillful advocacy, simply due to its obviousness and lack of imaginative flow.

Certain prejudices are ‘very hard to identify, let alone prove, except by questioning the jurors’.¹²⁷ Without this opportunity, ‘the possibility of making a successful challenge is extremely remote’.¹²⁸ So if a potential juror may opt to lie about their moral shortcomings, rather than volunteer a truthful response, it is reasonable to allow for the engagement of advocacy techniques in order to lay open the area of concern for a more searching inquiry. Demeanour evidence alone is a dangerous metric of credibility given the intimidating atmosphere of the courtroom.¹²⁹ In particular, juror confidence, although believed to be a sign of credibility,¹³⁰ ‘is not a reliable guide to [exposing] bias’.¹³¹

¹²⁴ *Hubbert* (n 6) para 27 (CA). See also *Spence* (n 48) paras 70-71.

¹²⁵ *R v Pickton*, 2006 BCSC 1832 at paras 14-23.

¹²⁶ The *Parks* question is a prime example. See the text in n 106.

¹²⁷ Alan Dashwood, ‘Juries in a multi-racial society’ [1972] Crim LR 85, 92.

¹²⁸ *ibid.*

¹²⁹ While there is no question that testimonial demeanor is relevant to the assessment of credibility, given the pressures associated with testifying it should not be a controlling factor. See *R v SHP*, 2003 NSCA 53 at paras 29-30.

¹³⁰ John M Conley, William M O’Barr and E Allan Lind, ‘The Power of Language: Presentation Style in the Courtroom’ (1978) 1978 Duke LJ 1375, 1395.

¹³¹ Mary R Rose and Shari Seidman Diamond, ‘Judging Bias: Juror Confidence and Judicial Rulings on Challenges for Cause’ (2008) 42 Law & Soc’y Rev 513, 515.

While Canadian and English cause challenges do not contemplate immediate access to the potential juror for questioning, the American model engages direct questioning as soon as the jury selection *voir dire* is convened. Rather than requiring the court to assess independent evidence before questioning can begin, the practice in the USA rationalizes that having access to panel members *ab initio* to assess partiality is not only more efficient, it can be more focused:

Counsel must with succinct, well-phrased questions posed in proper order, permit the juror to see in his mind's eye the inherently prejudicial effect of the special facts to which he will be exposed during the trial; the juror must be required to anticipate and articulate his reaction to what will be the evidence in the case. From the content of his answers and the manner in which he responds to and interacts with counsel, not only will specific prejudices be uncovered, but the astute examiner will gain important insights into the juror's character and personality. Avowed prejudices, too deeply held to be put aside, certainly render the juror challengeable for cause. Moreover, those intangible factors - the language the juror uses and the manner of his response to sensitive questions touching on racial bias or fear of crime - are essential to an effective exercise of peremptory challenges which make counsel the trier of juror bias.¹³²

One may question how a juror during the *voir dire* will 'anticipate and articulate his reaction to what will be the evidence in the case'?¹³³ Certainly these concerns are worthy of consideration. Indeed, Rose and Diamond point out those exact issues as being problematic:

... people often have difficulty producing accurate self-assessments of bias and find it difficult to estimate whether events or prior experiences are likely to influence them. In addition, during *voir dire* prospective jurors receive only a minimal description of what they will hear and see during the trial, and they must give decontextualized answers about hypothetical questions (i.e., "If you were a juror in the case as we have described it, would you be fair?").¹³⁴

What is evident is that for the triers to be better positioned to rule on partiality in an accurate way, more as opposed to less dialogue should arguably occur between the

¹³² S Mac Gutman, 'The Attorney-Conducted Voir Dire Of Jurors: A Constitutional Right' (1972) 39 Brook L Rev 290, 324.

¹³³ *ibid.*

¹³⁴ Rose and Diamond (n 131) 516.

questioner and the prospective juror. Restricting the exchange of information would seem antithetical to a reliable cause determination.

Another obvious by-product of the expansive American approach to jury selection is that the detail uncovered will address issues relevant to both for cause and peremptory challenges. It should be noted, however, that the Supreme Court of Canada has warned that '[t]he challenge for cause should not be used deliberately as an aid to counsel in deciding whether to exercise the right of peremptory challenge, although indirectly a proper challenge and the trial of its truth may have that effect.'¹³⁵ The reasoning behind this judicial fiat is not entirely clear given that in Canada juror questioning only comes as a result of an advance ruling by the court. Presumably a favourable ruling is dispositive of the legitimacy of the challenge and also of the *bona fides* of the applicant. If anything, the questions asked in the cause challenge might result in a less whimsical use of a peremptory strike. However, as will be discussed next, Canadian (and English) trepidation over the liberal questioning of those on the jury panel may be born of a fear of 'American-style'¹³⁶ litigation practices.

What is immediately apparent from a perusal of Canadian and English jurisprudence is a common anti-American sentiment against the practice of questioning would-be jurors to determine their suitability for service on the case in question. What has been described as a juridical 'fear' was explained by Haines J:

What is the American procedure in jury selection so feared by some jurists? Stated simply, the Federal Courts and the State Courts permit a voir dire examination of a prospective juror so as to enable a party to challenge peremptorily, or for cause. In the latter situation the judge tries the cause, although in a very few States provision is made for triers. Our fears arise from the practice in those States where the questioning of the jurors is left to the lawyers who use it as an opportunity to influence or prejudice the entire jury panel rather than the production of an impartial jury.¹³⁷

In speaking of the American inquisitorial approach to jury selection, where the questioning of jurors is a given, Lord Denning MR elaborated on the British concerns about the practice:

¹³⁵ *Hubbert* (n 6) para 24 (CA).

¹³⁶ See the text in n 65 in ch 1 regarding perceptions of American Litigation.

¹³⁷ *R v Elliott*, [1973] 3 OR 475 at 481 (HCJ).

. . . the parties in that country [the United States] can cross-examine the potential jurors before they are sworn: not only about their previous convictions, but also upon their occupations, their views on this matter or that which may arise in the course of the hearing - so as to see if they are prejudiced in any way.

That philosophy has never prevailed in England. Our philosophy is that the jury should be selected at random. We believe that 12 persons selected at random are likely to be a cross-section of the people as a whole - and thus represent the views of the common man. Some may be moral. Others not. Some may be honest. Others not.¹³⁸

Custom would appear to factor heavily into the intransigent posture that has been generally assumed by the Canadian judiciary in relation to cause challenge questioning. The minimalist approach is all the more remarkable given the expansive blueprint for juror examination that was sketched in the *Hubbert* case.¹³⁹ Indeed, it has been observed that the rights of the litigant responding to the challenge, once granted, may allow for questioning that is even more searching than what was permitted of the applicant:

It seems inconsistent with the general exercise of pre-defining the questions to allow the opposing party to engage in a less restricted examination. It also seems inequitable to confine the challenging party to a pre-approved question only to allow opposing counsel to ask questions that are not vetted, and to go beyond the general kind of inquiry allowed to the challenging party.¹⁴⁰

In the end, counsel would do well to remind the court that despite the rhetoric of conservatism that envelops cause challenges, there remains considerable room within which to manoeuvre.

In the USA both judge- and counsel-driven *voir dire* questioning occurs depending on whether the matter falls within federal or state jurisdiction.¹⁴¹ There appears to be a philosophical divide as to whether the Bench or the Bar is best suited to question potential jurors. In concluding that judges should ask such questions, Phelps remarked:

The major arguments for judicial questioning, namely dispatch, dignity, impartiality and public acceptance, while undeniably considerable, should not be conclusive if counsel would suffer some critical disadvantage in the

¹³⁸ *R v Sheffield Crown Court, ex parte Brownlow* [1980] QB 530 (CA) 541.

¹³⁹ *Hubbert* (n 6). See the text to n 30 - n 33.

¹⁴⁰ Tanovich, Paciocco and Skurka (n 8) 168.

¹⁴¹ Janeen Kerper, 'The Act and Ethics of Jury Selection' (2000) 24 Am J Trial Advoc 1, 1-2.

selection of those fit to serve in losing the opportunity to personally conduct the *voir dire*. However, there seems to be little evidence that counsel questioning is demonstrably more efficient in striking out the unfit, and, therefore, eliminating such questioning could hardly prove damaging to either of the two counsel.¹⁴²

It would appear that when a closely controlled procedure is mandated that includes predetermined questions that require an adherence to exact language, it matters not who asks the questions. Indeed, it may be advantageous for counsel to distance themselves entirely and thus avoid receiving the brunt of a disgruntled juror's remark who may take umbrage to the cause challenge inquiry.¹⁴³ When asked by the judge, questions become associated with standard courtroom procedure and are thus less likely to be linked to the motives of a particular lawyer.

However, when questions are not preordained and their delivery is more than just a rote exercise, different priorities take shape. Judges are largely devoid of foreknowledge about the cases over which they preside. By contrast, counsel are expected to know their brief. Thus, logically counsel should be better positioned to expose juror partiality, using their knowledge of the case to engage a more nuanced dialogue with the potential juror. As well, the relative advocacy skills of a lawyer and a judge cannot be overlooked. In Canada at least, there is no necessary correlation between trial ability and suitability for appointment to the Bench. The minimum requirements are ten years at the Bar¹⁴⁴ and presumably an unblemished record with the Law Society. Thus, judges can be and at times are appointed to their positions completely devoid of any trial experience. Others may have been trial lawyers in name only. Even if a judge was masterful in the courtroom in his or her day as a Barrister, being seen to be involved in strategic juror questioning would arguably be antithetical to the juridical role. To actively attempt to expose potentially partial jurors, save for those who present in an obvious or conflicted way, is to enter the fray, perhaps not as a partisan, but still in a role that is best reserved for the litigants' counsel. As such, there are both pragmatic and symbolic reasons for judges to avoid such questioning.¹⁴⁵

¹⁴² James E Phelps, 'Voir Dire Examination - Court or Counsel' (1967) 11 St Louis U LJ 234, 247.

¹⁴³ See *R v Beausoleil*, [1997] OJ No 3691 (GD) and *R v McLeod*, 2005 ABQB 846 for Canadian examples of where judges have been asked by counsel to assume the role of questioner.

¹⁴⁴ See the *Judges Act*, RSC 1985, c J-1, s 3 for the appointment criteria for Superior Court Judges.

¹⁴⁵ For words of warning about judges entering the fray see *R v Murray*, 2017 ONCA 393 at para 103. There is also a statutory reason for leaving the questioning of potential jurors to the lawyers. *Criminal Code*

The courts must not allow trials to become unnecessarily prolonged.¹⁴⁶ All aspects of a trial are subject to reasonable time limitations as determined by the presiding Justice.¹⁴⁷ This would therefore include the time it takes to examine jurors during a challenge for cause. Given the broad discretion that is afforded trial judges to regulate the *voir dire* process, ‘to establish error [on the part of the judge], it must be shown that an abuse of discretion rendered a fair trial impossible’.¹⁴⁸ There is ‘a good deal of latitude [given to judges] in supervising the challenge process’.¹⁴⁹ Ensuring that the rulings of the triers are made justly may take time. To this end, the wise use of discretion is guided by the following philosophy:

If the challenge process is used in a principled fashion, according to its underlying rationales, possible inconvenience to potential jurors or the possibility of slightly lengthening trials is not too great a price for society to pay in ensuring that accused persons in this country have, and appear to have, a fair trial, before an impartial tribunal, in this case, the jury.¹⁵⁰

Courts are alive to the fact that questioning may be a fishing expedition, embarked upon with the goal of selecting a favourable jury.¹⁵¹ When courts make reference to ‘fishing expeditions’, they are typically using the term pejoratively. It implies a lack of focus. Should a relevant piece of information be uncovered, more luck than strategy is usually involved. In the context of jury selection, challenges for cause ‘stray into illegitimacy if used merely, without more, to over- or under-represent a certain class of society or . . . in order to obtain personal information about the juror’.¹⁵² Canadian courts have generally put up a uniform front of resistance when counsel attempt to engage in wide-ranging and intimate questioning of prospective jurors.¹⁵³ Canadian courts also seem predisposed to assume that fishing expeditions are really designed with a view to empanelling a

(n 5) s 638(1) speaks to only a prosecutor or an accused being entitled to challenge for cause. Thus, the delegation of any aspect of the process to the judge is arguably inappropriate.

¹⁴⁶ Scarce judicial resources must not be squandered. There is a danger that delays and obstructions may occur when challenges for cause go unchecked. See *R v Makow* (1974), 20 CCC (2d) 513 at para 22 (BCCA) and *Douse* (n 38) paras 278-79.

¹⁴⁷ See generally *De La Rosa v Texas*, 414 SW 2d 668 (Tex Crim App 1967) and *Louisiana v Strange*, 619 So 2d 817 (La App 1st Cir 1993).

¹⁴⁸ *Maynard v Indiana*, 508 NE 2d 1346, 1359 (Ind App 1987). Note that Canadian judges at times will also use the term ‘*voir dire*’ when referencing the jury selection hearing. See *Makow* (n 146) para 35.

¹⁴⁹ *Douse* (n 38) para 65.

¹⁵⁰ *Sherratt* (n 4) para 59.

¹⁵¹ See *Makow* (n 146) para 36 and *Douse* (n 38) para 45.

¹⁵² *Sherratt* (n 4) para 59.

¹⁵³ *Parks* (n 39) para 25.

favourable as opposed to an impartial jury.¹⁵⁴ Indeed Kerper, speaking of the American experience, has rather pessimistically remarked that ‘counsel clearly lies when he states that he is trying to select a fair and impartial jury’.¹⁵⁵

It must be remembered that regardless of the parameters placed on juror questioning by the court, the inquiries are often made with very little knowledge of the prospective juror. Thus, in the circumstances the command of the questioner may seem lacking. Certainly the old lawyer’s caution not to ask a question in cross-examination without already knowing the answer would be difficult, if not impossible, to respect. Prosecutorial disclosure obligations generally do not contemplate providing jury panel information since that is controlled by statute¹⁵⁶ (save for certain vetting practices that are discussed in chapter 5). Thus, while the judge is vested with tremendous discretion in deciding ‘how far the challenges may be pushed’,¹⁵⁷ the court must not forget that in Canada cause challenge advocacy skills are not presently deployed to the extent that they might otherwise be. In the end, it may be prudent for the court to grant a wide berth to questioning counsel to ensure that ‘[t]rial fairness trumps technicalities.’¹⁵⁸

There is some debate as to whether challenge for cause questions should be put to individual jurors in the presence of the remainder of the panel or with the panel excluded from the courtroom. Keeping jurors separated during the selection process is likely tied to the same logic that has supported orders excluding witnesses during the trial proper. As explained by Carruthers J in *R v Collette*:

The immediate object or purpose of an order excluding witnesses is to prevent any possibility that any witness expected to testify will not, by reason of hearing others testify beforehand, to any extent, alter, modify or change that which he or she would otherwise state. This applies in either civil or criminal proceedings and, especially where credibility is in issue.¹⁵⁹

¹⁵⁴ *Sherratt* (n 4) para 58 and *R v Ahmed*, 2010 ONSC 256 at para 81.

¹⁵⁵ Kerper (n 141) 14.

¹⁵⁶ In Ontario jury panel lists may be released to litigants or accused persons or their solicitors ten days before the sittings of the court by the sheriff for a fee of \$2.00 pursuant to s 20 of the *Juries Act*, RSO 1990, c J3.

¹⁵⁷ *Douse* (n 38) para 65.

¹⁵⁸ *Spence* (n 48) para 76.

¹⁵⁹ *R v Collette* (1983), 6 CCC (3d) 300 at para 9 (Ont HCJ). See also *Liu Estate v Chan* (2004), 69 OR (3d) 756 at paras 18-28 (CA).

Although concerns over the tainting of jurors during the selection process is an important consideration on its own, a further complicating factor is that certain questions may be embarrassing to the juror such that they may be less inclined to be honest and forthcoming in front of a large and unknown audience.¹⁶⁰ This would particularly be the case if the person was called upon ‘to admit racial prejudice’.¹⁶¹ However, Cooper makes the argument for openness and collectivity:

In my view it is preferable that the entire panel observe the whole process. After two or three jurors have been challenged and questioned, the others called forward will know exactly what to expect and will realize that counsel is not singling them out as special examples. However some judges may require the balance of the panel to be outside the court-room during the challenge process. In that event, counsel should request that the judge instruct the jurors that they are all being selected according to a proper legal process and that no juror is being singled out for extraordinary treatment.¹⁶²

Traditionally in Canada the triers of the challenge for cause were ‘the two jurors who were last sworn or, if no jurors have been sworn, two persons present who are appointed by the court for the purpose’.¹⁶³ As each juror is selected to sit on the petit jury, a new trier is rotated into place and, as such, ‘[t]he case law uses the phrase “rotating triers” to describe this process for the selection of the triers.’¹⁶⁴ While the presiding trial judge had the common law or inherent discretionary power to exclude the unsworn panelists from observing the process, there remained a potential problem in that the sworn jurors would be present for the successive cause challenge questioning of each candidate and would be subjected to the answers that were provided, some of which could be volatile or otherwise inappropriate. The tainting of the sworn jurors by the answers of the prospective jurors was a concern.¹⁶⁵

In order to solve the potential tainting dilemma, the option to use consistent triers throughout the empanelment process was introduced.¹⁶⁶ This alternative process is explained as follows:

¹⁶⁰ John F DePue, ‘Recent Developments’ (1969) 15 Vill L Rev 214, 221.

¹⁶¹ *R v White*, [2009] OJ No 3348 at para 9 (SCJ).

¹⁶² Austin M Cooper, ‘The ABCs of Challenge for Cause in Jury Trials: To Challenge or Not to Challenge and What to Ask if You Get It’ (1995) 37 Crim LQ 62, 68.

¹⁶³ *Criminal Code* (n 5) s 640(2).

¹⁶⁴ *R v Sheridan*, 2015 ONCA 770 at para 25.

¹⁶⁵ *R v Grant*, 2016 ONCA 639 at para 21.

¹⁶⁶ See *Criminal Code* (n 5) ss 640(2.1) and (2.2).

In 2008, Parliament amended the jury selection provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, by adding a second method for deciding challenges for cause on the ground of partiality (S.C. 2008, c. 18, s.26). A trial judge may exclude all jurors, sworn and unsworn, from the courtroom during the challenge for cause proceedings to preserve the jury's impartiality. Two triers, appointed by the trial judge, then decide all of the challenges for cause. These two triers, called "static" triers, do not become part of the jury that decides the case. A trial judge can order the exclusion of all jurors from the courtroom and appoint static triers only on the application of the accused. Absent an application by the accused, challenges for cause on the ground of partiality are decided by the traditional method, by the use of rotating triers.¹⁶⁷

While the use of static triers will be more efficient as they need only be instructed once on their duties (as opposed to successively in the rotating method), the downside is that 'the process could be tainted by a single static juror who does not properly assess the partiality of prospective jurors'.¹⁶⁸ Thus, regardless of whether rotating or static methodology is employed, it is clear that the court is alive to the potential corruption of the overall process.

It is submitted that there is a direct correlation between the amount of information that is provided to a decision-maker and the accuracy of the decision being made. A tipping point from a correct to an unreliable decision may come where the sheer volume of evidence inundates the adjudicator and overwhelms human analytic processes. Conversely, a dearth of evidence can also produce suspect conclusions. Indeed, it is not unheard of for courts to require further evidence on a point before feeling comfortable in rendering a decision.¹⁶⁹ It is the potential evidentiary underfunding of the cause challenge hearing that is arguably most concerning. Calling upon triers to deliberate on the backdrop of limited information, often a one-word answer to a stock self-assessment question about partiality, is less than satisfactory. It is extremely unlikely that a professional judge would be willing or able to decide the challenge issue on such a Spartan record. The professional judge would expect more from counsel. Indeed, the instructions that are provided by the trial judge to the challenge triers belies the perfunctory hearing that is so often the case in Canada.

¹⁶⁷ *Grant* (n 165) para 12.

¹⁶⁸ *ibid* para 21. See also *Sheridan* (n 164) para 65.

¹⁶⁹ See for example *Criminal Code* (n 5) s 723(3) which states: 'The Court may, on its own motion, after hearing argument from the prosecutor and the offender, require the production of evidence that would assist it in determining the appropriate sentence.'

The *Hubbert* court promulgated the basic instructions that should be provided to the triers:

When two triers have been called and sworn, the trial judge should explain briefly to them what is happening and what their function is. He should tell them that they are to decide “whether the challenged juror is indifferent -- that is, is impartial -- between the Crown and the accused”, that they are to decide the question on the balance of probabilities, that the decision must be that of both of them, that they may retire to the jury-room or discuss it right where they are, that if they cannot agree within a reasonable time, they are to say so.¹⁷⁰

The failure to provide adequate instructions to the triers ‘can have a dramatic negative impact on the jury selection process’.¹⁷¹ While the instructions ‘need not be complicated’,¹⁷² Simmons JA of the Ontario Court of Appeal has recognized that perverse findings can occur: ‘I do not rule out the possibility that a finding that a particular prospective juror is either acceptable or unacceptable in the face of an answer indicating the contrary could, in some circumstances, suggest a lack of understanding of the challenge for cause procedure.’¹⁷³ Arguably, the misapprehension of instructions is less likely to occur on the backdrop of a fulsome evidentiary foundation. However, it is conceded that not understanding instructions is a different thing than failing to comprehend the evidence, despite the hand in glove relationship. Suffice it to say that even the best of instructions will not give triers the insight needed to resolve a partiality concern unless they are also furnished with sufficient facts upon which to ground their finding.¹⁷⁴ Without both the evidential and instructive components, the task of the triers is rendered unfair and may impact on the general support that trial by jury enjoys in Canada and elsewhere.¹⁷⁵ As MacCoun and Tyler suggest, ‘[i]t seems likely that people are evaluating the accuracy of verdicts indirectly by assuming that a procedure that involves a careful review of the evidence will lead to an accurate verdict.’¹⁷⁶

¹⁷⁰ *Hubbert* (n 6) para 39 (CA). See also *R v Hungwe*, 2018 ONCA 456 at para 61.

¹⁷¹ *R v Brown* (2005), 194 CCC (3d) 76 at para 31 (Ont CA).

¹⁷² *ibid* para 31.

¹⁷³ *ibid* para 41.

¹⁷⁴ For an example of a case where instructions to the triers were found to be lacking see *R v Moore-McFarlane* (2001), 56 OR (3d) 737 at paras 82-90 (CA).

¹⁷⁵ See generally Julian V Roberts and Mike Hough, *Public Opinion and the Jury: An International Literature Review* (Ministry of Justice Research Series 1/09, 2009).

¹⁷⁶ Robert J MacCoun and Tom R Tyler, ‘The Basis of Citizens’ Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency’ (1988) 12 *Law & Hum Behav* 333, 350.

4.3.3 Protecting the Potential Juror from Unfair Treatment during Cause Challenges

In free and democratic societies, the practical arm of the rule of law is exercised with the ability to compel the attendance at trial of potential jurors and witnesses alike. Treating all justice participants with respect is in keeping with the dignity of judicial proceedings. It is to be remembered that while considered a civic duty, potential jurors and witnesses have had their lives disrupted by the command of the court. As such, their involuntary participation should be accompanied by fair treatment. But it must be at the same time emphasized that justice requires those who are summoned be closely scrutinized by the adversarial process. After all, trials are far from ‘tea parties’.¹⁷⁷ Thus, it is submitted that the respect that is to be afforded to those that appear for jury duty should not be conflated to mean that they will only be subjected to superficial questioning on the topic of the challenge. Indeed, questions that have the potential to bring a degree of opprobrium to the juror are better asked before that person is selected by the litigants. Like in various areas of the law, front-end authorization is much preferred over back-end justification.¹⁷⁸ As has been noted, ‘[b]ecause the jury, once in deliberation, has virtually unguided discretion in reaching its decision, the people sent into the jury room must be those who are most likely to reach a fair result.’¹⁷⁹

There is no bright line that demarcates when the questioning of jurors is no longer truly about exposing partiality and has moved into private affairs which might allow for the selection of a favourable jury. As was explained over a century ago by the Supreme Court of Illinois, such decisions cannot be made with a view to predetermined search parameters:

The examination should, in all cases, be confined to a legitimate inquiry into the particular matter under investigation, and taking range enough only to put the court and counsel in possession of such material matters affecting the juror as will enable them to act intelligently in the selection of the jury. The nature and extent of the inquiry in each case is necessarily left to the

¹⁷⁷ *Ross v Lamport*, [1956] SCR 366 at para 20.

¹⁷⁸ See for example *R v Feeney*, [1987] 2 SCR 13 at para 49 where the court discusses the general need to first obtain a warrant authorizing an arrest in a dwelling house as opposed to making a warrantless arrest and then trying to justify the decision later at trial where the admissibility of important evidence may hang in the balance.

¹⁷⁹ Anon, ‘Developments in the Law - Race and the Criminal Process’ (1988) 101 Harv L Rev 1472, 1583.

sound judgment and judicial discretion of the presiding judge. What would be reasonable examination in one case would be manifestly unreasonable in another, and the trial court is therefore clothed with large discretion in controlling and limiting the examination, and may prevent its abuse.¹⁸⁰

While politeness can never be faulted, overly reserved inquiries may only scratch the surface of the issue and thus yield answers of miniscule value. Glover suggests that questions can be put in such a way that they are least offensive while still eliciting the necessary information.¹⁸¹ However, pointed questioning is often required to drill through layers of rejoining rhetoric since ‘there is a danger that veniremen with stereotypical notions will not articulate or even be fully aware of them’.¹⁸² Another option involves the use of questionnaires which may induce answers that are more fulsome because they lessen the need for open court disclosures.¹⁸³ However, the down-side to responding to a document is that it lacks the same element of confrontation that comes with face-to-face testimony.

There may be circumstances where juror anonymity is appropriate, typically in cases where there are concerns over jury tampering, including acts of bribery or intimidation.¹⁸⁴ However, such circumstances presumably will be rare and require a strong evidentiary basis for such an order to be issued.

Perhaps the most effective way of protecting the rights of potential jurors while still allowing for meaningful questioning is to order that the selection *voir dire* be conducted *in camera*. However, such orders come in direct conflict with the open-court doctrine and the need ‘that justice should not only be done, but should manifestly and undoubtedly be seen to be done’.¹⁸⁵ Certainly seeing is believing. Visual accountability comforts the citizenry and acts as an important check and balance. A trial is understood to be a public

¹⁸⁰ *Donovan v People*, 28 NE 964, 966 (Ill 1891).

¹⁸¹ Michael R Glover, ‘The Right to Privacy of Prospective Jurors During Voir Dire’ (1982) 70 Cal L Rev 708, 719.

¹⁸² Anon, ‘Voir Dire Limitations as a Means of Protecting Jurors’ Safety and Privacy: *United States v. Barnes*’ (1980) 93 Harv L Rev 782, 791.

¹⁸³ Glover (n 181) 719.

¹⁸⁴ See generally *United States v Thomas*, 757 F 2d 1359 (2d Cir 1985) and *United States v Ippolito*, 10 F Supp 2d 1305 (MD Fla 1998). See also *Criminal Code* (n 5) s 631(6) regarding judicial options for protecting the identity of a juror. Consider the rationale behind the Diplock Courts in Northern Ireland acting as a bulwark against jury nobbling in Laura K Donohue, ‘Terrorism and Trial by Jury: The Vices and Virtues of British and American Criminal Law’ (2007) 59 Stan L Rev 1321.

¹⁸⁵ *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 (KB) 259.

event and what transpires in the proceedings has been described as ‘public property’.¹⁸⁶ Openness has the power to allay the fears that are associated with private courses of action:

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.¹⁸⁷

Thus, all aspects of the criminal trial process are presumptively open to public scrutiny¹⁸⁸ and ‘[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to preserve that interest.’¹⁸⁹ Whether juror privacy concerns will eclipse the open court standard must fall to a case-by-case analysis and the legitimate needs of the individual jury candidates. No doubt this further layer of complexity may be impactful on courts when considering the degree of cause challenge questioning. As explained by Gawthrop J:

Their privacy rights - “to be let alone” - are not, of course, absolute. Their jury service does expose them to some searching inquiry as to such matters as their ability to be fair, their absence of preconceived, fixed opinions. But there must be some balance, some drawing the line, and when hard-charging counsel are in hot pursuit of every little empirical nugget they get their eyes on, it is the trial judge who must, *sua sponte*, reign them in and give the jurors some protection.¹⁹⁰

¹⁸⁶ *Cox Broadcasting Corp v Colin*, 420 US 469, 492 (1974), citing from *Craig v Harney*, 331 US 367, 374 (1947).

¹⁸⁷ *Press-Enterprise Co v Super Ct of Cal Riverside County*, 464 US 501, 508 (1984) (emphasis in original).

¹⁸⁸ *Criminal Code* (n 5) s 486(1) reads as follows:

Any proceedings against an accused shall be held in open court, but the presiding judge or justice may, on application of the prosecutor or a witness or on his or her own motion, order the exclusion of all or any members of the public from the court room for all or part of the proceedings, or order that the witness testify behind a screen, or other device that would allow the witness not to be seen by members of the public, if the judge or justice is of the opinion that such an order is in the interest of public morals, the maintenance of order or the proper administration of justice or is necessary to prevent injury to international relations or national defence or national security.

¹⁸⁹ *Press-Enterprise* (n 187) 510 (emphasis in original). See also generally David Weinstein, ‘Protecting a Juror’s Right to Privacy: Constitutional Constraints and Policy Options’ (1997) 70 Temp L Rev 1.

¹⁹⁰ *United States v McDade*, 929 F Supp 815, 817-818 (ED Pa 1996). See similar protectionist concerns in *R v Atkinson* (1995), 167 AR 191 at para 52 (QB).

4.4 Jury Inscrutability as an Added Factor When Considering the Challenge for Cause Option

In Canada, the law makes it exceedingly difficult, if not practically impossible to effectively investigate juror impropriety after a verdict has been rendered. That is because the deliberations of a jury are expected to remain forever secret. The rule is informed by ‘the proposition that the jury must deliberate in private free from outside influence’.¹⁹¹ Commonly known as ‘Lord Mansfield’s Rule’,¹⁹² named after the British judge who famously decided that he would not receive affidavits from jurymen who candidly admitted to having tossed a coin rather than properly deliberate on their verdict,¹⁹³ the principle prohibits the jury from impeaching its own decision. The need for jury secrecy has been distilled down to three policy-driven determinants:

1. The promotion of candour and the kind of full and frank debate that is essential to this type of collegial decision making;
2. The need to ensure finality of the verdict;
3. The need to protect jurors from harassment, censure and reprisals.¹⁹⁴

Despite the apparent soundness of the above-described reasons, the inviolability of the rule also bespeaks the realistic potential for miscarriages of justice. Indeed, an impenetrable deliberative process insulates both legitimate and corrupt jury dialogue. The lack of transparency is stark as the following observations underscore:

Jury decision-making is designed to be a black box: the inputs (evidence and argument) are carefully regulated by law and the output (the verdict) is publicly announced, but the inner workings and deliberation of the jury are deliberately insulated from subsequent review. Judges instruct the jury as to the law *but have no way of knowing whether the jurors follow those instructions*. Judges and lawyers speak to the jury about how to evaluate the evidence, but cannot tell how the jurors decide among conflicting testimony or facts. Juries are told to put aside their prejudices and preconceptions, but no one knows whether they do so. Juries provide no reasons, only verdicts.¹⁹⁵

¹⁹¹ *R v Pan; R v Sawyer*, 2001 SCC 42 at para 47.

¹⁹² *ibid* para 48. *Benally* (n 103) 1233.

¹⁹³ See *Vaise v Delaval* (1785) 1 TR 11. This case has been cited with approval in *McDonald v Pless*, 238 US 264, 268-69 (1915) and *Davis v Saumure*, [1956] SCR 403 at 406.

¹⁹⁴ *Pan* (n 191) paras 50-52.

¹⁹⁵ *Benally* (n 103) (emphasis added).

To protect against corrupting influences finding their way into the jury room while guilt or innocence is being determined, an exception to the absolute prohibition on post-verdict deliberation investigation exists. A common law exception concerns itself with situations where ‘extraneous influences’ infiltrate the jury room.¹⁹⁶ However, what is extrinsic and what is intrinsic can be unclear. Overlap is bound to occur. Indeed, even when jurors are allowed to testify by the court, their testimony is limited to ‘whether or not they were exposed to extrinsic information in the course of their deliberations [and] the court should not admit evidence as to what effect such information had on their deliberations’.¹⁹⁷ In the USA, the rule and its exception are entrenched in legislation:

1. *Prohibited Testimony or Other Evidence.* During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury’s deliberations; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processes concerning the verdict or indictment. The court may not receive a juror’s affidavit or evidence of a juror’s statement on these matters.
2. *Exceptions.* A juror may testify about whether:
 - (a) extraneous prejudicial information was improperly brought to the jury’s attention;
 - (b) an outside influence was improperly brought to bear on any juror; or
 - (c) a mistake was made in entering the verdict on the verdict form.¹⁹⁸

What is clear is that improper juror conduct and considerations are at times occurring at the most critical juncture of a criminal trial. While the House of Lords has emphasized that ‘the jury must be told of their right and duty both individually or collectively to inform the court clerk or the judge in writing if they believe that anything untoward or improper has come to their notice’,¹⁹⁹ by itself such an admonition may be too little, too late. As well, it may legitimately be asked whether the policing of jurors by jurors is a

¹⁹⁶ *Connor* (n 36) [103]-[107] where Lord Hope discusses cases where extrinsic evidence was proffered to show variously: that a juror did not understand English; that a juror may have known that the accused had previous convictions; and, that an Ouija board was in the jury room during deliberations.

¹⁹⁷ *Pan* (n 191) para 59.

¹⁹⁸ Fed R Evid 606(b).

¹⁹⁹ *Connor* (n 36) [148].

proper expectation of those empanelled, or rather an unnecessary distraction away from their ultimate, and already stressful, responsibility?²⁰⁰ Whatever may be the case, the argument that the deliberative process serves as a check and balance against any lingering partiality to which a juror may still be clinging provides limited reassurance.²⁰¹ The casual attitudes found in certain jurors may militate against expectations of proactivity in this regard.²⁰² Consequently, more should be done while the jury is being selected. Using extra time and resources at this stage would seem more cost effective than when the case is all but over. As Gutman suggests, '[u]nless the defence can examine juror bias on the voir dire, the trial may be a hollow gesture.'²⁰³

Before leaving this area of discussion it should be mentioned that in 2017 the Supreme Court of the United States in *Pena-Rodriguez v Colorado* ('*Pena-Rodriguez*') held that the no impeachment rule regarding jury verdicts was no longer paramount.²⁰⁴ It concluded that the prohibition must 'give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee' where the comments exhibit 'overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict'.²⁰⁵ Whether Canada (or England) ever moves away from the orthodoxy of Lord Mansfield's rule remains to be seen. Certainly there will be difficulty in compiling empirical data given the inability of jurors in those countries to speak about their deliberations.²⁰⁶ Thus, while the *Pena-Rodriguez* case has no precedential value outside the USA, it may have persuasive value as an example of why a more expansive challenge for cause platform should be built. Arguably the *Pena-Rodriguez* court surrendered to the realization that more needed to be done despite the expansive American jury selection procedures that are already in place. Canada, in turn, may wish to reconsider the value of a process that has colloquially been

²⁰⁰ The deliberative process ranks as a prominent source of stress. See generally Sonia R Chopra and James RP Ogloff, 'Evaluating Jury Secrecy: Implications for Academic Research and Juror Stress' (2000) 44 Crim LQ 190 and Noelle Robertson, Graham Davies and Alice Nettleingham, 'Vicarious Traumatization as a Consequence of Jury Service' (2009) 48 How J 1.

²⁰¹ See for example Cheryl Thomas, *Are Jurors Fair?* (Ministry of Justice Research Series 1/10, 2010) 19 where her study showed that the deliberative process rarely caused male jurors to change their views.

²⁰² Nancy J King, 'The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle' (1994) 31 Am Crim L Rev 1177, 1185-86.

²⁰³ Gutman (n 132) 312.

²⁰⁴ *Pena-Rodriguez* (n 54).

²⁰⁵ *ibid* 869.

²⁰⁶ See the text to n 52 – n 54.

described as involving ‘offensive Americanisms’.²⁰⁷ While the Supreme Court of Canada has stated that it has concerns that ‘the American system takes longer and intrudes more markedly into the privacy of prospective jurors’,²⁰⁸ perhaps a middle ground can be developed which takes the best from both jurisdictions.

4.4.1 Indigenous Justice Initiatives that can Support More Expansive Challenge for Cause Hearings

Sometimes intransigence to change is founded in a mentality that embraces tradition over progress. The comfort that comes with all things familiar is well understood. Yet occasionally change is prompted by needs external to the perceived efficiencies of an existing system. Initiatives to reduce the overrepresentation of IP in all aspects of the criminal justice system can therefore justify a reconsideration of how juries are selected in Canada. Given that the doctrine of judicial notice has now obviated the need to call evidence of pervasive racism against IP and the reasonable possibility that potential jurors would be partial as a result,²⁰⁹ the question remains as to whether more wide-ranging and personalized questioning at the *voir dire* stage will be countenanced by the courts? To obtain the necessary judicial support for an expanded jury selection process, it would be important to highlight the fact that generally there has been a jurisprudential shift applicable to the IP of Canada and their unique circumstances. This is the linchpin that would justify a change in approach.

In the seminal case of *Gladue*, the Supreme Court of Canada obliged all judges ‘to take judicial notice of the systemic or background factors and the approach to sentencing which is relevant to aboriginal offenders’.²¹⁰ The court further explained:

What is important to note is that the different conceptions of sentencing held by many aboriginal people share a common underlying principle: that is, the importance of community-based sanctions. Sentencing judges should not conclude that the absence of alternatives specific to an aboriginal community eliminates their ability to impose a sanction that takes into account principles of restorative justice and the needs of the parties

²⁰⁷ See *R v Challice* (1993), 26 CR (4th) 285 at para 11 (OCGD) where McIsaac J voices his disdain for certain American jury selection practices.

²⁰⁸ *Find* (n 36) para 27. See also *Williams* (n 23) paras 51-52.

²⁰⁹ *Williams* *ibid* paras 54-58.

²¹⁰ *Gladue* (n 110) para 83.

involved. Rather, the point is that one of the unique circumstances of aboriginal offenders is that community-based sanctions coincide with the original concept of sentencing and the needs of aboriginal people and communities.²¹¹

The spirit of the *Gladue* decision has now transcended the boundaries of its *ratio decidendi*. While the case *prima facie* dealt with the interpretation of s. 718.2(e) of the *Criminal Code*,²¹² and the creative ways that trial judges can fashion sentences for Indigenous offenders that might not involve imprisonment,²¹³ the far more important message would appear to be that the Canadian criminal justice system has failed to meet the needs of the original inhabitants of the country. Such failings ‘cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it’.²¹⁴ As noted by Rudin, ‘[o]ne of the live questions arising from the [*Gladue*] decision was the extent to which the decision could be extended to other areas involving the treatment of Aboriginal offenders by the justice system.’²¹⁵ Those words have proved prophetic as the special considerations afforded IP have now ‘repeatedly’ surfaced ‘outside the sentencing context’.²¹⁶ Indeed, it has been observed that the principles of *Gladue* are ‘clearly . . . overriding principles in the justice system from the time a person comes into the system to sentence’.²¹⁷ Consequently, there would not appear to be any reason why the questioning component of the cause challenge process could not be adjusted so that the goal of uncovering racial prejudice can be more easily achieved. This would be consonant with the *Gladue* message. In 2012 the Supreme Court of Canada in *R v Ipeelee* reminded lower courts of their obligations to apply the principles of *Gladue*, particularly given the ironic increase in incarceration rates for IP since *Gladue*’s release over a decade earlier.²¹⁸ This admonition could help support a reconsideration of the present state of challenges for cause.²¹⁹

²¹¹ *ibid* para 74.

²¹² *Criminal Code* (n 5) s 718.2(e). See the text to n 28 in ch 2 for the language of the section.

²¹³ *Gladue* (n 110) paras 29-51.

²¹⁴ *ibid* para 64.

²¹⁵ Jonathan Rudin, ‘Aboriginal Over-representation and R. v. Gladue: Where We Were, Where We Are and Where We Might Be Going’ (2008) 40 SCLR (2d) 688, 699.

²¹⁶ *R v Hope*, 2016 ONCA 648 at para 10. See also the text in n 216 in ch 3.

²¹⁷ *R v Bain*, [2004] OJ No 6147 at para 12 (SCJ). Similar sentiments can be found in Fergus J O’Connor, *Halsbury’s Laws of Canada: Penitentiaries, Jails and Prisoners* (LexisNexis 2014 Reissue) 230.

²¹⁸ *R v Ipeelee*, 2012 SCC 13 at paras 60-63, 80-87.

²¹⁹ As an example of the healthy post-*Gladue* debate that has been spawned by the plight of IP generally, see the comments regarding the fairness of affording special consideration status made by Stenning and Roberts in the text to n 29 in ch 2. Others have pointed out that colonialism, rather than similar social and economic disadvantage, distinguish the Indigenous experience. See the comments of Rudin and Roach in the text to n 34 in ch 2. As well, consider the further responses offered by Julian V Roberts and Philip

4.4.2 Judicial and Academic Commentary Suggesting that Change to the Cause Challenge Process is Overdue

Although challenge for cause case law continues to embrace conservatism, both judicial and academic commentary recognizes that there is room for improvement. As has been suggested earlier in this chapter, the blueprint for an expansive challenge for cause *voir dire* has existed at least since the time that *Hubbert* was decided in 1975.²²⁰ While the restrictive juridical approach appears to be largely founded in the dual concerns over juror privacy rights and hearing prolixity, it can also be argued that the prosecution, to some extent, has contributed to the present state of affairs. Had the state joined the defence more often in its challenge for cause efforts, perhaps the Bench would have been more inclined to grant the desired questions and questioning procedure.²²¹ An admirable example can be traced to the unreported murder case of *R v Lutzi* where 15 questions were asked of each prospective juror by defence counsel in a challenge for cause that appeared to be unopposed by the Crown.²²²

Whatever progress is being made is far from rapid.²²³ However, the courts are occasionally comfortable in announcing that ‘[t]he law with respect to challenge for cause questions is evolving.’²²⁴ They are also equally comfortable in reminding the readership of their judgments that judges have wide discretion in this area,²²⁵ as to almost encourage counsel to continue to push the envelope of acceptability when it comes to establishing new questioning parameters. As explained by Pomerance J in *R v Muvunga*:

The conduct of a challenge for cause falls within the broad discretion of the trial judge. In order for the law to evolve, trial judges must take a flexible

Stenning in, ‘The Sentencing of Aboriginal Offenders in Canada: A Rejoinder’ (2002) 66 Sask L Rev 75, 82-83.

²²⁰ *Hubbert* (n 6). See the text to n 31.

²²¹ Although counsel can never bind the hands of the court, consider as an example how persuasive the joint submissions of counsel are at sentencing hearings. See *R v Anthony-Cook*, 2016 SCC 43.

²²² The case of *R v Lutzi* is referenced in Neil Vidmar and Julius Melnitzer, ‘Juror Prejudice: An Empirical Study of Challenge for Cause’ (1984) 22 Osgoode Hall LJ 488 n 36, where the 15 questions are listed.

²²³ See Rakhi Ruparelia, ‘Erring on the Side of Ignorance: Challenges for Cause Twenty Years after *Parks*’ (2013) 92 Can Bar Rev 267, 269 where the author argues that:

... the progress we have made in examining the racial prejudices of prospective jurors has been negligible. While some individual judges have engaged in thoughtful and insightful analysis, the vast majority do not grapple with the insidiousness of racism in any meaningful way and preclude attempts to deepen the inquiry.

²²⁴ *R v McKenzie* (2001), 49 CR (5th) 123 at para 41 (Ont SCJ).

²²⁵ *ibid.*

and open-minded approach. It is difficult to root out racial prejudice, as it often has a conscious and non-conscious character. The courts must be vigilant to screen out insidious partiality that can flow from racial prejudice and stereotypes. While the *Parks* question has been used in Canadian courtrooms for many years, it may not be the only one or even the best way to uncover and assess racial bias. As stated by Sharpe, J.A. in *R. v. Gayle*, “Trial judges should avoid adopting a routine, mechanical or formulaic approach to this difficult and sensitive area”.²²⁶

The judicial inclination in a race-based challenge for cause has been to allow the asking of only a small number of questions, often just one.²²⁷ More often than not the question requires only a ‘yes’ or ‘no’ answer. Thus, if ‘the first objective of any voir dire is information’,²²⁸ then such a limited response would appear to defeat the purpose of the exercise. Indeed, it was observed by the court in *R v Valentine* that ‘a simple yes or no answer . . . and the degree of hesitation before answering provide a scant basis for the triers to assess racial bias’.²²⁹ In addition, if other members of the jury panel are not excluded during the cause challenge, the routine of the question may soon indoctrinate a common answer. Iannuzzi, albeit speaking of questioning during the trial proper, explains that:

. . . not telegraphing trial strategy by too systematic an approach is also true in regard to the individual cross-examination of a witness. Headlong and continuous inquiry along a particular line may permit the witness to anticipate your path and prepare harmful answers.²³⁰

The formalism that is associated with rigid-response answers has not been lost on various Canadian legal academics who have called for changes to how questions are put to prospective jurors.²³¹ As Tanovich explains:

. . . the utility of *Parks* and *Williams* has been limited by the failure of the Courts to permit a more sophisticated manner of questioning. Judging the impartiality of a prospective juror on his or her yes or no answer to a

²²⁶ *R v Muvunga*, 2013 ONSC 2770 at para 3.

²²⁷ See *R v Sinclair* (2009), 245 CCC (3d) 203 at para 59 (Ont SCJ) and *R v Bulatci*, 2009 NWTSC 63 at paras 26-27.

²²⁸ Kerper (n 141) 5.

²²⁹ *R v Valentine*, [2009] OJ No 5961 at para 11 (SCJ).

²³⁰ John Nicholas Iannuzzi, *Cross-Examination: The Mosaic Art* (Prentice-Hall 1982) 9.

²³¹ See for example: Kent Roach, ‘Challenges for Cause and Racial Discrimination’ (1995) 37 Crim LQ 410, 425-27; Neil Vidmar, ‘The Canadian Criminal Jury: Searching for a Middle Ground’ (1999) 62 Law & Contemp Probs 141, 162; and, Vanessa MacDonnell, ‘The Jury Vetting Cases: New Insights on Jury Trials in Criminal Cases?’ (2013) 63 SCLR (2d) 419, 436-37.

question which simply asks whether the juror believes that he or she can be impartial in a case with a Black or Aboriginal accused is not sufficient. It is time to relitigate this issue.²³²

In allowing only the basic *Parks* question to be asked in *R v Brooks*, Barnes J made a small, but significant concession:

The primary limitation of the *Parks* question is that the jurors may be unaware that they may provide other answers other than the standard “yes” or “no”. Therefore, jurors in this case shall be asked the standard *Parks* question but they shall also be instructed that they must answer the question honestly. They may provide as much detail as they see fit.²³³

While an inroad of sorts, the ruling of Barnes J leaves what will be forthcoming in the answer entirely with the potential juror. However, as advocacy techniques go, cross-examination has no equal.²³⁴ Indeed, it has been described as ‘a better security than the oath’.²³⁵ As explained by Wellman:

If all witnesses had the honesty and intelligence to come forward and scrupulously follow the letter as well as the spirit of the oath, “to tell the truth, the whole truth, and nothing but the truth,” and if all advocates on either side had the necessary experience, combined with honesty and intelligence, and were similarly sworn to *develop* the truth and nothing but the truth, of course there would be no occasion for cross-examination, and the occupation of the cross-examiner would be gone. But as yet no substitute has ever been found for cross-examination as a means of separating truth from falsehood, and of reducing exaggerated statements to their true dimensions.²³⁶

At times Canadian courts have shown a willingness to permit multiple-choice questions to be asked to allow for a wider range of answers to a predetermined racial bias question.²³⁷ Even the use of a questionnaire has occasionally been granted.²³⁸ But the use of spontaneous, free-flowing and unscripted questions continues to be a contentious

²³² David M Tanovich, ‘The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System’ (2008) 40 SCLR (2d) 655, 683.

²³³ *R v Brooks*, 2015 ONSC 6299 at para 33.

²³⁴ John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, vol 5 (3rd edn, Little, Brown and Company 1940) 29, para 1367.

²³⁵ Edward W Cox, *The Advocate: his training, practice, rights and duties*, vol 1 (J Crockford 1852) 428.

²³⁶ Francis L Wellman, *The Art of Cross-Examination* (4th edn, Collier Books 1936) 27 (emphasis in original).

²³⁷ *Douse* (n 38) para 281 and *Valentine* (n 229) para 11.

²³⁸ *R v Riley* (2009), 247 CCC (3d) 517 at para 22 (Ont SCJ).

point. It remains to be seen if judges will allow the full deployment of advocacy skills during jury selection. Nevertheless, it is difficult to argue against the general proposition that insight is better achieved when detailed and personalized answers are secured.

4.5 Conclusion

This chapter assessed the utility of the cause challenge as the primary mechanism for securing jury impartiality where racial prejudice may influence a verdict. Racial prejudice in Canada has permeated all quarters of life, including the criminal justice system and the potential jurors who are summoned by the court to act as triers of fact. With the guilt or innocence of the subject resting largely on their collective wisdom, experience and beliefs, the potential for partiality-driven outcomes remains a real possibility. The examples referenced throughout this chapter make that point clear.

The present challenge for cause system in Canada is praiseworthy for its simplicity, efficiency and overall respectful nature. However, it is wanting more fundamentally in that its questioning scheme is less likely to expose those potential jurors who are unable or unwilling to achieve a state of indifference. The limited ability of the present procedure to achieve the intended result, an impartial jury, is capable of being improved.

The old guard notion of insulating jury panelists from any meaningful scrutiny cannot be allowed to continue in the face of increasing concerns over the effectiveness of the present interdiction method being employed to expose the intractably biased.²³⁹ More searching and unscripted questions emanating from counsel, under the watchful eye of the court, must be incorporated into the cause challenge regime in order to produce more data for the consideration of the triers. If necessary, mock jury selection studies could easily be arranged in Canada to emphasize the point that greater questioning has the potential to produce a greater yield of partiality-relevant information. Indeed, this point was empirically established in the USA over a quarter of a century ago.²⁴⁰ While abuses by lawyers who question on irrelevant matters will no doubt sometimes occur, those

²³⁹ Consider *Pena-Rodriguez* (n 54) and *Dowholis* (n 57) as examples of cases where significantly biased jurors made their way onto juries which illustrates the need to improve partiality detection methods.

²⁴⁰ See for example Gary Moran, Brian L Cutler and Elizabeth F Loftus, 'Jury selection in major controlled substance trials: The need for extended voir dire' (1990) 3 *Foren R* 331.

incidents can be quickly addressed with the aid of judicial admonishment which should have a general salutary effect on counsel for the remainder of the *voir dire*.

Further controls can be levied with the imposition of time limits on questioning. While ‘stop watch’ advocacy is likely antithetical to a meaningful justice experience for the litigants, quantifying beforehand and then clearly advising counsel of the interrogative period that they will be afforded should help streamline the overall selection process. Indeed, even the Supreme Court of Canada has time restrictions placed on the oral argument it hears.²⁴¹

In order to make the best use of time in court, there is also value in utilizing questionnaires beforehand when the panelists first gather for jury duty. While the questions should be vetted by the presiding judge in advance, it is submitted that the information that would flow from such documents could only help to focus lawyers as they turn their minds to the questions that they plan to ask later while challenging for cause. Although out-of-court disclosures may lack the value of evidence born of confrontation and may also lack truthfulness, they compensate for these shortcomings by giving counsel and client an earlier (and closer) look at the panelists in a cost-neutral way that equally benefits both impecunious and wealthy litigants.

A brief comment is warranted as to why it is proposed that counsel, as opposed to the court, should engage in questioning jury candidates. While having a judge put the questions to those on the jury panel would serve to insulate counsel from certain unpleasant reactions that might otherwise come their way, it must be remembered that the selection process remains the singular right of the litigants in Canadian cause challenges. Thus, while it is attractive to further legitimize the questioning exercise by having a judicial officer query the potential jurors, to do so would perpetuate a false premise (ie. that juror selection is the province of the court). Having judges put the questions also encroaches on the traditional territory of the advocates. Indeed, the skill set of the court lies in its sagacity rather than in its lawyerly talents. Consequently, the

²⁴¹ See the *Supreme Court Act*, RSC 1985, c S-26, s 97 (1) which allows the court to make rules. Rule 71 (5)(a) generally restricts the oral argument of counsel to one hour in total. However, it should be noted that by the time a matter reaches Canada’s highest court, save for fresh evidence applications, an evidentiary record has already been fully developed.

preferred approach must remain the orthodox one, with the court keeping its distance from the fray.

Further studies may also wish to reconsider the use of triers in determining cause challenges. Although not the main thrust of the research in this chapter, if Parliament were to leave challenge for cause decisions to the trial judge, there is an argument to be made that the court would require that a greater field of evidence be generated before it decided partiality issues. An informed decision, after all, requires that more pertinent information be provided than what flows from a binary answer to a stock question. However, this paucity of evidence issue remains equally concerning for the present triers model. Additionally, the need to repeat the adjudicative instructions to successive triers, as is the case when the rotating approach is in place, would be obviated. This would certainly save some time which could be otherwise apportioned to the actual questioning period. Furthermore, as is the case with static triers, a consistency of decisional approach would be assured with one judge turning his or her mind to assessing the responses to each cause challenge.

Striving for impartial juries must be pursued regardless of whether the standard can ever be consistently met. Indeed, given the general inscrutability of the jury in Canada, whether impartiality is ever truly achieved remains unknowable. The present metric of the cause challenge system will continue to be based on how many prospective jurors are found to be partial by the triers and how many biased jury deliberations later come to the attention of the courts. It is not unreasonable to conclude that due to the impotency of the present jury selection process, unacceptably biased juror candidates will continue to make their way onto juries. Whatever their number, that number can be reduced. As well, by revamping the process an important message would be sent to the greater public and, particularly those of Indigenous heritage, that formalistic principles will no longer be an acceptable substitute for a more penetrating jury selection procedure.

CHAPTER 5

IS THE ‘PEREMPTORY CHALLENGE’ OPTION NEUTRAL IN ITS APPLICATION OR POTENTIALLY DISCRIMINATORY AGAINST INDIGENOUS PEOPLES?

We are critical of a system that permits Aboriginal people to be so often and so easily excluded from sitting on a jury. Both the Crown and defence counsel have too many opportunities, through the use of peremptory challenges . . . to make decisions on the basis of racist and sexist stereotypes.¹

5.1 Introduction

Matters ‘peremptory’, as the term suggests, are not vulnerable to ‘contradiction or denial’.² For all practical purposes they are deemed to be indisputable. However, save for perhaps the presumption of innocence,³ most criminal law principles are open for debate in the adversarial arena. This is for good reason since incontrovertible stances tend to militate against accountability and can contribute to unjust consequences. This chapter will explore the utility and potential dangers associated with the peremptory challenge of prospective jurors.

Section 5.2 examines the concept of random selection as the foundation upon which a jury is built and its relationship to an actual selection process that tends to detract from that general notion. Within the discussion certain presumptions that are associated with juries are explored with a view to understanding why, despite expectations of impartiality, legislation has been crafted to allow for challenges to the candidacy of any person called upon for jury duty. The opportunity to remove potential jurors peremptorily is explored, both as a statutorily created option and also as a more fundamental right.

¹ Manitoba, Report of the Aboriginal Justice Inquiry of Manitoba, *The Justice System and Aboriginal People - The Aboriginal Justice Implementation Commission* (1999) vol 1, ch 9, 7 <<http://www.agic.mb.ca/volume1/chapter9.html>> (*‘Implementation Commission’*) accessed 6 May 2014.

² John A Simpson and Edmund SC Weiner (eds), *The Oxford English Dictionary*, vol XI, (2nd edn, Oxford University Press, 1989) *sub verbo* ‘Peremptory’.

³ See s 11(d) of the *Canadian Charter of Rights and Freedoms*, being Part 1 of the *Constitution Act, 1982*, enacted by the *Canada Act, 1982* (UK) c 11 (*‘Charter’*). Section 11(d) reads: ‘Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.’ See also *Phillips v Nova Scotia (Commission of Inquiry in the Westray Mine Tragedy)*, [1995] 2 SCR 97 at para 104 where the court stated that ‘[t]he right to be presumed innocent is the single most important principle in our system of criminal justice.’

Section 5.3 embarks upon a detailed analysis of the main arguments for and against the peremptory challenge as a vehicle to assist in the creation of a fair and impartial jury. Particular emphasis is focused on issues pertaining to individual juror privacy including vetting practices and the realities of life lived in the shadow of the World Wide Web. The special responsibilities of the prosecution are discussed in the context of trial conduct and in relation to the unique obligations that the Crown must respect when it deals with IP. Similarly, the potential for divided loyalties are examined by considering the officer-of-the-court role, being a member of a self-governing profession and acting in the best interests of a client.

Section 5.4 explores the peremptory challenge experience in England, the USA and Canada. Whether any insights can be gleaned from the jurisprudence generated by the three countries is considered on the backdrop of the contemporary concerns of Canadian society. In particular, the realities of racism, sexism and generalized stereotypical thinking are recognized when reflecting on whether the peremptory challenge continues to have utility despite its latent potential for abuse.

5.2 How Representativeness is Theoretically Achieved through Random Selection

It has been recognized that a jury that represents the demographics and values of the community from which it is drawn helps to guarantee impartiality.⁴ The collective wisdom of the group, with its varied life experiences, brings to the deliberative process nuanced perspectives that no single individual can possibly possess. Indeed, judges and academic commentators agree that as a result of its hoped-for representative character, the jury acts as the conscience of the community.⁵

There are typically three stages involved in the seating of a jury, two being out-of-court and the final being the in-court selection stage. The former stages can be impacted by both provincial jury legislation and the conduct of state officials tasked with arranging for the attendance of citizens at the courthouse for jury duty. The latter stage, which is

⁴ *R v Williams*, [1998] 1 SCR 1128 at para 46 and *R v Kokopenace*, 2015 SCC 28 at para 50.

⁵ *R v Sherratt*, [1991] SCR 509 at para 30. See also David M Tanovich, David M Paciocco and Steven Skurka, *Jury Selection in Criminal Trials: Skills, Science, and the Law* (Irwin Law 1997) 2.

the focus of this chapter, can be impacted by the lawyers who are responsible for selecting the individual jurors who will sit in judgment of the accused person.⁶

It is obvious that the more human involvement there is in the selection process the less random will be the result. Even when intervention is kept to an absolute minimum, there is no guarantee that representativeness, however defined, will be achieved. Thus, seeking representativeness through fair processes is seen as being more important, and certainly more attainable, than achieving actual representativeness. As the Supreme Court of Canada explains:

Representativeness is an important feature of the jury; however, its meaning is circumscribed. What is required is a representative cross-section of society, honestly and fairly chosen. There is no right to a jury roll of a particular composition, nor to one that proportionately represents all diverse groups in Canadian society. Courts have consistently rejected the idea that an accused is entitled to a particular number of individuals of his or her race on either the jury roll or petit jury. What is required is a process that provides a platform for the selection of a competent and impartial petit jury, ensures confidence in the jury's verdict, and contributes to the community's support for the criminal justice system.⁷

In essence, chance is seen as the great leveler regardless of the final verdict that is rendered. However, with haphazardness comes the possibility of an unfair result. Random selection could seat an entirely unrepresentative jury, such as an all-white jury trying an Indigenous person or an all-male jury trying a female. Permutations on such themes are numerous. The issue is not the ability of such groups to be objective. Rather, the homogeneity of such groups detracts from certain lived experiences that only come with race or gender or some other distinctive association.

The notion of communal representation on juries, while practically unachievable in any diffuse way, is still of aspirational importance and attainable on a micro level. Thus, in order to achieve a measure of diversity on the petit jury, the fruits of random selection are tempered by the challenge system. The normative focus of the seating process serves

⁶ See the text in n 86 in ch 3 regarding *Kokopenace* for a description of the three-stage process. Note that in *Kokopenace* (n 4) the court explains at para 9 that '[i]n Ontario, the first two stages are governed by the *Juries Act* and the third stage is governed by the *Criminal Code*'.

⁷ *ibid* para 39 (citations and quotation marks omitted). See also *R v Brown* (2006), 215 CCC (3d) 330 at para 22 (Ont CA), where the court dismissed true representation as being the empanelment goal for a petit jury given the 'almost infinite number of characteristics that one might consider'.

two at times overlapping, but equally important purposes: to increase the likelihood of coming to reliable and accurate verdicts; and, to maintain societal beliefs in the equity of peer adjudication.

Group deliberation has been recognized to be less likely driven by the prejudices that are at times seen in trial-hardened prosecutors and judges.⁸ Indeed, ‘a jury drawn from a fair cross-section [of society] is better suited to fulfill the jury’s function of serving as a democratic check on government functionaries who run the criminal justice system’.⁹ The multifarious views of jurors are seen as ‘the genius of the jury system . . . [which] makes jury verdicts a reflection of the shared values of the community’.¹⁰ It has also been recognized that background diversity makes for efficient fact finders and less extreme outcomes.¹¹

Without public support the legitimacy of trial by jury would be impossible to maintain. Legitimacy is tied to notions of fairness. As such, ‘people are more willing to accept decisions . . . when they perceive those decisions as having been produced by fair procedures’.¹² For the public, visual homogeneity within the ranks of the selected jury will detract from an acceptance of the ultimate verdict that is rendered because the process is seen as an exclusionary one.¹³ Should diversity be seen to be lacking, for example due to an absence of racial minority representation, ‘societal mistrust of the system’¹⁴ can develop. Thus, inclusivity equates to fairness which, in turn, engenders trust. Without diversity, society loses ‘a set of filters from the fact-finding process, which interferes with the legal system’s search for the truth’.¹⁵

⁸ See Toni M Massaro, ‘Peremptories or peers? Rethinking Sixth Amendment doctrine, images and procedure’ (1986) 64 NCL Rev 501, 511, 515 and Hiroshi Fukurai, ‘The Representative Jury Requirement: Jury Representativeness and Cross Sectional Participation from the Beginning to the End of the Jury Selection Process’ (1999) 23 Int’l J Comp & App Crim Just 55, 84.

⁹ *ibid* Fukurai. See also generally *Duncan v Louisiana*, 391 US 145 (1968) and *Taylor v Louisiana*, 419 US 522 (1975).

¹⁰ *R v Parks* (1993), 15 OR (3d) 324 at para 36 (CA).

¹¹ Edward S Adams and Christian J Lane, ‘Constructing a Jury that is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection’ (1998) 73 NYU L Rev 703, 743 citing Richard Posner, *Economic Analysis of the Law* (4th edn, Little, Brown and Company 1992) 583.

¹² Leslie Ellis and Shari Seidman Diamond, ‘Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy’ (2003) 78 Chi-Kent L Rev 1033, 1040.

¹³ *ibid* 1049.

¹⁴ Adams and Lane (n 11) 709.

¹⁵ *ibid*.

The peremptory challenge has the potential to correct a skewed representation of society. Depending on the statutory allotment, peremptory challenges can be deployed to make slight or significant adjustments to what chance has otherwise orchestrated. In Canada, the *Criminal Code* presently provides all parties with an equal number of peremptory challenges depending on the severity of the potential punishment that, upon conviction, can be meted out based on the charge or charges that are before the court.¹⁶ Section 634(2) states:

634(2) Subject to subsections (2.1) to (4), the prosecutor and the accused are each entitled to

- (a) twenty peremptory challenges, where the accused is charged with high treason or first degree murder;
- (b) twelve peremptory challenges, where the accused is charged with an offence, other than an offence mentioned in paragraph (a), for which the accused may be sentenced to imprisonment for a term exceeding five years; or
- (c) four peremptory challenges, where the accused is charged with an offence that is not referred to in paragraph (a) or (b).¹⁷

In addition to the visual associations that are typically linked to representativeness, there remains the concern that the jury panel has within its midst one or more intractably biased candidates waiting for an opportunity to sit on the jury proper. As was discussed in chapter 4, there are limitations to the challenge for cause process as it is presently constituted in Canada that detract from its effectiveness. Without a degree of intrusive questioning, there is a danger that prospective jurors who are partial will not be exposed which, in turn, leaves only the peremptory challenge as the final gatekeeper before empanelment is complete.

It stands to reason, as Blackstone emphasized, that an accused person ‘should have a good opinion of his jury’.¹⁸ Indeed, if the alleged offender is empowered by law to have a hand

¹⁶ *Criminal Code*, RSC 1985, c C-46, s 634(2).

¹⁷ *ibid.* Note that ss (2.1) - (4) deal with adjusting the number of peremptory challenges if the size of the petit jury is increased, if alternate jurors are ordered, where jurors are discharged or when two or more accused are tried together.

¹⁸ 4 Bl Comm 347.

in selecting those who will adjudicate guilt or innocence, then he or she will arguably be more likely to accept the verdict when it is rendered, or so the logic goes.¹⁹ Perhaps more importantly, the peremptory challenge allows for the removal of ‘those individuals whom the lawyer suspects of being biased against the defendant where there is not the overt manifestation of bias’.²⁰ As Babcock remarked, in advocating for the continued use of peremptory challenges in ferreting out those persons perceived to be unsuitable for jury service, ‘we have evolved in the peremptory challenge a system that allows the covert expression of what we dare not say, but know is true more times than not’.²¹ The comment, while pointing out that mere hunches are often significant drivers of decision-making, also underscores that there remains the potential for abuse. Indeed, the abstraction that is associated with suspicion is also closely related to the ‘opportunity to discriminate’.²²

The peremptory challenge, despite best intentions, is a largely subjective exercise. Whether born of thoughtful consideration, whimsy or stereotyping, the striking of potential jurors in such a fashion tends to pit possessed bias against perceived bias. Certainly the eye of the beholder has the capacity to perpetuate an atmosphere of bias. Such is the nature of the practice. Arguably, the general character of the adversarial process militates against benign approaches to dispute resolution. Nevertheless, despite the obvious flaws in the procedure, many lawyers remain convinced that active participation in jury selection has tremendous strategic value.²³ As will be discussed later in this chapter, it is open to debate whether stratagem beyond the goal of ousting partisanship should be countenanced by the courts. Suffice it to say at this juncture that

¹⁹ See James J Gobert, ‘The peremptory challenge - an obituary’ [1989] Crim LR 528, 529 where the author alludes to a concern by some that should the defendant not be permitted peremptory challenges, ‘[h]e would be more likely to enter prison focusing on the injustice of the legal system than the injustice of his crime and less likely to be amenable to rehabilitation.’

²⁰ *ibid.*

²¹ Barbara Allen Babcock, ‘Voor Dire: Preserving Its Wonderful Power’ (1975) 27 Stan L Rev 545, 554.

²² Brian J Serr and Mark Maney, ‘Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance’ (1988) 79 J Crim L & Criminology 1, 8.

²³ See for example Janeen Kerper, ‘The Art and Ethics of Jury Selection’ (2000) 24 Am J Trial Advoc 1, 3 where the author points out that ‘[i]ndeed, many skilled trial attorneys maintain that trials can be won or lost during the jury selection process.’ See also *Pointer v United States*, 151 US 396, 408 (1894) where the court emphasized that ‘[t]he right to challenge a given number of jurors without showing cause is one of the most important rights secured to the accused.’ For the contrary position see Judith Heinz, ‘Peremptory Challenges in Criminal Cases: A Comparison of Regulation in the United States, England and Canada’ (1993) 16 Loy LA Int’l & Comp LJ 201, 224 and Amy Wilson, ‘The End of Peremptory Challenges: A Call for Change Through Comparative Analysis’ (2009) 32 Hastings Int’l & Comp L Rev 363, 372-73.

although the law only entitles an accused person to be tried by an ‘impartial jury’,²⁴ it is largely believed that the real goal of counsel and client when selecting a jury is to empanel a ‘favourable jury’.²⁵ Indeed, in the minds of some there is little question that ‘discrimination in selecting jurors has been practiced systematically for decades, with the knowledge and acquiescence of the courts’.²⁶

By fashioning a prophylactic regime of challenges, Parliament has essentially conceded that there are those in society who cannot be trusted ‘to render a verdict based only on the evidence and an application of the law as provided by the trial judge’.²⁷ Thus, while merely a creature of statute,²⁸ the peremptory challenge serves to protect the constitutional imperative of impartiality.

It is important to remember that bias in and of itself is not necessarily problematic. Leanings and inclinations are part of the human condition and are to be expected. Indeed, important issues are generally not decided by cloistered ciphers. Rather, the diffused experiences of life are drawn upon to resolve all manner of concerns. As explained by Doherty JA, partiality is unacceptable only when it overrides objective analysis:

Partiality has both an attitudinal and behavioural component. It refers to one who has certain preconceived biases, and who will allow those biases to affect his or her verdict despite the trial safeguards designed to prevent reliance on those biases. A partial juror is one who is biased and who will discriminate against one of the parties to the litigation based on that bias.²⁹

The difference between having biases, which we all do, and acting on them with unshaking partiality as a trier of fact, is easily enough understood. However, the question

²⁴ See generally *R v Barrow*, [1987] 2 SCR 694. Specifically, in Canada, an impartial tribunal is constitutionally guaranteed. See *Charter* (n 3) s 11(d).

²⁵ Babcock (n 21) 551 where the author explains ‘[o]f course, neither litigant is trying to choose “impartial” jurors, but rather to eliminate those who are sympathetic to the other side, hopefully leaving only those biased *for* him’ (emphasis in original). See also the text to n 154 – n 155 in ch 4.

²⁶ Wilson (n 23) 371. See also Morris B Hoffman, ‘Peremptory Challenges Should be Abolished: A Trial Judge’s Perspective’ (1997) 64 U Chi L Rev 809, 863 where the author remarks, ‘[t]he proposition that lawyers in the exercise of their peremptory challenges, are permitted to act and indeed are often acting on their most base, bigoted, stereotyped, and irrational hunches screams out to everyone present during voir dire.’

²⁷ *R v Parks* (1993), 15 OR (3d) 324 at para 36 (CA). See also the partiality discussion in *Wainright v Witt*, 469 US 412, 423 (1985).

²⁸ See *Stilson v United States*, 250 US 583, 586 (1919) and *Edmonson v Leesville*, 500 US 614, 620-21 (1991).

²⁹ *Parks* (n 27) para 35 (footnote omitted).

remains whether the best-intentioned individual can exercise the necessary controls on a complex conscious level, let alone unconsciously. McLachlin J, as she then was, spoke to this issue in an extra-judicial address:

I am not suggesting that people consciously decide to apply inappropriate racial stereotypes on the ground that they provide easier solutions than rational decision-making. The matter is more complicated, less express than that. In fact, the racial or sexual stereotypes are there, in our minds, bred by social conditioning and encouraged by popular culture and the media. Sometimes they are embedded in our institutions. We tend to accept them as truths. When faced by a problem, we automatically apply them because it is natural and easy -- much easier than really examining the problem and coming to a rational conclusion by the processes of thought and listening and evaluation.³⁰

It has been suggested that ‘in a heterogeneous society, no person is truly impartial, unbiased, or unprejudiced’.³¹ Thus, what is hoped for, often expected, is that the strength and logic of the group will prevail in returning equilibrium to its adjudicative task.³²

5.3 The Main Arguments for and Against the Peremptory Challenge

Although many of the arguments that are regularly marshalled for either the continued use of the peremptory challenge or for its abolition appear to be mirror images of each other, with only the philosophical emphasis being different, what is clear is that perceptions play a pivotal part in the exercise. One could argue that at no other juncture in the criminal trial process is the fairness of the justice system more on display than when the jury is being compiled. It is during these critical moments that the foundation of the justice edifice, the fact-finding body, is constructed. It is upon this foundation that the quality of justice will be measured. Optics are all important,³³ and how a jury is

³⁰ Beverly McLachlin, ‘Stereotypes: Their Uses and Misuses’ (Address to the McGill University Faculty of Law Human Rights Forum, November 25, 1992) 11.

³¹ Hiroshi Fukurai and Richard Krooth, *Race in the Jury Box: Affirmative Action in Jury Selection* (State University of New York Press 2003) 129.

³² *ibid* 128. Consider also the findings of Cheryl Thomas (with Nigel Balmer) regarding the significance of the deliberative process as tending to increase juror confidence in the verdict for which they voted in *Diversity and Fairness in the Jury System* (Ministry of Justice Research Series 2/07, June 2007) 169-72. See also generally Cheryl Thomas, *Are Juries Fair?* (Ministry of Justice Research Series 1/10, February 2010).

³³ See *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 (KB) 259. See also *R v Biddle*, [1995] 1 SCR 761 at para 50 where Gonthier J spoke of the importance of ‘the perception of the reasonable observer as to the quality of the jury’.

assembled becomes a significant vista for all the observing justice stakeholders. This is perhaps why some believe that jury selection is the trial,³⁴ not so much because the empanelment outcome can foretell the verdict (although some believe it can), but rather because the process will be a testament to whether a just decision will result.

The core principle of jury impartiality remains a fundamental concern to the administration of justice and any added measures that can further assist in achieving this goal are of value. Those in favour of peremptory challenges see them as an added safeguard to augment the range of protective jury selection processes that are built into the system.³⁵ Where the other measures fail to root out partiality, particularly via challenge for cause which is specifically designed to address the problem,³⁶ having the ability to strike a juror who still may harbour partisan leanings is an important option. However, those against the use of peremptories point out that lawyers are often inaccurate assessors of partisanship, despite their experience.³⁷ Of much greater concern are lawyers and clients whose motives are illegitimate and who are acting in a manner inconsistent with seeking a neutral jury. Classically, the concern is that peremptory powers are used to attempt to assemble a favourable jury in order to undermine what is expected of the archetypal jury.³⁸

Proponents of the peremptory challenge also see it as a quick and effective mechanism to help maintain diversity and cross-sectional societal representation. While comprehensive representation is beyond practical reach, peremptory challenges can be effectively deployed with a view to achieving racial and gender presence on the petit jury to a degree that is somewhat consistent with the characteristics possessed by the parties.³⁹ However, opponents are quick to rejoin that peremptory challenges can just as easily be

³⁴ Kerper (n 23) 3.

³⁵ See the text to n 38 in ch 4 for a list of the built-in safeguards.

³⁶ Challenges for cause may not be effective given their limitations. See the discussion in the text to n 127 – n 176 in ch 4.

³⁷ See Roger Allan Ford, 'Modeling the Effects of Peremptory Challenges on Jury Selection and Jury Verdicts' (2010) 17 Geo Mason L Rev 377, 387-90.

³⁸ Consider the remarks of Raymond J Broderick in, 'Why the Peremptory Challenge Should Be Abolished' (1992) 65 Temple L Rev 369, 411:

The question is not whether socioeconomic status, race, education, religion, vocation, age, and other associations affect, as a factual matter, one's view of the case. Nor is it whether a given venire contains persons clinging to secret biases or unconscious prejudices. Rather, the issue is whether attorneys or their clients with imperfect knowledge and in spite of their own prejudices, should have the prerogative of using peremptory challenges to deny persons the constitutional right to be jurors in order to accomplish their objective of obtaining, not an impartial jury, but a jury which would be partial.

³⁹ Queensland Law Reform Commission, *A Review of Jury Selection* (Report No 68, February 2011) 313.

utilized for nefarious reasons, those being to discriminate against a certain race or gender as a result of stereotypical thinking. By selecting jurors with the intention to achieve or maintain the underrepresentation of certain minority groups, the legitimacy of the criminal justice system as an inclusive body is undermined.⁴⁰ This is due to the fact that diversity ‘infuses the judicial system with community values and thereby legitimates the system in the eyes of the community’.⁴¹

5.3.1 Jury Duty: Opportunities and Obligations

While the reasons for defendant participation in jury selection remain understandable despite the tension it necessarily causes with the concepts of random selection and representativeness, it must be remembered that a criminal trial is not entirely an accused-centric affair. Of the many other justice stakeholders that are impacted by the prosecution of criminal allegations, arguably the jury is the most pivotal of the interest groups because it must determine guilt or innocence.⁴² Its assessment of the credibility and reliability of witnesses and the other trial evidence, as well as its application of the law including the doctrine of reasonable doubt,⁴³ will be dispositive of the accused person’s fate. As such, it is only fair to consider the use of peremptory challenges through a second lens, that being the view of the potential juror.

Is there a right to serve on a jury in a free and democratic society? It is perhaps better to describe it as an opportunity based on certain state-determined qualities of which the individual candidate must, or must not, be possessed. For example, in the province of Ontario, a person becomes eligible to be selected to serve on a jury if:

- The person resides in the province;
- The person is a Canadian citizen;

⁴⁰ Anon, ‘Developments in the Law: Race and the Criminal Process’ (1988) 101 Harv L Rev 1472, 1559-61.

⁴¹ *ibid* 1561.

⁴² For a discussion of the importance of trial by jury see *R v Bryant* (1984), 48 OR (2d) 732 at paras 16-40 (CA).

⁴³ For a definition of ‘proof beyond a reasonable doubt’ and how the concept should be explained to juries see *R v Lifchus*, [1997] 3 SCR 320 at paras 23-40.

- The person has attained 18 years of age in the year prior to jury selection;
- The person is not of an ineligible class due to his or her profession, appointment or elected political office;
- The person does not have an interest in the proceeding as a party or a witness;
- The person has not attended for jury duty within three years of the year of the present attendance;
- The person has no physical or mental disability that would seriously impair his or her ability to discharge the duties of a juror; and,
- The juror has not been convicted of an unpardoned offence that could have been prosecuted by indictment.⁴⁴

Whether an individual is described as ineligible, exempt, excused or otherwise disqualified, it is clear that barring a constitutional challenge to the legislation itself,⁴⁵ provincial statutes largely govern who will obtain the necessary candidacy.⁴⁶ As explained by Tanovich, Paciocco and Skurka:

Since the process of selecting the panel of prospective jurors is seen to be largely administrative, and since the criteria for eligibility are considered to be unconnected to the criminal case to be tried, the definition and application of provincial criteria for juror eligibility and exemption are not

⁴⁴ See *Juries Act*, RSO 1990, c J3, ss 2-4. The sections also detail the specific professions in question that fall within the spectrum of ineligibility.

⁴⁵ In *R v Church of Scientology of Toronto* (1997), 33 OR (3d) 65 (CA) the court dismissed a challenge to the Ontario *Juries Act* exclusion of non-citizens from the jury pool. Given that approximately 14 percent of the population of Metropolitan Toronto at the time was made up of non-citizens, the appellants argued that their constitutionally protected equality rights were infringed as non-citizens were 'a discrete minority' significant enough in size to impact on a representative jury. Without their potential presence, it was submitted that fundamental justice principles were not being observed. Ultimately at para 119 Rosenberg JA explained that equality rights are personal and do not afford standing to champion the rights of third parties (ie. potential jurors):

The common thread in all these cases is because of their status as accused, the accused persons have been accorded standing to challenge the provisions under which they were charged, provided that the rights of some potential accused person would be infringed. We were referred to no case that gave an accused standing to assert s. 15 rights of some other person in the justice system.

For the contrary argument, particularly on the issue of standing, see Tanovich, Paciocco and Skurka (n 5) 21-26.

⁴⁶ Note, however, that there is an extra, federally legislated safeguard in the form of s 638(1)(c) of the *Criminal Code* (n 16), which allows for a challenge for cause where a 'juror has been convicted of an offence for which he was sentenced to death or to a term of imprisonment exceeding twelve months'.

generally considered to be matters of central importance to the parties to a criminal prosecution.⁴⁷

Thus, it would appear that participating in the jury selection process is far more a state-circumscribed civic duty than any form of democratic right.⁴⁸ That being said, given that trial by jury is a fundamental right of an accused person in many countries,⁴⁹ it stands to reason that the population of juries should be liberally orchestrated so as to avoid any notion of exclusivity or elitism. However, the method of compelling the attendance of a prospective juror makes it clear that participation in the process is obligatory. As Hill J explains: ‘A jury summons is not an invitation. Nor is it a mere option to volunteer to be a juror. It cannot simply be ignored. It is a court order with consequences for disobedience.’⁵⁰

In order for the state to continue to reap the benefits of the high regard in which trial by jury is held in general,⁵¹ such that ‘the experience of jury service . . . [is] welcomed and appreciated by those fortunate enough to be selected for it’,⁵² the manner in which peremptory challenges are exercised and the steps that lead up to that penultimate moment, deserve a measure of oversight. Without controls in place, the process is open for abuse. However, for every degree of oversight that is introduced, the ‘peremptory’ aspect of the challenge is reduced gradationally with the ultimate risk being that explanation and accountability will be required, much like a challenge based on cause.

⁴⁷ Tanovich, Paciocco and Skurka (n 5) 42 (citation excluded), summarizing aspects of *Barrow* (n 24) 712-16.

⁴⁸ Service on a jury has variously been described as a public duty, an obligation and a right: see *Lavoie v Canada*, 2002 SCC 23 at para 114 and *R v Crown Court of Guildford, ex parte Siderfin* [1990] 2 QB 683 (DC) 691. However, as was observed in *United States v Conant*, 116 F Supp 2d 1015, 1022 (ED Wis 2000):

While the court agrees with defendants that jury service is a “badge of citizenship” worn proudly by all those who have the opportunity to do so and that it would, indeed, be desirable for all citizens to have that opportunity, the court is unwilling to go the next step and to proclaim the opportunity to serve on a jury to be a fundamental right.

⁴⁹ See Ethan J Leib, ‘A Comparison of Criminal Jury Decision Rules in Democratic Countries’ (2008) 5 Ohio St J Crim L 629, 635-38.

⁵⁰ *Reference re: Juries Act (Ont)*, 2011 ONSC 1105 at para 34.

⁵¹ See Julian V Roberts and Mike Hough, *Public Opinion on the Jury: An International Literature Review* (Ministry of Justice Research Series 1/09, February 2009) 39 where the authors conclude:

It is striking that despite differences in the nature of the jury - as well as differences in the wording of specific survey questions - the positive reaction to the jury in England and Wales also emerges from surveys conducted in other common law counties. This suggests that the strong support for the jury is a cross-jurisdictional phenomenon (at least within the common law world) and probably reflects an underlying support for the concept of trial by jury that transcends local variation in the way that the jury functions.

⁵² Christopher Granger, *The Criminal Jury Trial in Canada* (2nd edn, Carswell 1996) 9.

5.3.2 The Concept of Jury Vetting

The ability to manipulate the composition of a petit jury from an otherwise randomly selected jury panel impacts on the notion of neutrality, one way or the other. Even an effort to infuse a jury with impartiality and representativeness by making sure that a person does not become a juror is problematic because it is fundamentally a subjective act, however ‘educated’ the peremptory strike is thought to be. Although Canadian law only entitles an accused person to an impartial jury,⁵³ the adversarial process and the human condition may combine to push a litigant to try to select a more accommodating group of fact-finders. To suggest otherwise is to fail to recognize humankind’s tendency to self-preserve whenever possible.

Compiling foreknowledge about the background of a prospective jury member is advantageous. Information is vital if the peremptory challenge is to stem from something more than a momentary glance combined with a kaleidoscope of conjectural impressions. As explained by Gobert, ‘[a] lawyer who can pack the jury with persons whose life experiences, values and personality incline them to his or her client’s position has won a significant battle in the overall war.’⁵⁴ However, Gobert also concedes that ‘the amount of understanding necessary to decide a case impartially may require sympathy and empathy, but not necessarily an identity of common experience’.⁵⁵ Nevertheless, attempting to generate an individual attributive profile, particularly when harnessed to the notion of ‘jury science’,⁵⁶ remains an attractive option to those that subscribe to its utility.

Is vetting a jury any different than vetting a judge? Although in relative terms a potential juror is much more of an unknown commodity than is a long-presiding judicial officer, compiling data about the proclivities of a judge is seen to be good lawyering in some circles. Even though, like a juror, a judge is deemed to abide by their oath of office and

⁵³ *Charter* (n 3) s 11(d).

⁵⁴ James J Gobert, ‘In Search of the Impartial Jury’ (1988) 79 *J Crim L & Criminology* 269, 322-23.

⁵⁵ *ibid* 278.

⁵⁶ Jeremy W Barber in ‘The Jury is Still Out: The Role of Jury Science in the Modern American Courtroom’ (1994) 31 *Am Crim L Rev* 1225, 1234 explains ‘[a]t its core, jury science is little more than a social scientific or psychological attempt to compile and implement the “ideal” juror profile.’

maintain impartiality, ‘judge-shopping’⁵⁷ remains a clandestine, but generally well-known practice in trial level courts. With a modicum of effort, cases can be purposely stalled, transferred to assisting courts and otherwise kept away from, or connected to, the dockets of certain judges. Although the following list is by no means exhaustive, shopping for or actively avoiding a certain judicial officer is known to occur in the following circumstances:

- When the police are attempting to get a search warrant.⁵⁸
- When a defendant schedules a bail hearing.⁵⁹
- When a defendant purposely delays the progress of their case to trial.⁶⁰
- When a defendant wishes to resolve their case by way of guilty plea.⁶¹
- When a defendant, after ascertaining the identity of the trial judge, wishes to re-elect from trial by jury to trial by judge sitting alone.⁶²

It is submitted that knowing how judges are investigated better informs the discussion on the propriety of investigating the antecedents of would-be jurors. Yet whether the ultimate goal of those who would manipulate the process is to garner favour, empathy or perhaps even a greater likelihood of objectivity, it would appear that society tends to look

⁵⁷ See Theresa Rusnak, ‘Related Case Rules and Judge-Shopping: A Resolvable Problem’ (2015) 28 Geo J Legal Ethics 913, 913:

Judge-shopping occurs when attorneys attempt to have their cases tried, or not tried, before a particular judge. Generally, attorneys engage in judge-shopping in the belief that judges are, as individuals, predisposed to rule a certain way, in specific types of cases, and that a sympathetic judge increases an attorneys [*sic*] odds of winning their case.

⁵⁸ For a discussion of the propriety of looking for agreeable judges to sign search warrants see Chip Somodevilla, “‘Judge-shopping’ allegation surfaces in Freddie Gray case” *RT American* (Washington, 21 July 2015) <<https://www.rt.com/usa/310315-Judge-shopping-allegation-freddie-gray/>> accessed 21 November 2016.

⁵⁹ Anon, “‘Judge Shopping’ ban: Lawyers’ attempts to get “soft” decisions for clients disallowed” *Daily Telegraph* (Sydney, 12 March 2016) <<http://www.dailytelegraph.com/au/news/judge-shopping-ban-lawyers-attempts-to-get-soft-decisions-for-clients-disallowed/news-story/8126639b060181abd065...>> accessed 21 November 2016.

⁶⁰ Brian Manarin, ‘Bedeviled by Delay: Straight Talk About Memory Loss, Procedural Manipulation and the Myth of Swift Justice’ (2009) 27 Windsor Rev Legal Soc Issues 117, 127-28.

⁶¹ See Arnold H Lubasch, ‘Judge-Shopping in Federal Court: Lawyers’ Quest for Leniency’ *New York Times* (New York, 4 March 1987) <<http://www.nytimes.com/1987/03/04/nyregion/judge-shopping-in-federal-court-lawyers-quest-for-leniency.html>> accessed 21 November 2016. Also consider *R v Arcand*, 2010 ABCA 363 at para 8 where the court remarked that ‘judge shopping is alive and well in Canada – and fighting to stay that way’.

⁶² In Canada, save for certain indictable and other ‘absolute jurisdiction’ offences, an accused person has the option of a jury trial or a bench trial. Indeed, a re-election as to mode of trial is also allowed within specified time periods or with the consent of the Crown. See *Criminal Code* (n 16) ss 469, 536 (2), 561 (1)(c) and (1)(d) and 553.

beyond process and instead simply asks whether the adjudicative body is honourable. As explained by Tyler and Sevier:

Interestingly, trust in the motives of judicial authorities is primarily linked to assessments of truth, which are the most important goal-based influences on legitimacy. When people evaluate whether or not they believe that the courts are able to determine the truth, it is the integrity of judges that is central, not the nature of the legal procedures they enact. People see truth as arising from the intentions and motives of the judicial actors.⁶³

While Tyler and Sevier are speaking of professional judges, the issue of adjudicative integrity resonates whatever the mode of trial. The difference is that professional judges already have been vetted and are appointed to their positions in advance of presiding over trials whereas juries are constructed during the trial itself. Thus, the journey to empanelment remains as important as the ultimate functioning of the seated jury.

The role of the prosecution is particularly instructive in the context of jury selection. Bearing in mind that any effort to sit an impartial jury is fraught with subjective influences, the philosophy that underpins the role of the Crown suggests that a properly motivated prosecutor can positively influence jury selection when exercising their allotment of peremptory challenges. Although speaking in a dissenting opinion, Gonthier J in *R v Bain* ('*Bain*') recognized the benefits that can flow from conscientious prosecutorial decision-making:

In keeping with this quasi-judicial role, the Crown prosecutor in the jury selection process has a duty to ensure that the jury presents . . . [with] three characteristics . . . that is impartiality, representativeness and competence. Let it be made clear, however, that these qualities, especially impartiality, must not be sought in light of securing a conviction, but rather in light of selecting the best jury to try the case. Indeed the Crown Attorney should use the means at his or her disposal to exclude prospective jurors that could be biased in favour of the prosecution, even if the defence is not aware of this fact.⁶⁴

⁶³ Tom R Tyler and Justin Sevier, 'How do the Courts Create Popular Legitimacy?: The Role of Establishing the Truth, Punishing Justly, and/or Acting Through Just Procedures' (2013) 77 Alb L Rev 1095, 1128.

⁶⁴ *R v Bain*, [1992] 1 SCR 91 at para 40. See also *R v Boucher*, [1955] SCR 16 at 24 where Rand J classically remarked that 'the role of the prosecutor excludes any notion of winning or losing'.

While the Crown Attorney is more than a mere spectator of the empanelment procedure, the ‘justification for taking part in the jury selection process stems from his or her responsibilities as a public officer’.⁶⁵ As such, even though a prosecutor is generally expected to bring ‘earnestness and vigor’⁶⁶ to their efforts and to advance positions ‘forcefully and effectively’,⁶⁷ it is also expected that they will responsibly influence the selection process. This is particularly so when it appears that exercising a peremptory strike may ‘produce a more representative jury depending on both the nature of the community and the accused’.⁶⁸ Motivation thus becomes quite important. As explained by Sharpe JA, ‘[p]eremptory challenges are not incompatible with the Crown’s quasi-judicial role, but the Crown should exercise peremptory challenges in a manner that is in keeping with its quasi-judicial role.’⁶⁹ In doing so trial fairness is more likely to be achieved. No doubt there may even be circumstances where the prosecution should consult with the defence before electing to challenge or not. There may be something that has missed the eye or the ear of the Crown. Or perhaps the defence has information about the potential juror’s antecedents that the prosecution ought to know. Or it may simply be that the defence has already spent its peremptory challenges, but remains desirous of seeing that a same-race or same-gender (as the defendant) prospective juror, who is only a few positions down the panel line, make it on to the jury.

While jury selection procedures can never achieve true representativeness,⁷⁰ in all its multitudinous forms, jury selection typically falters not because of the limitations of the peremptory challenge, but rather due to a lawyer yielding to adversarial temptations. Litigation courts competitiveness and prosecutors are just as likely to succumb to the allure of ‘victory’, despite the incongruence of the concept with the best traditions of the Crown.⁷¹ Cory J in *R v Bain*,⁷² although speaking on the use of ‘stand-bys’,⁷³ observed

⁶⁵ *ibid* *Bain*.

⁶⁶ *Berger v United States*, 295 US 78, 88 (1935).

⁶⁷ *R v Daly* (1992), 57 OAC 70 at para 32. Note that the court was speaking about the Crown’s closing jury address, however, the point is still taken.

⁶⁸ *R v Gayle*, [2001] OJ No 1559 at para 63 (CA).

⁶⁹ *ibid* para 62.

⁷⁰ As explained by McLachlin J, as she then was, in *Biddle* (n 33) at para 58, rather than a representative jury, what is essential [and likely more attainable] is an ‘impartial and competent’ jury.

⁷¹ Consider *R v Banks* [1916] 2 KB 621 (CA) 623 where Avory J underscored that ‘prosecuting counsel ought not to press for a conviction’.

⁷² *Bain* (n 64).

⁷³ Requesting that a potential juror ‘stand-by’ or ‘stand-aside’ are synonymous expressions. Such petitions were afforded to the Crown but not the defence. See generally R Blake Brown, ‘Challenges for Cause, Stand-Asides, and Peremptory Challenges in the Nineteenth Century’ (2000) 38 Osgoode Hall L J 453. As

that ‘those acting for the Crown do, on occasion demonstrate human frailties’.⁷⁴ He went on to disabuse any notion of the superior rectitude of the prosecution, regardless of its historic station: ‘It is suggested that the Crown Attorney, as an officer of the Court would never act unfairly in the selection of a jury. Yet the most exemplary Crown might be so overwhelmed by community pressure that just such a step might be taken.’⁷⁵ A case in point was *R v Latimer*, a highly publicized murder described in the media as a mercy killing.⁷⁶ A severely disabled child was killed by her father via carbon monoxide poisoning.⁷⁷ It came to be known that the trial prosecutor, with the assistance of the RCMP, had arranged for the out-of-court administration of a questionnaire ‘asking prospective jurors for their views on a number of issues, including religion, abortion and euthanasia’.⁷⁸ Even more direct contact between police officers and potential jurors occurred, despite prosecution instructions to the contrary, including asking how well the accused was known to the jury candidate.⁷⁹ Five of the investigated jurors actually served on the jury that ultimately found the accused guilty of murdering his daughter.⁸⁰ Perhaps most disturbingly, the prosecutorial jury interference was not disclosed until the conviction appeal was under way.⁸¹ In granting a new trial as a result of the impugned Crown conduct, Lamer CJC commented as follows:

I need only address this issue very briefly. The actions of Crown counsel at trial, which were fully acknowledged by Crown counsel on appeal, were nothing short of a flagrant abuse of process and interference with the administration of justice. The question of whether the interference actually influenced the deliberations of the jury is quite beside the point. The interference contravened a fundamental tenet of the criminal justice system, which Lord Hewart C.J. put felicitously as “justice should not only be done, but should manifestly and undoubtedly be seen to be done”.⁸²

explained by Sally Lloyd-Bostock and Cheryl Thomas in ‘Decline of the “Little Parliament”: Juries and Jury Reform in England and Wales’ (1999) 62 Law & Contemp Probs 7, 27:

The effect of standing a juror by is to remove him or her without showing cause. There is no limit on the number of jurors who may be stood by. The juror goes back into the pool and may in theory be called again if the pool runs out. The prosecution can thus defer having to show cause until the pool is exhausted.

⁷⁴ *Bain* (n 64) para 5.

⁷⁵ *ibid.*

⁷⁶ *R v Latimer*, [1997] 1 SCR 217 at para 1.

⁷⁷ *ibid* para 6.

⁷⁸ *ibid* para 13.

⁷⁹ *ibid* para 13-14.

⁸⁰ *ibid* 14.

⁸¹ *ibid.*

⁸² *ibid* para 43 (citations omitted).

5.3.3 The Honour of the Crown Doctrine as a Jury Selection Control

Although all stakeholders are charged with the responsibility of keeping watch over the course of justice, arguably the state with its vast resources and powers has the most profound obligations in this regard. The government is in many respects the peoples' fiduciary, holding the best interests of society in trust. That special relationship is even more important when IP are the focus of consideration. The concept of the honour of the sovereign can be traced to England and the issuing of land grants.⁸³ As explained by Isaac:

The honour of the Crown was intended to premise the notion that the Crown would not enter dealings with ignoble intentions, thereby allowing the courts to achieve greater justice by tempering the strictness of the law. Justice and the law are deemed to flow from the Crown. As the law is for the benefit of the Crown's subjects, the premise was that the Crown should not cause harm to private individuals.⁸⁴

The honourable intentions concept remains important in Canada and has application in various ways as evidenced by the robust body of case law that has been generated on state-Indigenous issues.⁸⁵ As Grammond underscores, 'the concept of the honour of the Crown allows courts to inquire into the morality of government conduct, above and beyond strict technical legal rules'.⁸⁶ However, it is important to emphasize that the concept has 'been used almost exclusively to buttress the sorts of Aboriginal rights described in s. 35 of the *Constitution Act, 1982*'.⁸⁷ Section 35(1) reads: 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.'⁸⁸ Thus, with such rights by virtue of the section having achieved 'constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent

⁸³ See *The Case of the Churchwardens of St. Saviour in Southwark* (1613) 77 ER 1025, 1027.

⁸⁴ Thomas Isaac, *Aboriginal Law* (5th edn, Carswell 2016) 341.

⁸⁵ See Sébastien Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law* (Carswell 2013) 134-41 where the author documents some of the important appellate jurisprudence on issues such as: the liberal construction of treaties rule; the duty to consult and accommodate IP; and, the *sui genesis* approach that courts must take to the unique needs of indigenous society.

⁸⁶ *ibid* 135.

⁸⁷ *British Columbia (Ministry of Attorney General, Criminal Justice Branch) v British Columbia (Commission of Inquiry into the Death of Frank Paul - Davies Commission)*, 2009 BCCA 337 at para 114.

⁸⁸ *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11, s 35.

that Aboriginal rights are affected'.⁸⁹ As a result, it is submitted that the mere potential for an honour violation should be such as to incentivize government to maintain a constant sensitivity to discreditable conduct. Indeed, honour obligations should in theory deter all improper state behaviour in relation to IP.⁹⁰

In order to determine whether an honour of the Crown violation has occurred which is not otherwise defensible, the Supreme Court of Canada fashioned a test that contemplates stages of analyses for both the alleged infringement of an Indigenous right and any purported justification therefore:

First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a prima facie infringement lies on the individual or group challenging the legislation.

...

If a prima facie interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective?

...

If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle . . . the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.⁹¹

The rights contemplated by s. 35(1) of the *Constitution Act* are those that stem from treaties, meaning 'negotiated instruments which the Crown has pledged its honour to

⁸⁹ *R v Sparrow*, [1990] 1 SCR 1075 at para 64.

⁹⁰ As explained by Rothstein JA, as he then was, while referencing Supreme Court of Canada precedent in *Stoney Band v Canada*, [2005] 2 CNLR 371 at para 13 (FCA), 'the honour of the Crown is always at stake in the Crown's dealings with the Aboriginal people . . . and it will give rise to different duties in different circumstances'. See also *R v Badger*, [1996] 1 SCR 771 at para 41 and *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 16, 18.

⁹¹ *Sparrow* (n 89) paras 70-71, 75.

uphold’,⁹² and those that are derived from Aboriginal customary laws and traditions.⁹³ Importantly, ‘Aboriginal rights are not dependent upon treaty, executive order or legislative existence’⁹⁴ and, as such, do ‘not depend on non-Aboriginal recognition’⁹⁵ to be of constitutional significance. That being said, rights afforded by legislation are often the source of an honour of the Crown argument.⁹⁶ What is obviously important is to determine and isolate a right since without there being some form of identifiable obligation peculiar to IP, Crown honour will not constrain the will of the government:

. . . the obligation must be explicitly owed to an Aboriginal group. The honour of the Crown will not be engaged by a constitutional obligation to which Aboriginal peoples simply have a strong interest. Nor will it be engaged by a constitutional obligation owed to a group partially composed of Aboriginal peoples. Aboriginal peoples are part of Canada, and they do not have special status with respect to constitutional obligations owed to Canadians as a whole. But a constitutional obligation explicitly directed at an Aboriginal group invokes its “special relationship” with the Crown.⁹⁷

Although the honour of the Crown has been argued in the context of criminal prosecutions in Canada, there does not appear to be any case where the conduct of the prosecution, in its exercise of peremptory challenges, has been alleged to violate the doctrine. However, treaties and agreements have, for example, been used to underpin arguments suggesting the existence of a right to mixed juries, those being juries composed of fixed numbers of IP.⁹⁸ More recently, the Supreme Court of Canada ruled that the Crown’s honour was not engaged when considering provincial jury legislation, despite the statute in question requiring ‘the government to treat Aboriginal on-reserve residents differently for the purposes of jury selection’⁹⁹ when compiling jury rolls.

⁹² Leonard I Rotman, ‘Defining Parameters: Aboriginal Rights, Treaty Rights and the *Sparrow* Justificatory Test’ (1997) 36 *Alta L Rev* 149, 164.

⁹³ *ibid* 156.

⁹⁴ *ibid*. In this quotation Rotman was referencing Hall J in *Calder v Attorney General of British Columbia* (1973), 34 DLR (3d) 145 at 200 (SCC).

⁹⁵ Manitoba, Report of the Aboriginal Justice Inquiry of Manitoba, *The Justice System and Aboriginal People* (Queen’s Printer 1991) vol 1, 261.

⁹⁶ See for example *Union of Nova Scotia Indians v Canada (Attorney General)*, [1997] 1 FC 325 where the *Environmental Assessment Act* was considered in relation to the positive obligations it placed on the Crown to consider how environmental changes caused by a government approved dredging project could impact on the traditional uses of Indigenous lands and resources.

⁹⁷ *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 72.

⁹⁸ Such arguments have not found favour with the courts, largely as a result of how the treaties in question were construed. See for example *R v Cyr*, 2014 SKQB 61 and *R v Papequash*, 2014 SKQB 118.

⁹⁹ *Kokopenace* (n 4) para 99.

Describing the relevant legislative section as an ‘administrative provision’,¹⁰⁰ the court was of the view that ‘[i]t does not create a particular obligation to Aboriginal peoples, nor does it create a need for consultation between the Crown and Aboriginal groups.’¹⁰¹

As for the actual conduct of counsel during the course of litigation, there is precedent for the assertion that the honour of the Crown is engaged ‘in negotiations and agreements reached in relation to the criminal or quasi-criminal context’.¹⁰² As well, disreputable behaviour regarding the actions of the Crown during civil litigation has been alluded to in the same breath that the honour of the Crown was referenced, perhaps foreshadowing arguments to come had the matter actually proceeded to trial.¹⁰³ However, before meaningful precedent could be set, the case settled.¹⁰⁴

There does exist, however, the analysis of Rothstein JA, as he then was, in *Stoney Band v Canada*¹⁰⁵ where he dismissed the suggestion that the honour of the Crown somehow constrained the way civil litigation is to be conducted. At paragraph 24 of the judgment the court observed:

Focusing specifically on litigation practices, I find it impossible to conceive of how the conduct of one party to the litigation could be circumscribed by a fiduciary duty to the other. Litigation proceeds under well-defined court rules applicable to all parties. These rules define the procedural obligations of the parties. It seems to me that to impose an additional fiduciary obligation on one party would unfairly compromise that party in advancing or defending its position. That is simply an untenable proposition in the adversarial context of litigation. Even where a fiduciary relationship is conceded, the fiduciary must be entitled to rely on all defences available to it in the course of litigation.

What is manifest from the foregoing quotation is twofold: the state in civil litigation assumes a more symmetrical posture as a defending party than it does when it brings a criminal prosecution; and, the dynamic of a trial on its merits requires that parties be granted significant latitude to marshal their positions as compared to what they likely

¹⁰⁰ *ibid.*

¹⁰¹ *ibid.*

¹⁰² *R v Kelley*, [2007] 2 CNLR 332 at para 53 (Alta QB).

¹⁰³ *Hagwilget Indian Band v Canada (Minister of Indian Affairs and Northern Development)*, 2008 FC 574 at paras 21-25.

¹⁰⁴ *Hagwilget Village v Canada*, 2009 FC 900 at paras 1-8.

¹⁰⁵ *Stoney Band* (n 90) para 24.

require in selecting a jury that will determine the merits of a case. Indeed, the Supreme Court of Canada has opined that ‘the [jury selection] process is not governed by the strictures of the adversarial model, nor should it be’.¹⁰⁶ Despite the hurdles, it remains to be seen whether an Indigenous rights-based argument, drawn from a passage in a treaty, a legislative enactment or some other source, can act as a bulwark against the dishonourable use of a peremptory challenge by the Crown. So far, an articulation of such an Indigenous right has yet to be made. Nevertheless, the honour of the Crown can serve to reinforce the need for high standards within the ranks of the prosecution when choosing, if at all,¹⁰⁷ to remove a potential juror peremptorily.

5.3.4 Impediments to Fully Investigating the Jury Panel

Pre-selection inquiries of a potential juror, directly or indirectly, present potential difficulties. Perhaps the foremost reason that problems may arise in this area stems from the sacrosanct nature of the jury and the general inscrutability that surrounds its existence. Learning about the extra-judicial activities and proclivities of those who may make it on to an actual jury is seen by many as being unnecessarily intrusive on legitimate privacy expectations. Indeed, some see the investigatory practice as ‘reprehensible’¹⁰⁸ which has the potential to become criminal in nature.¹⁰⁹ Nonetheless, various forms of jury vetting continue to be performed.

A common form of out-of-court jury panel scrutiny occurs when a deep-pocketed litigant is able to employ anything from a private investigator to a team of social scientists to compile a brief biography of the backgrounds of prospective jurors. Courts and indeed

¹⁰⁶ *R v Yumnu*, 2012 SCC 73 at para 71.

¹⁰⁷ See Maureen A Howard, ‘Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges’ (2010) *Geo J Legal Ethics* 361, 414 where the author remarks that many prosecutors that she has come across do not exercise their peremptory strikes.

¹⁰⁸ See the discussion of the practice by Donald V Macdougall, ‘Jury Vetting by the Prosecution’ (1981) 24 *Crim LQ* 98, 111-12.

¹⁰⁹ Although there is clearly a distinction between a sworn and seated juror, and a potential juror, attempting to obstruct justice under s 139(2) of the *Criminal Code* (n 16) remains a legitimate charge to consider if a not-yet-selected juror is directly approached for vetting purposes by anyone who may be investigating the ‘suitability’ of that person for membership on a petit jury. Of course, attempting to solicit disclosure from a sitting juror will also constitute contempt of court. See generally *Re Papineau; R v Varin* (1980), 58 CCC (2d) 72 (Que SC). Consider the English experience as generally described by Cheryl Thomas in ‘Avoiding the perfect storm of juror contempt’ [2013] *Crim LR* 483.

the public at large are aware that such services are available for a price.¹¹⁰ Vetting proponents may argue that if the biographical data and other information that is uncovered came from the public domain, the general citizenry cannot be heard to complain.¹¹¹ As long as elicitation practices are at arm's length and otherwise non-invasive, reasonable expectations of privacy will likely remain so. Everything else is open to scrutiny and must be, perhaps grudgingly, accepted.¹¹²

Presently, however, it would appear that prying eyes are becoming less tolerated, at least in circumstances where the state is trying to assume an advantaged position in the jury vetting realm. Perhaps the disproportionate access to data, indeed big data, enjoyed by government bespeaks the concern in the main. Despite the fact that individuals are free to disseminate as much information about themselves as they wish on social media, when 'Big Brother'¹¹³ collects items of intelligence, something more sinister is connoted. This may, in part, be as a result of the skepticism and mistrust that is shown by some toward elected officials.¹¹⁴

A trilogy of criminal cases from the province of Ontario made their way to the Supreme Court of Canada on the issue of jury vetting in general and, in particular, on the use of police databases to search whether panel members were possessed of criminal or other questionable antecedents.¹¹⁵ In *R v Yumnu* ('Yumnu'), the court established that, absent legislation to the contrary, state authorities are permitted to determine whether potential

¹¹⁰ See *Dow v Carnegie III Steel Corp*, 224 F 2d 414, 430 (3d Cir 1955) and *Kiernan v Van Schaik*, 347 F 2d 775, 777 (3d Cir 1965) where the utility of the practice is discussed. For a more contemporary and dramatic depiction of jury vetting strategies that has informed the general public see 'The Runaway Jury' (20th Century Fox 2003), a motion picture based on the John Grisham novel of the same name (Doubleday Books 1996).

¹¹¹ See generally Christie Smythe, 'Jury screening now starts with Google: juror secrets revealed as lawyers mine "treasure trove of information" online' *Windsor Star* as originally reported in *The Washington Post* (Windsor, 2 December 2017) D3.

¹¹² It is submitted that even the most technologically challenged jury panel investigator, armed with no more than a telephone directory and a pair of binoculars, could in short order ascertain: where the potential juror lives; what kind of motor vehicle they drive; whether they appear to be single or with a partner; whether they have children or are childless; how they typically dress; their approximate age and apparent health; their overt affiliations; and, a host of other details that might influence jury selection decisions.

¹¹³ 'Big Brother' was the fictional character in George Orwell's classic novel *1984* (Penguin 1949) and the name has become synonymous with government surveillance operations.

¹¹⁴ See for example Steven Fielding, 'The long history of Britain's distrust of MPs' *The Guardian* (London, 1 January 2013) <<https://www.theguardian.com/commentisfree/2013/jan/01/british-public-distrust-mps>> accessed 3 December 2016 and Russell J Dalton, 'Political Trust in North America' in Sonja Zmerli and Tom WG van der Meer (eds), *Handbook on Political Trust* (Edward Elgar Publishing Limited 2017) 375.

¹¹⁵ *Yumnu* (n 106); *R v Emms*, 2012 SCC 74; and, *R v Davey*, 2012 SCC 75.

jurors are eligible to serve on juries by utilizing police databases.¹¹⁶ These eligibility inquiries are focused on ascertaining criminal antecedents and also pending criminal charges in provinces where that status has been made statutorily relevant.¹¹⁷ In addition, jury vetting disclosure obligations were described and detailed for the benefit of both Crown and defence counsel who may be engaging in the practice.¹¹⁸ In *R v Emms*, the court recognized that ‘there was a good deal of grey, not just on the Crown side of the ledger but the defence side as well, as to the nature and extent of background checking that could lawfully be carried out and the type of information that must be disclosed, short of cases involving obvious partiality’.¹¹⁹ Finally, in *R v Davey*, the parameters of ‘informal’ jury vetting were discussed including the conscripting of police opinions on the ‘suitability’ of potential jurors.¹²⁰

The overarching message that can be taken from the trilogy of cases is that the Crown may use various police databases to do criminal record checks on potential jurors under the authority of federal and provincial legislation to determine who may be disqualified from serving on a jury by virtue of such antecedents. While the net must not be cast wider than is needed to make a criminal record inquiry, should other information be inadvertently collected despite the inputted search parameters, then the state need not turn a blind eye to it if the information is relevant to jury selection.¹²¹ The state must not, however, distribute jury panel lists to the constabulary for the purpose of gaining commentary about prospective jurors, but can engage in focused consultation with police officers who have been assigned to the case.¹²² Significantly, disclosure obligations arise for both the prosecution and the defence, the latter party being obliged to reciprocally disclose in two circumstances:

¹¹⁶ *Yumnu* ibid paras 50-51.

¹¹⁷ ibid paras 51-53.

¹¹⁸ ibid paras 36-72.

¹¹⁹ *Emms* (n 115) para 47.

¹²⁰ *Davey* (n 115) paras 38-49.

¹²¹ *Yumnu* (n 106) paras 50-63.

¹²² *Davey* (n 115) paras 38-40. See also Tim Quigley, ‘Have We Seen the End of Improper Jury Vetting?’ (2013) 98 CR (6th) 109, 111-12 where the author, in speaking on *Davey*, comments:

In the first place, it is not obvious why police should be asked to express opinions Second, opinions as to partiality or suitability run the risk of straying into the forbidden categories. Finally, excluding general impressions, etc., from the disclosure obligation invites placing information in that category so as to avoid disclosure. Opinion input from the police might have been prohibited altogether instead of running these risks.

First, where defence counsel know or have good reason to believe that a potential juror has engaged in criminal conduct that renders him or her ineligible for jury duty under provincial law or subject to being challenged for cause under s. 638(1)(c) of the Code [meaning a juror has been convicted of an offence for which they were sentenced to death or to a term of imprisonment exceeding twelve months], this should be disclosed.

Second, where the defence counsel know or have good reason to believe that a potential juror cannot serve on a particular case due to matters of obvious partiality, this too should be disclosed.¹²³

Essentially, the reason why disclosure obligations transcend adversarial stances is because '[t]he jury does not belong to the parties; it belongs to the people.'¹²⁴ At least in theory, 'the Crown and the defence are united in the common purpose of ensuring impartiality'.¹²⁵ However, exchanges of information need not occur when they are merely comprised of 'such things as feelings, hunches, suspicions, innuendo, and other such amorphous information'.¹²⁶

It is important to note that the Ontario Ministry of the Attorney General had a Practice Memorandum to Counsel in place on the subject of 'Juror Background Checks'¹²⁷ a number of years before the trilogy of cases made their way to the Supreme Court of Canada. Arguably, the subject memorandum commanded a standard for jury vetting as circumspect as was articulated by Canada's highest court, as can be seen by the direction found therein:

In choosing a jury, both Crown counsel and defence should have access to the same background information material. To that end, results of criminal record checks of potential jurors, if obtained by Crown counsel, should be disclosed to defence counsel. Crown counsel should not request police to undertake any further or other investigation into the list of jurors. Crown counsel should not request police to conduct out-of-court investigations into private aspects of potential jurors' lives.¹²⁸

¹²³ *Yumnu* (n 106) paras 66-67.

¹²⁴ *ibid* para 71.

¹²⁵ Vanessa MacDonnell, 'The Jury Vetting Cases: New Insights on Jury Trials in Criminal Cases?' (2013) 63 SCLR 419, 433.

¹²⁶ *Yumnu* (n 106) para 64.

¹²⁷ Practice Memorandum to Counsel, 'Juror Background Checks', Ontario Ministry of the Attorney General, Criminal Law Division, PM [2005] No 17, March 31, 2006.

¹²⁸ *ibid* 1.

However, despite the earlier Crown directive and the later Supreme Court pronouncements, the best practices for counsel in this area remain vague. This is because the *Rules of Professional Conduct* for lawyers, as promulgated by both the Law Society of Ontario ('LSO') and the Canadian Bar Association, allow for jury vetting inquiries to be made that far exceed the mere consideration of a criminal record.¹²⁹ Indeed, the associated commentary of LSO Rule 5.5-1 authorizes preparatory vetting as follows:

A lawyer may investigate a prospective juror to ascertain any basis for challenge provided that the lawyer does not directly or indirectly communicate with the juror or with any member of the juror's family. But a lawyer should not conduct or cause another, by financial support or otherwise, to conduct a vexatious or harassing investigation of either a member of the jury panel or a juror.¹³⁰

Thus, it would appear that the prosecutors in the trilogy of cases, while in conflict with their employer's vetting restrictions, were nonetheless comporting themselves in a manner that was consistent with the expectations of their governing body. To make things even more muddled, as jury vetting concerns became more public the Ontario Information and Privacy Commissioner conducted her own investigation into the practices resulting in a report entitled *Excessive Background Checks Conducted on Prospective Jurors: A Special Investigation Report*, which was released on October 5, 2009.¹³¹ Although her findings were largely underpinned by provincial privacy legislation concerns,¹³² the Commissioner found that 'where the police disclose information relevant to juror criminal conviction eligibility criteria . . . such disclosure meets valid law enforcement and administration of justice purposes'.¹³³ However, 'disclosure of additional personal information of prospective jurors, beyond information relevant to criminal conviction eligibility criteria, does not validly meet those law enforcement and administration of justice purposes',¹³⁴ and thus would be in violation of

¹²⁹ See The Law Society of Ontario ('LSO'), *Rules of Professional Conduct* (Toronto, LSO 2018), Rule 5.5-1 to 5.5-3 <http://www.lsoc.on.ca/relationship-administration-of-justice/#ch5_sec1-lawyers-as-advocate> accessed 21 March 2018 and The Canadian Bar Association, *CBA Code of Professional Conduct* (Ottawa, CBA 2009), Rule 21 <<http://www.cba.or/CBA/activities/pdf/codeofconduct.pdf>> accessed 5 January 2015.

¹³⁰ LSO *ibid* Rule 5.5-1, Commentary [1].

¹³¹ Information and Privacy Commissioner of Ontario, Ann Cavoukian, PhD, *Excessive Background Checks Conducted on Prospective Jurors: A Special Investigative Report* (Info and Priv Com, Order PO-2826, 2009) ('*Excessive Background Checks*').

¹³² The primary pieces of legislation are the *Freedom of Information and Privacy Act*, RSO 1990, c F-31 and the *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, C M-56.

¹³³ *Excessive Background Checks* (n 131) 127.

¹³⁴ *ibid*.

the governing privacy statutes for the province. As such, the Commissioner issued an order requiring the Ministry of the Attorney General ‘to immediately take the necessary legal and administrative steps to ensure that it cease collecting personal information’¹³⁵ beyond the provincial and federal criminal conviction eligibility criteria in place for potential jurors.

In the aftermath of the discovery that certain trial prosecutors were, in consort with police agencies, at times exceeding acceptable background search parameters, the Ontario Ministry of the Attorney General not only supported the order of the Privacy Commissioner, but underscored that ‘[t]here must be no “informal” inquiries into jurors [*sic*] backgrounds.’¹³⁶ Certainly an informal inquiry contemplates a vast array of search types, including the obvious choice of online investigations. Not surprisingly, internet searches and social media inquiries often uncover information placed on the medium by the individual in question. Why those who self-promote and otherwise pursue their own notoriety should not be informally investigated is unclear. Certainly, potential employers, university admissions officers and even political party strategists have used the World Wide Web to further their respective interests.¹³⁷ Indeed, the Supreme Court of Canada, in the context of state disclosure obligations, has acknowledged the relative accessibility we all have to certain public domain data:

To the extent that the underlying information is readily ascertainable by members of the community, it is not linked to the prosecution’s role as an agent of the state, or to the Crown’s disproportionate access to resources, and there is no onus on the Crown to bring forward information that is easily

¹³⁵ *ibid* 137.

¹³⁶ Crown Policy, *Information and Privacy Commissioner Order and Juror Checks* (Criminal Law Division, Ministry of the Attorney General, December 23, 2009) 1 <http://intra.cldnet.mag.gov.on.ca./scripts/index_.asp?action=31+P_ID=26769+N_ID=1+...> accessed 15 November 2016.

¹³⁷ Thaddeus Hoffmeister, in ‘Investigating Jurors in the Digital Age: One Click at a Time’ (2012) 60 U Kan L Rev 611, 637 observed:

Digital Natives have grown up on the Internet and are more likely to have been subjected to and conducted their own online investigations. As previously discussed, in the Digital Age, online investigations occur regularly both in and outside the courtroom. In 2009, forty-five percent of employers reported that they used social networking sites to screen applicants.

See also Natasha Singer, ‘They Loved Your G.P.A. Then They Saw Your Tweets’ *The New York Times* (New York, 9 November 2013) <<http://www.nytimes.com/2013/11/10/business/they-loved-your-gpa-then-they-saw-your-tweets.html>> accessed 4 December 2016 and Diarmaid Byrne, ‘The Evolving Use of Social Media for Political Campaigns’ *Social Media Today* (Washington, 17 August 2011) <<http://www.socialmediatoday.com/content/evolving-use-social-media-political-campaigns.html>> accessed 4 December 2016.

obtainable elsewhere. The same logic applies to information about a prospective juror readily available on the internet.¹³⁸

While searching the backgrounds of potential jurors may now be off limits in certain prosecution offices, the same cannot be said for private counsel not constrained by policy directives. Many subscribe to the view, as expressed by Starr and McCormick, that ‘[i]t is imperative that as many juror biases and prejudgments as possible be determined during pretrial investigation or during voir dire.’¹³⁹ As explained by Hoffmeister, the electronic era has ushered in with it certain expectations of counsel:

As more and more personal information is placed online, attorneys are increasingly turning to the internet to investigate jurors. In certain jurisdictions, the practice has become fairly commonplace. One prominent trial consultant has gone so far as to claim, “Anyone who doesn’t make use of [internet searches] is bordering on malpractice.” While this may somewhat overstate the importance of investigating jurors online, it nonetheless demonstrates just how routine the practice has become. Aside from increased acceptance among practitioners, courts have both approved of and encouraged online investigation of jurors.¹⁴⁰

Thus, many lawyers will continue to come to trial forearmed with fragments of extra knowledge that they obtained as a result of their enterprising jury vetting efforts.¹⁴¹ While the accuracy of the vetted data is a separate issue, it will nonetheless influence juror selection practices. As will be discussed next, the relationship between lawyer and client becomes heightened, and ethically complicated, as the duo begin to use the vetted information during the in-court juror seating process.

5.3.5 The Lawyer-Client Dynamic

The exercise of a peremptory challenge only requires a fleeting contemplative moment followed by uttering the word ‘challenge’. Yet the proclamation is significant for those who may be suspicious of the proclaimer’s motives. Many things are happening at once. In no particular order, counsel and client are understood to be analyzing the information

¹³⁸ Davey (n 115) para 46.

¹³⁹ V Hale Starr and Mark McCormick, *Jury Selection* (Little, Brown and Company 1985) 112.

¹⁴⁰ Thaddeus Hoffmeister, ‘Applying Rules of Discovery to Information Uncovered About Jurors’ (2011) 59 UCLA L Rev 28, 30 (citations omitted).

¹⁴¹ Having been provided jury panel lists from the state. See for example the text in n 156 in ch 4.

that they have at hand from their vetting of those on the jury panel list; visually assessing the juror candidate while quietly discussing that person's perceived suitability; and, most importantly, trying to avoid exhibiting any overt signs that stereotypical logic is being employed during the process. Certainly this description of what theoretically occurs in a matter of seconds belies the truth. The idea that calculating judgment can be brought to bear in such a short time is to a great extent a fiction. Thus, it can only be hoped that the focus of any peremptory challenging is to produce a representative, independent and indifferent jury.¹⁴²

An important question that needs to be discussed between defence counsel and client early on in the relationship is who will make the decision as to whether to use a peremptory challenge? Although the lawyer will typically utter the response 'challenge' or 'content' in open court, at that penultimate moment it will not be clear whether the lawyer has independently made the decision or is merely the puppet of the client. While there may be some disagreement amongst counsel as to what decisions are solely those of the accused person to make (after receiving the lawyer's advice), three would appear to be beyond dispute: (1) whether to plead guilty or not guilty; (2) whether to elect to be tried by a jury or a judge sitting alone, when that is an option; and, (3) whether to testify.¹⁴³

Counsel knows that they are not the mouthpiece of their client. If unable to induce a client to act on sound advice, precedent suggests that 'the proper course is to return his brief'.¹⁴⁴ However, the combination of obligations and allegiances never make such decisions easy. Indeed, there is no bright line that demarcates where zealous advocacy stops and where the overriding duty to the court takes over.¹⁴⁵ Tanovich sees justice, 'for

¹⁴² However, consider the position of Abbe Smith in "Nice Work if You Can Get It": "Ethical" Jury Selection in Criminal Defense' (1998) 67 Fordham L Rev 523, 565:

No matter how personally distasteful or morally unsettling, zealous advocacy demands that criminal defence lawyers use whatever they can, including stereotypes, to defend their clients. Criminal lawyers are "not allowed to refrain from lawful advocacy simply because it offends" them.

¹⁴³ G Arthur Martin, 'The Role and Responsibility of the Defence Advocate' (1969-70) 12 Crim LQ 376, 386-87.

¹⁴⁴ *Strauss v Francis* (1865-66) LR 1 QB 379, 382.

¹⁴⁵ Consider the words of Spence J in *Kam v Hermanstyn*, 2011 ONCJ 101 at para 18:

... as an officer of the court, lawyers must always be candid and forthright with the court. The court must always have confidence that the lawyer will never knowingly allow false or misleading evidence to be presented to the court. The court must also have confidence that lawyers will answer all questions from the court in a straightforward and honest

the purpose of the lawyering process, as the correct resolution of legal disputes or problems in a fair, responsible and non-discriminatory manner'.¹⁴⁶ Tanovich further advocates the ethical need for lawyers to be, *inter alia*, 'responsible' and to '[a]void and disclose conduct that will unjustifiably harm an innocent third party.'¹⁴⁷ Clearly Tanovich's 'innocent third party' could be a prospective juror. As such, stereotypical thinking and discriminatory logic must never be used in the pursuit of a justiciable end.¹⁴⁸ Consequently, despite the widespread socioeconomic disadvantage, dislocation and prejudicial treatment suffered by IP at the hands of the dominant society in Canada,¹⁴⁹ a race-based peremptory challenge of a prospective white juror by an Indigenous defendant would be nonetheless unacceptable. For similar reasons, even an intra-race or cross-cultural bias held by the challenger would be of concern. Not all members of a race may necessarily want same-race members on their petit jury.¹⁵⁰

As mentioned earlier, during the initial stages of the solicitor and client relationship, ideally at the time of retainer discussions, the decision-making powers of counsel must be carefully delineated and agreed upon. However, it is clear that the statutory right to challenge a juror is afforded to the accused person and not to his or her counsel.¹⁵¹ As explained by Kelly: 'The rule was, at one time, that the accused had personally to make the challenge. Even if the challenge is made by counsel for the accused, as is now the practice, it is nevertheless made upon instructions of the accused.'¹⁵²

manner, without having to worry about, or wonder whether there are extraneous considerations that could impair the lawyer's ability to act appropriately.

¹⁴⁶ David M Tanovich, 'Law's Ambition and the Reconstruction of Role Morality in Canada' (2005) 28 Dal LJ 267, 284.

¹⁴⁷ *ibid* 285 (citation omitted).

¹⁴⁸ Consider the LSO *Rules of Professional Conduct* (n 121) Rule 6.3.1-1 which states that:

A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences (as defined in the Ontario *Human Rights Code*), marital status, family status, or disability with respect to professional employment of other lawyers, articulated students, or any other person or in professional dealings with other licensees or any other person.

¹⁴⁹ Racism in Canadian society against IP is a judicially noticed fact. See for example: *Williams* (n 4) paras 37-43; *R v Gladue*, [1999] 1 SCR 688 at paras 66-69; and, *R v Ipeelee*, 2012 SCC 13 at paras 56-79.

¹⁵⁰ See generally the discussion on same race disharmony in Yin Paradies and Joan Cunningham, 'Experiences of racism among urban Indigenous Australians: findings from the DRUID study' (2009) 32 *Ethnic and Racial Stud* 548, 564 and Leland Ware, "'Color Struck': Intragroup and Cross-Racial Color Discrimination' (2013) 13 *Conn Pub Int LJ* 75, 77-82, 110.

¹⁵¹ JJ Kelly, 'Case and Comment: Criminal Procedure - Issue of Insanity - Challenges to Jurors - Peremptory Challenge - Challenge for Cause' (1952) 30 *Can Bar Rev* 176, 178.

¹⁵² *ibid*.

There are a number of positives associated with client-centered jury selection. By instructing counsel who to challenge, it is less likely that the client will later be heard to complain about the final composition of the triers of fact. Indeed, in theory the selection process should be empowering because the individual accused person, in relation to the state, assumes equal footing on the fundamental issue of which members of society will determine guilt or innocence. Secondly, by taking control of jury selection the accused person is able to draw upon the life experiences that are important to him or her, rather than those that resonate only with counsel. Although the process has the potential to be just as stereotype-driven as when counsel determines who to challenge, the endeavour will incorporate an evaluative process unique to the defendant which should not be lost on each potential juror. Each ‘acceptable’ juror bears witness to what has been orchestrated by an untrained layperson. Thus, the candidate may view his or her selection as being more consistent with being tried by a jury of one’s ‘peers’ as the concept is commonly understood.¹⁵³ Furthermore, the selection motives of the defendant may be viewed as less dubious than those of counsel because they lack the hubris that at times can be associated with a professional, particularly a lawyer. Finally, it may be strategically wise to give the accused person control during jury selection because, generally speaking, the discussions between lawyer and client are privileged. Thus, should the court ever inquire as to the reasoning behind a particular challenge, the lawyer is duty bound to maintain confidences.¹⁵⁴ As well, an accused person’s right to remain silent similarly looms large.¹⁵⁵ As was explained in the case of *R v Brown*:

. . . the court has no such power to order comparable disclosure by the defence. The difference is a consequence of the right to silence and the right against self-incrimination recognized by the Charter. The defence may, but need not, voluntarily disclose the reasons for challenging the black prospective jurors.¹⁵⁶

¹⁵³ Although the term ‘peer’ now connotes the notion of ‘fellow citizen’, it at one time suggested a person of equal societal status. See Gobert (n 54) 277-78 and Hilary Weddell, ‘A Jury of Whose Peers?: Eliminating Racial Discrimination in Jury Selection Procedures’ (2013) 33 BC JL & Soc Just 453, 460.

¹⁵⁴ LSO *Rules of Professional Conduct* (n 129) require at Rule 3.3-1 that:

A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless (a) expressly or impliedly authorized by the client; or (b) required by law or order of a tribunal of competent jurisdiction to do so...

¹⁵⁵ See *R v Hebert*, [1990] 2 SCR 151 at paras 68-92.

¹⁵⁶ *R v Brown* (1999), 45 WCB (2d) 416 at para 9 (OCGD).

Of course, the ‘attorney-client privilege does not give a criminal defendant the right to carry out through counsel an unlawful course of conduct’.¹⁵⁷ Thus, if the benefit of protected conversations with counsel is being used as a safe haven to break the law with each successive peremptory strike, it would appear that privilege is vulnerable to piercing through an order of the court.¹⁵⁸ This is perhaps another justification for leaving the client to their own devices during jury selection. As Hutchison warns, ‘[o]nce the lawyer-client relationship is established a large part of the ethical die is cast; the lawyer’s options about what they are and are not prepared to do are severely curtailed and their obligation is closely circumscribed.’¹⁵⁹ The best interests of the client are paramount and thus will supersede all others, save for ‘those duly disclosed by the lawyer and willingly accepted by the client’.¹⁶⁰

No retainer agreement can ever envision all the turns that a legal journey may take. As such, there is always the possibility that a client may feel that their lawyer’s stance on a particular issue is tantamount to a betrayal. That is why it is so important that a lawyer discuss jury selection tactics as soon as possible, including who will possess the authority to make such decisions. Simply because certain conduct is requested by the client or tacitly condoned by the court does not further imply that it should be pursued.¹⁶¹

Perhaps lawyers and their clients are not even cognizant of what truly motivates them to peremptorily challenge a prospective juror. The degree of introspection required to achieve such awareness is likely beyond the moment. Yet the pressures to justify a peremptory strike can bring about pretext-laden responses.¹⁶² In the following section the experiences of two other countries will be explored in order to see how the Canadian peremptory challenge regime might be improved upon.

¹⁵⁷ *Georgia v McCollum*, 505 US 42, 58 (1992).

¹⁵⁸ See the ‘future crimes’ exception to solicitor and client privilege discussed in *R v Campbell*, [1999] 1 SCR 565 at paras 55-64.

¹⁵⁹ Allan C Hutchison, *Legal Ethics and Professional Responsibility* (Irwin Law 2006) 75.

¹⁶⁰ *Strother v 3464920 Canada Inc*, 2007 SCC 24 at para 1.

¹⁶¹ For instance, consider the views of David M Tanovich on the defence of sexual assault allegations in ‘“Whack” No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases’ (2013) 45 *Ottawa L Rev* 495.

¹⁶² See *Batson v Kentucky*, 476 US 79, 106-07 (1986).

5.4 The Peremptory Challenge Experience in England and the USA and Canada's Response to the Issue

5.4.1 England

It is convenient to first discuss the English experience with the peremptory challenge given that for some time now it has ceased to exist in that country, despite trial by jury remaining a mainstay in the resolution of serious crime. While 'the origin of the peremptory challenge is unknown',¹⁶³ Broderick indicates that its advent predates the year 1305:

Before 1305, the Crown not only selected those to be included on the jury list, but held an unlimited number of peremptories to strike individuals deemed unsuitable. Parliament, concluding that this method generated juries biased in favor of the government, rescinded the prosecutor's peremptory challenge and allowed the Crown to remove only those prospective jurors for who it could demonstrate a "Cause Certain."¹⁶⁴

The legislative enactment which sounded the demise of prosecution peremptories was entitled 'An Ordinance for Inquests'.¹⁶⁵ However, in short order the Crown peremptory challenge was reincarnated in the form of the 'stand-aside' or 'stand-by' option which was a common law creation.¹⁶⁶ The stand-aside procedure gave the Crown, and only the Crown (as between the parties), the power to require a potential juror to essentially wait in the wings until the assembled panel was exhausted.¹⁶⁷ The implication was that the Crown would at that time show cause why the potential juror that was standing-by was unsuitable for service or otherwise concede his candidacy.¹⁶⁸ The larger the jury panel the more advantageous the stand-aside manoeuvre obviously became. Indeed, the request to stand-aside a juror was a peremptory challenge in all but name and it was open to the same abuses. Accountability for the practice need never occur.¹⁶⁹

¹⁶³ Samuel J Cohen, 'The Regulation of Peremptory Challenges in the United States and England' (1988) 6 B U Int'l LJ 287, 304.

¹⁶⁴ Broderick (n 38) 371-72.

¹⁶⁵ An Ordinance for Inquests 1305 (33 Edw 1 Stat 4).

¹⁶⁶ Heinz (n 23) 209.

¹⁶⁷ *ibid.*

¹⁶⁸ *ibid.*

¹⁶⁹ The initial request to stand-by occurred 'without giving any reason'. See John Baldwin and Michael McConville, *Jury Trials* (Clarendon Press 1979) 92.

While the use of Crown stand-asides continued unabated over the years, slowly Parliament began to whittle away at the quantum of peremptory challenges afforded the defence. Cohen chronicled the diminution as follows:

Early English case law shows that defendants could use thirty-five peremptory challenges per trial. The number of peremptory challenges was limited to twenty in 1533, and four hundred years later, the Juries Act of 1974 limited the number of peremptory challenges in felony trials to seven. The Juries Act was amended in 1977, further limiting the number of peremptory challenges to three.¹⁷⁰

Also in the 1970s came an increased concern over the misuse of personal juror information during the selection process. In 1972, a case dubbed the ‘Angry Brigade Trial’, which involved allegations of the bombing of the houses of Members of Parliament, saw the court question jurors about political affiliations and connections to Northern Ireland, with a view to excluding them from being seated.¹⁷¹ Subsequently, the Lord Chief Justice denounced such forms of juror questioning.¹⁷² Additionally, the Lord Chancellor discontinued the release of juror occupations with panel lists as it was believed that the knowledge of a potential juror’s occupation was being misused by defence counsel ‘when exercising peremptory challenges in cases with political overtones’.¹⁷³ Similarly, counsel appearing on behalf of the Crown might use occupational data for their own strategic reasons,¹⁷⁴ despite beliefs to the contrary.¹⁷⁵

It has been suggested that the ‘progressive reductions [of the number of peremptory challenge opportunities] appear to have been precipitated by concerns arising in particular cases’.¹⁷⁶ Two prosecutions that received considerable press coverage and debate involved allegations of rioting in the city of Bristol,¹⁷⁷ and the release of state

¹⁷⁰ Cohen (n 163) 305.

¹⁷¹ Lloyd-Bostock and Thomas (n 73) 26.

¹⁷² See *Practice Direction (Jurors)* [1973] 1 WLR 134 (CA).

¹⁷³ Lloyd-Bostock and Thomas (n 73) 26.

¹⁷⁴ See Baldwin and McConville (n 169) 92 who cite House of Lords Debates wherein, while discussing the 1977 Criminal Law Act, a one-time Barrister conceded that in comparison to his peremptory challenge tactics as a defence counsel, as Crown counsel ‘I used to stand by jurors . . . just as shamelessly’.

¹⁷⁵ As explained by Heinz (n 23) 210: ‘the English jurists were confident that a Crown prosecutor would never standby a juror unless the Crown prosecutor reasonably believed that the juror could be challenged for cause successfully. *After all, the Crown prosecutor was bound to uphold the law*’ (emphasis added).

¹⁷⁶ Lloyd-Bostock and Thomas (n 73) 24.

¹⁷⁷ *ibid.* The authors indicate that the Bristol case involved charges of ‘criminal damage and disorder’ where it was reported that ‘the defence used their peremptory challenges to try to achieve a representation of ethnic minorities on the jury, and the youths were acquitted’. At the time Lord Denning MR was critical

secrets from a British Armed Forces base situated in Cyprus.¹⁷⁸ In regard to the latter case, Lloyd-Bostock and Thomas suggest that it:

... fueled the campaign for the abolition of peremptory challenges. When eight men in the Royal Air Force were charged with offences under the Official Secrets Act, it was claimed that their counsel had privately agreed to exercise their peremptory challenges to ensure a young male jury. The defendants were all acquitted ...¹⁷⁹

In some circles the manipulation of the composition of the jury was falling into disfavour. On the heels of the ‘Cyprus Spy Trial’ verdicts, the subject of the peremptory challenge was vigorously debated in the House of Commons.¹⁸⁰ Whether the strikes were removing bias from the jury or purposely infusing it with partiality was central to many of the observations provided by the members.¹⁸¹ As well, two influential documents were authored as the Parliamentarians grappled with the issue, those being the *Fraud Trials Committee Report* chaired by Lord Roskill (‘Roskill Committee’)¹⁸² and the White Paper, *Criminal Justice: Plans for Legislation* (‘White Paper’),¹⁸³ both released in 1986. Additionally, a Crown Prosecution Service (‘CPS’) survey was conducted ‘to provide answers to some basic questions about current practices in the use of peremptory challenge, challenge for cause and the use of Crown “stand-by” in Crown Courts throughout England and Wales’.¹⁸⁴

of the ‘jury packing’ practice and in his 1982 book *What Next in the Law* he ‘suggested that this practice was increasingly being used to overload juries with blacks who were reluctant to convict those of their own race’. See Anon, ‘Noted British Judge Quits After Charges of Racism in a Book’ *The New York Times* (New York, 29 May 1982) 1 <<http://www.nytimes.com/1982/05/world/noted-british-judge-quits-after-charges-of-racism-in-a-book.html?pagewanted=print>> accessed 7 December 2016.

¹⁷⁸ The case was described in the media as ‘a sordid tale of espionage, homosexuality, drugs and blackmail among British military forces’ where the prosecution alleged that young servicemen ‘turned over thousands of classified documents to Soviet agents’. See Karen DeYoung, ‘British Prosecutors Open Case Against 7 Servicemen for Spying’ *The Washington Post* (Washington, 16 June 1985) 1 <https://www.washingtonpost.com/archive/politics/1985/06/16/british-prosecutors-open-case-against-7-servicemen-for-spying/57eac37e-4a04-4-4-4-elc-b923-a50c7cb58e2b/?utm_term=.36c51794c277> accessed 8 December 2016.

¹⁷⁹ Lloyd-Bostock and Thomas (n 73) 24. The authors, however, go on to explain that:

... it is questionable whether this [the acquittals] was because of the composition of the jury. There were other reasons why a jury might be sympathetic. In fact, systematic data on the peremptory challenge were available at the time: A study of 2,500 cases showed that the use of peremptory challenges was not associated with an increased likelihood of acquittal.

¹⁸⁰ See for example HC Deb 18 December 1985 vol 89 cc 415-32.

¹⁸¹ *ibid.* See also HC Deb 31 March 1987 vol 113 cc 972-88.

¹⁸² Lord Roskill, *Fraud Trials Committee Report* (HMSO, London 1986) (‘Roskill Committee’).

¹⁸³ Home Office, *Criminal Justice: Plans for Legislation* (Cmnd 9658, 1986) (‘White Paper’).

¹⁸⁴ David Riley and Julie Vennard, ‘The use of peremptory challenge and stand by of jurors and their relationship to trial outcome’ [1988] Crim LR 731, 734.

Neither the Roskill Committee nor the White Paper authors waited for the results of the CPS survey before releasing their respective documents for public consumption. In the context of fraud trials, the Roskill Committee recommended ‘with one dissent, the abolition of the right of peremptory challenge, and of the prosecution’s right to “stand by for the Crown”’.¹⁸⁵ Taking a strong position which underscored the fundamental importance of randomness, the Committee members explained:

For reasons which in modern society are perfectly understandable, but nevertheless regrettable, the principle of random selection which is central to the very nature of the jury has been progressively eroded by exclusions and releases. The current practice of peremptory challenge further weakens the same principle, to a potentially critical extent. Our evidence shows that the public, the press and many legal practitioners now believe that this ancient right is abused cynically and systematically to manipulate cases towards a desired result. The current situation bids fair to bring the whole system of jury trial into public disrepute. We conclude that in respect of fraud trials such manipulation is wholly unacceptable and must be stopped. Whether it is acceptable in robbery, drugs or murder trials is for others to conclude.¹⁸⁶

The White Paper summarized both sides of the peremptory challenge argument but did not otherwise suggest the inclinations of the government on the issue, alluding to the still outstanding CPS survey which would help inform further debate.¹⁸⁷ In ironic fashion, when the survey was completed and released, it showed that ‘the overall rate of conviction was significantly higher in cases in which peremptory challenge was used (59 per cent) than where no challenge was made (51 per cent)’.¹⁸⁸ Relatedly, ‘[c]onviction rates were also higher (but not significantly so) in cases in which the prosecution stood by one or more potential jurors.’¹⁸⁹

Without further study,¹⁹⁰ ‘the government forcefully advocated for the abolition of the peremptory challenge’¹⁹¹ and in 1988 the peremptory challenge was abolished by statute.¹⁹² Thus, in the span of slightly over five years, a few sensational jury trials

¹⁸⁵ Roskill Committee (n 182) 130.

¹⁸⁶ *ibid.*

¹⁸⁷ White Paper (n 183) paras 30-38.

¹⁸⁸ Riley and Vennard (n 184) 737.

¹⁸⁹ *ibid.*

¹⁹⁰ Jacqueline Horan and Jane Goodman-Delahunty, ‘Challenging the peremptory challenge system in Australia’ (2010) 34 *Crim LJ* 167, 169.

¹⁹¹ Gobert (n 19) 535-36.

¹⁹² Criminal Justice Act 1988, s 118(1).

combined with some timely research was enough to marshal sufficient political will to discontinue what was for centuries considered a venerable selection practice. It was arguably not so much that the practice had lost its reverence as it was that the legal practitioners had lost the trust of justice stakeholders.

Importantly, the Crown was also curtailed in its use of its stand-by powers. Although historically the Attorney General had the right to stand-aside potential jurors ‘when he considers that the interests of justice demand it’,¹⁹³ such a wide-ranging and subjective power was obviously open to the same abuses that motivated Parliament to do away with peremptory challenges. As such, the Attorney General issued guidelines to closely circumscribe when and how the mechanism should be engaged.¹⁹⁴ Two circumstances are contemplated as to when a member of a jury panel may be stood-aside:

(a) where a jury check authorized in accordance with the Attorney General’s Guidelines on Jury Checks . . . reveals information justifying exercise of the right to stand by; or (b) where a person is about to be sworn as a juror who is manifestly unsuitable and the defence agree that, accordingly, the exercise by the prosecution of the right to stand by would be appropriate.¹⁹⁵

Beyond standard criminal record checks, it was envisioned that certain circumstances would exceptionally require greater safeguards to ensure the proper administration of justice: ‘These classes of case may be broadly defined as (a) classes in which national security is involved and part of the evidence is likely to be heard in camera, and (b) terrorist cases.’¹⁹⁶ With regard to circumstances where a juror is manifestly unsuitable, in the eyes of both counsel, the example is given of an illiterate person who slips by the safeguards built into the governing jury legislation and is about to be called upon to sit on a complex case where presumably being able to read is a must.¹⁹⁷ With regard to the national security and terrorist type cases, use of the records in the possession of the police Special Branches and other security services is contemplated.¹⁹⁸ However, more intrusive searches into potential juror backgrounds, referred to as ‘authorized checks’ can

¹⁹³ *R v McCann* (1991) 92 Cr App R 239 (CA) 246.

¹⁹⁴ See *Attorney General’s Guidelines (Juries: Right to Stand By)* [1988] 3 All ER 1086.

¹⁹⁵ *ibid.*

¹⁹⁶ *ibid* 1087.

¹⁹⁷ *ibid* 1086-1087.

¹⁹⁸ *ibid* 1087.

only occur on ‘the personal authority of the Attorney General on the application of the Director of Public Prosecutions’.¹⁹⁹ Thus, save for the mutually agreed upon cases of obvious unsuitability, the jury check guidelines will animate all other stand-aside decisions.

Updated jury vetting and stand-by guidelines in 2012 further defined and controlled such processes in the following ways:

- An emphasis that previous conviction checks are now done automatically by Her Majesty’s Courts Services thus removing the involvement of the Association of Chief Police Officers in this task;
- A requirement that when the Attorney General has agreed to an authorized check being conducted, the Director of Public Prosecutions will write to the Presiding Judge for the area to advise him that this is being done;
- The information revealed in the course of an authorized check must be considered in line with the normal rules of disclosure;
- That a record of stand-asides used by Crown counsel must be relayed to the Director of Public Prosecutions and, in turn, forwarded to the Attorney General, for the sole purpose of enabling him to monitor the operation of the guidelines;
- That no use of the information obtained as a result of an authorized check is to be made except as may be necessary in direct relation to or arising out of the trial for which the check was authorized.²⁰⁰

Some have pointed out that ‘[t]he resulting imbalance between the government’s ability to remove unwanted jurors and the defence’s [lack of] ability to do likewise may exacerbate the perception of unfairness.’²⁰¹ Indeed, why the state needs to maintain the stand-aside option is puzzling. Presumably the vetted information could be provided to the trial judge who could then excuse the impugned jurors as the court saw fit. This way the all-important optics of jury selection would maintain the semblance of neutrality, with

¹⁹⁹ *ibid.*

²⁰⁰ As generally described in GOV.UK, *Jury vetting: right of stand by guidelines* (Attorney General’s Office, 30 November 2012) 1-4 <<https://www.gov.uk/guidance/jury-vetting-right-of-stand-by-guidelines-2>> accessed 6 September 2016.

²⁰¹ Gobert (n 19) 536.

neither side appearing to be possessed of advantageous powers to choose a favourable jury.

5.4.2 The USA

At least one reason for the American affinity toward trial by jury was the country's 'revolutionary past [which] created a preoccupation with the attainment of unbiased juries supported in turn by a belief in natural rights'.²⁰² As explained by King:

Across the centuries, prominent features of American law and culture have left their mark on the criminal jury: Americans' distrust of the judiciary, their passion for open procedures, their struggle to overcome racial and ethnic injustice, their commitment to adversarial adjudication, and the dual state-federal justice system.²⁰³

Anchoring the foregoing considerations is the Sixth Amendment to the United States Constitution which ensures 'a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed'.²⁰⁴ While 'the Constitution presupposes that a jury selected from a fair cross-section of the community is impartial',²⁰⁵ such a patriotic presumption is of doubtful validity since '[c]ommon human experience, common sense, psychosociological [*sic*] studies, and public opinion polls tell us that it is likely that certain classes of people statistically have predispositions that would make them inappropriate jurors for particular kinds of cases.'²⁰⁶

Late in the 18th century Congress provided the right to engage peremptory challenges and by 1870 almost all the states had afforded the right to peremptories to all parties.²⁰⁷ Indeed, at one time the prosecution was also allowed to use stand-asides despite the

²⁰² Brown (n 73) 478.

²⁰³ Nancy Jean King, 'The American Criminal Jury' (1999) 62 Law & Contemp Probs 41, 41.

²⁰⁴ US Const Amend VI (1791).

²⁰⁵ *Ross v Oklahoma*, 487 US 81, 86 (1988). See also *Holt v People*, 13 Mich 224, 228 (1865) where Cooley J remarked: 'But it must be borne in mind that a person is presumed to be qualified and impartial until the contrary is shown.'

²⁰⁶ Babcock (n 21) 553. Despite presumptions of impartiality, the jury selection practices in the USA have been described by Durno J, a Canadian judge, as an 'approach which treats all members of the jury pool as presumptively suspect'. See *R v Douse* (2009), 246 CCC (3d) 227 at para 41 (Ont SCJ).

²⁰⁷ Wilson (n 23) 366. See also *Swain v Alabama*, 380 US 202, 212-17 (1965), where White J chronicles the history of peremptory challenges in the USA after colonial separation.

practice being seen as controversial.²⁰⁸ However, as the peremptory strike regime became more common in the legislation of the states, the ability to stand-by jurors ended.²⁰⁹ Thus, modern American jury selection knows only for cause and peremptory challenges.

Interestingly, the Supreme Court of the United States has emphasized that ‘[t]he right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused.’²¹⁰ Furthermore, the court has acknowledged that there is a ‘long and widely held belief that peremptory challenge is a necessary part of trial by jury’.²¹¹ Yet despite the esteem in which the particular selection process is held, America’s highest court has also underscored that the peremptory challenge is not embedded in a Constitutional foundation, rather it is merely underpinned by federal and state legislation.²¹² As such, its continued existence is vulnerable to the political will of the times.

While the peremptory challenge has generated a prodigious mass of jurisprudence, it is clear that those who would see its demise either remain in the minority or lack the necessary clout to engage any wholesale changes.²¹³ In 2015, Howe made the following observations:

Despite the criticism and venerated positions of many critics, peremptory challenges remain the norm throughout the country. Various study groups appointed by national organizations and state governments have opposed abolition, including the American Bar Association. No state has gotten rid of peremptory challenges, and the Supreme Court has never had a majority of members who appeared ready to abolish them or to recommend their abolition.²¹⁴

²⁰⁸ *Brown* (n 73) 471. See also *United States v Marchant*, 25 US 480, 483-86 (1827) and *United States v Shackleford*, 59 US 588, 590-91 (1856).

²⁰⁹ *Brown* *ibid*.

²¹⁰ *Pointer* (n 23) 408.

²¹¹ *Swain* (n 207) 219.

²¹² *ibid*. See also *Stilson v United States*, 250 US 583, 586 (1919).

²¹³ See the observations of Nancy S Marder regarding the influence of the American Bar Association in ‘Justice Stevens, the Peremptory Challenge, and the Jury’ (2006) 74 *Fordham L Rev* 1683, 1685-87.

²¹⁴ Scott W How, ‘Deselecting Biased Juries’ (2015) 2 *Utah L Rev* 289, 292.

It is not within the purview of this thesis to engage in an analysis of the history of racism in the USA. As it relates to jury selection, it will suffice to simply reference the following observations made by the United States Supreme Court:

While we recognize, of course, that the peremptory challenge occupies an important position in our trial procedures, we do not agree that our decision today will undermine the contribution the challenge generally makes to the administration of justice. The reality of practice, amply reflected in many state- and federal-court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors. By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.²¹⁵

Thus, ‘to “presume” that peremptories are exercised in a permissible manner is to turn a blind eye to the history of this practice’.²¹⁶ Faithful and trusting relations, although still important in the overall workings of the justice system, need to be augmented with other checks on those that wield the challenges.

Before discussing the supervisory function of the court in relation to the use of peremptory challenges, one must be aware of the extent to which prospective American jurors may be investigated before they assemble at the court house. While the United States Supreme Court has yet to ‘express any views on the techniques used by lawyers who seek to obtain information about the community in which a case is to be tried, and about members of the venire from which the jury is likely to be drawn’,²¹⁷ it surely knows that jury vetting occurs. Lower courts, however, have made it clear that, subject to making contact with prospective jurors,²¹⁸ the ‘pretrial investigation of veniremen has never been foreclosed, and is an inherent part of the jury system as it has developed’.²¹⁹ As posited by Quirico J:

²¹⁵ *Batson* (n 162) 98-99.

²¹⁶ *Marder* (n 213) 1687.

²¹⁷ *Batson* (n 162) 89, n 12.

²¹⁸ *Dow* (n 110) 430-31.

²¹⁹ *Commonwealth v Allen*, 400 NE 2d 229, 237 (Mass 1980).

. . . it is essential that in interviewing third parties investigators do not, by design or effect, influence, solicit, intimidate or propagandize either the persons interviewed or, indirectly, the prospective juror. The risk of this improper influence occurring may be minimized by certain precautions. First, the investigators should be persons who are not closely related or associated with a litigant or his family. Second, the investigators should, where possible, avail themselves of sources of information other than third-party interviews, if such sources are likely to provide the desired data. Third, ideally investigators would be employed on a mutual or cooperative basis between parties, with the resulting information available to both sides.²²⁰

Although it appears that vetting the names on a panel is not proscribed, there is no concomitant right to be provided a list of names.²²¹ Thus, unless afforded the names and addresses of prospective jurors through local practice or statutory entitlement, the ability to vet a jury panel may be rendered impossible. Relatedly, certain prosecution offices are known to keep lists of their impressions of certain jurors for office use, given that jury panels may be utilized many times during the sittings of the court before they are disbanded. As well, in smaller jurisdictions citizens may be called upon for jury duty with a degree of regularity. It is believed by some that these lists of ‘good’ and ‘bad’ jurors ought to be disclosed to the defence upon request.²²² However, as was pointed out by Barnes J in *Hamer v United States*:

The use of ‘jury books’ showing how members of a jury panel voted on previous juries has long existed in our courts. It has been praised and criticized; attacked and defended. Many an experienced trial lawyer will insist that knowing how a juror votes on one case will not give the slightest indication how he or she would vote on another, even if it is the same kind of case. If the facts differ, it is a different case, and different pressures, feelings, and sympathies come into being.²²³

Returning to the actual in-court execution of a peremptory strike, the seminal case that discusses its improper usage is *Batson v Kentucky* (‘*Batson*’), where the United States Supreme Court fashioned a three-part test for determining whether the prosecution had

²²⁰ *ibid* 238.

²²¹ See *Hamer v United States*, 259 F 2d 274, 278-79 (9th Cir 1958) and *Wagner v United States*, 264 F 2d 524, 527-28 (9th Cir 1959).

²²² See the arguments for disclosure made by Ira P Robbins in “‘Bad Juror’ Lists and the Prosecutor’s Duty to Disclose” (2012) 22 Cornell J L & Pub Pol’y 1.

²²³ *Hamer* (n 221) 280.

used its challenges in a racially discriminatory fashion.²²⁴ The constituent parts of the test are as follows:

Batson held that a defendant would overcome the presumption that peremptory challenges were used legitimately by making a prima facie case that the challenges at hand were race-motivated (*Batson* step one), after which the burden would then shift to the prosecutor to articulate a race-neutral reason for the challenges (*Batson* step two). If a race-neutral reason were proffered, then the final step would be for the trial court to determine whether the challenger had met his or her burden of proving that the peremptory challenges were in fact exercised because of racial prejudice (*Batson* step three).²²⁵

The *Batson* rationale has been extended to defence counsel challenges²²⁶ as well as to peremptory challenges based on gender.²²⁷ Civil jury trials are subject to the same strictures.²²⁸ What is apparent, however, is that as the case law in America makes inroads into overcoming race- and gender-driven juror selection, it also has arguably demarcated a move to elevate ‘the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death’.²²⁹ Indeed, a majority of the Supreme Court of the United States made it clear that ‘if race stereotypes are the price for acceptance of a jury panel as fair, we affirm today that such a price is too high to meet the standard of the Constitution’.²³⁰

It is apparent that a *Batson* challenge has the potential to become a byzantine affair given its amorphous search parameters. At first glance it also evinces a concern as to its efficiency. No doubt in the end it produces the most unseemly of spectacles in an environment otherwise known for its solemnity. Not only is a lawyer-focused, as opposed to witness-focused, inquisition antithetical to the orthodoxy of courtroom procedure, it is bound to elicit the occasional pretextual, if not blatantly contrived, response. Similar to what at times occurs with potential jurors in challenges for cause, a challenged attorney may opt for a socially acceptable, yet untrue, answer. As Marshall J explained in *Batson*:

²²⁴ *Batson* (n 162) 96-98.

²²⁵ *Hoffman* (n 26) 833-34.

²²⁶ *McCollum* (n 157).

²²⁷ *J E B v Alabama*, 511 US 127 (1994).

²²⁸ *Edmonson* (n 28).

²²⁹ *McCollum* (n 157) 62.

²³⁰ *ibid* 57 (internal citation and quotation marks omitted).

Nor is outright prevarication by prosecutors the only danger here. It is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal. A prosecutor's own conscious and unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A Judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.²³¹

At least one study has revealed that 'when called upon to do so, *Batson* respondents offer acceptable neutral explanations in almost four out of five situations in the United States'.²³² This would suggest that approximately 20 percent of challenged lawyers are found to harbour racist intentions when selecting a jury. Despite such abuses, the peremptory challenge remains.²³³

5.4.3 Canada's Response

The Canadian experience with peremptory challenges indicates a recognition of similar problems to those of England and the USA, despite the country's relative youth.²³⁴ Indeed, it has been suggested that 'the contemporary Canadian criminal jury system may be viewed as a hybrid of the English and American jury systems'.²³⁵

The year 1892 saw Canada's first *Criminal Code* come into being, which largely 'followed Sir James Fitzjames Stephen's draft English code of 1879, and its basic structure is retained in the modern Criminal Code'.²³⁶ Like the original *Criminal Code*, the present iteration recognizes 'the right to jury trial for serious offences'.²³⁷ The in-court seating procedures of the petit jury can all be found in the *Criminal Code*.

²³¹ *Batson* (n 162) 106 (internal citations and quotation marks omitted).

²³² Kenneth J Melilli, 'Batson in Practice: What We Have Learned About *Batson* and Peremptory Challenges' (1996) 71 Notre Dame L Rev 447, 465.

²³³ See *Foster v Chatman*, 136 S Ct 1737 (2016). In this case the court granted a death penalty appeal where it was shown, via fresh evidence obtained by way of an Open Records Act request, that peremptory challenges exercised by the state at a murder trial held over three decades earlier were racially motivated.

²³⁴ England became a country in 1066, the USA in 1776 and Canada in 1867.

²³⁵ Neil Vidmar, 'The Canadian Criminal Jury: Searching for a Middle Ground' in Neil Vidmar (ed), *World Jury Systems* (Oxford University Press 2000) 213.

²³⁶ *ibid* 217.

²³⁷ *ibid*.

With regard to the use of stand-asides, it was long believed that they ‘assisted colonial officials attempting to secure convictions’.²³⁸ Thus, the notion that the Crown had noble intentions when it exercised its stand-by option was questionable. The candid concession of early twentieth century Minister of Justice, the Honourable CJ Doherty, while discussing *An Act to Amend the Criminal Code (respecting Jurors)*,²³⁹ exposes the likely motivation behind the practice: ‘Perhaps it might be more correct to say that the more you increase the number of men from whom you can, by this process of elimination, select the twelve it wants, the more you increase the opportunity for the Crown to find a jury exactly to its liking.’²⁴⁰

Judges have also been vocal about the stand-by powers of the Crown because of the ‘unfair advantage’²⁴¹ it provided. In the case of *R v Pizzacalla* (*‘Pizzacalla’*), a sexual assault prosecution, the Crown utilized its stand-asides in such a way that it was able to select a jury composed entirely of women.²⁴² The prosecutor openly admitted his intention to stack the jury:

Yes, Your Honour, the selection process is obviously weighted in favour of the Crown, inasmuch as, if the Crown chooses to employ its stand-asides, it can outlast the number of challenges . . . I will concede that most of the challenges I used were directed at keeping men from this jury, and preferring to have women try this particular case. I have tried, in my experience, probably 50 or 100 jury trials involving sexual assaults. I have never before used the option that I used in this case, of attempting to get a jury of all women. This is a case involving sexual harassment in the workplace. In my experience, I was of the view that I might encounter a man or more than one man who felt that, somehow, a person in the workplace has the right to fondle, touch, make passes at . . . people in the workplace.²⁴³

Within a year of *Pizzacalla*, the stand-aside was ruled unconstitutional in Canada. Despite the repeated negative judicial commentary that was being voiced about the option, Parliament was not moved to proactively address the problem. Rather, a

²³⁸ Brown (n 73) 492.

²³⁹ *An Act to Amend the Criminal Code (respecting jurors)*, SC 1917, c 13, s 1.

²⁴⁰ *House of Commons Debates*, 12th Parl, 7th Sess, Vol 5 (9 August 2001) at 4309.

²⁴¹ *R v Piraino* (1982), 37 OR (2d) 574 at para 10 (H CJ). See also *R v Cecchini* (1985), 22 CCC (3d) 323 at paras 6-10, 20-25 (Ont H CJ).

²⁴² *R v Pizzacalla* (1991), 5 OR (3d) 783 (CA).

²⁴³ *ibid* para 4. The Ontario Court of Appeal at para 5 held that ‘the manner in which Crown counsel exercised the right to stand aside jurors gave the appearance that the prosecutor secured a favourable jury, rather than simply an impartial one’ (internal quotation marks omitted).

constitutional challenge to the *Criminal Code* section which enabled the stand-by procedure was brought in *Bain*.²⁴⁴ The Supreme Court of Canada, by a slim 4-3 majority, held that stand-asides infringed s. 11(d) of the *Charter* as the fairness of the jury selection process was compromised.²⁴⁵ Cory J emphasized that ‘whenever the Crown is granted statutory power that can be used abusively then, on occasion, it will indeed be used abusively’.²⁴⁶ Justice Cory recognized that rather than relying on the ‘continuous exemplary conduct of the Crown’, the safer and better approach required that ‘the offending statutory provision be removed’.²⁴⁷ Parliament never sought to reintroduce a modified stand-aside procedure, presumably content that for cause and peremptory challenges were sufficient safeguards.²⁴⁸

Like the misuse of the right to stand-aside, the right to challenge peremptorily has not escaped criticism. While both the prosecution and the defence are supplied peremptories in equal number,²⁴⁹ so that quantum inequity arguments are avoided, improperly motivated strikes have been litigated. However, in relative terms the Canadian version of a *Batson* inquiry is used sparingly. Indeed, few reported decisions exist. The 1993 decision of *R v Lines* (‘*Lines*’) would see a court consider the issues raised in *Batson* for the first time in Canada.²⁵⁰ Interestingly, it was the prosecution that moved for a ruling that would limit the exercise of peremptory challenges by all parties, such that no peremptory challenge could be brought on the basis of race.²⁵¹ The argument of the Crown was that the exercise of a peremptory challenge based solely on race would infringe s. 15 of the *Charter* which pertains to the right to equal protection and equal benefit of the law.²⁵²

²⁴⁴ *Bain* (n 64). As explained by Stevenson J at para 85: ‘This case concerns the constitutional validity of the jury selection process contained in s. 563 of the Criminal Code . . . which grants the Crown 48 stand bys and four peremptory challenges while the accused’s [*sic*] being allowed only four, 12 or 20 peremptory challenges’.

²⁴⁵ *ibid* para 9. See the text in n 3 regarding the focus of s 11(d) of the *Charter*.

²⁴⁶ *ibid* para 8.

²⁴⁷ *ibid*.

²⁴⁸ As pointed out by Sopinka J in *Biddle* (n 33) para 34 ‘[f]ollowing upon our decision in *R. v. Bain*, supra, this provision was repealed and this issue of law cannot recur.’

²⁴⁹ *Criminal Code* (n 16) s 634(2).

²⁵⁰ *R v Lines*, [1993] OJ No 3284 (GD).

²⁵¹ *ibid* para 6.

²⁵² *ibid* para 10.

Despite having the benefit of, *inter alia*, the *Batson* decision and that of *Georgia v McCollum*²⁵³ before him, such that he would have understood the logic behind the argument that American defendants were considered state actors for the purpose of exercising peremptory challenges, Hawkins J nonetheless rejected the agency-by-conscription reasoning that had found favour in the USA. He ruled that ‘it is fanciful to suggest that in the selection of a jury he [the accused] doffs his adversarial role and joins with the Crown in some sort of joint and concerted effort to empanel an independent and impartial tribunal’.²⁵⁴ Thus, the defence in that case was free to use whatever discriminatory logic it chose to employ during jury selection.

Coincidentally, some six years later, the lead counsel in the *Lines* prosecution, Brian Trafford, QC, was now a judge and found himself presiding over the matter of *R v Brown*.²⁵⁵ However, in that case it was counsel for the defence that was making application to have the Crown prohibited from exercising its peremptory challenges in a discriminatory manner against black potential jurors.²⁵⁶ In using the *Canadian Bill of Rights* as an interpretive aid,²⁵⁷ to assist in a s. 15 *Charter* analysis, Justice Trafford was nonetheless convinced that ‘it is reasonable to conclude that [even at] common law a black person was entitled to be treated without discrimination on the basis of race when he/she was summoned as a juror in a criminal trial’.²⁵⁸ Ultimately Trafford J ruled that ‘[n]either the prosecution nor the defence may discriminatorily challenge a prospective juror on the basis of race.’²⁵⁹ The court then went on to hold that should either side establish a *prima facie* case of *mala fides* in the use of peremptory challenges,²⁶⁰ which is upheld by the court after hearing the respondent’s version of events (which could involve the calling of evidence),²⁶¹ a panoply of remedies would be contemplated:

. . . the relief may in the circumstances of a given case include ordering any prospective juror who has been unlawfully challenged to re-attend for further consideration by the defence - a co-accused may choose to challenge

²⁵³ *McCollum* (n 157). The case stands for the proposition that the logic of *Batson* also applies to the defence.

²⁵⁴ *ibid* para 26. But consider the more contemporary argument in the text to n 124 – n 125.

²⁵⁵ *Brown* (OCGD) (n 156).

²⁵⁶ *ibid* para 1.

²⁵⁷ *ibid* para 6.

²⁵⁸ *ibid*.

²⁵⁹ *ibid*.

²⁶⁰ *ibid* paras 8 and 9.

²⁶¹ *ibid*.

juror(s) peremptorily - while preventing the Crown Attorney from doing so. If the jury panel includes other black people, the court may prevent the Crown Attorney from challenging them peremptorily. In those cases where there has been a pattern of prosecutorial misconduct, the court may order a mistrial. Other relief may be fashioned to meet the circumstances of a particular case. Similarly, with one exception, where the defence has violated s. 634 of the Code [the peremptory challenge section] the same range of remedies should be considered and may be appropriate. I would be disinclined to order a juror improperly challenged by the defence to be placed on the jury subject to the Crown Attorney challenging him/her peremptorily in any such case.²⁶²

Whether the procedures set out by Trafford J were ever actually engaged during jury selection is unknown to the author as the results of the selection process are not reported. However, what is clear from the decision is that a *Batson*-like remedy has been available in Canada for approximately two decades.

The Ontario Court of Appeal considered the alleged misuse of peremptory challenges by the Crown in *R v Gayle* ('*Gayle*'), albeit in *obiter dictum*.²⁶³ Sharpe JA acknowledged the paucity of authority on the topic in Canada. However, he emphasized the historic role of the Crown as a minister of fairness; the need for the Crown to use its discretion in conformity with *Charter* principles and values; and, that there will indeed be cases where it will be appropriate to review the exercise of a peremptory challenge, at least when exercised by the Crown.²⁶⁴ While the court was not willing to rule on the use of the peremptory challenges by the Crown at trial, given no objection was raised at the time and no proper factual record had been generated,²⁶⁵ it did make the following observations:

. . . 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 a trial by jury and the right to a fair and impartial trial must 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 established, nor can they be impeded by shortcomings in the jury selection process.²⁶⁶

²⁶² *ibid* para 10.

²⁶³ *Gayle* (n 68) paras 64-67.

²⁶⁴ *ibid* paras 61-67.

²⁶⁵ *ibid* para 68.

²⁶⁶ *ibid* para 58. Note that Doherty JA in *R v Biddle*, [1993] OJ No 1833 (CA), although speaking primarily about stand-asides, indicated at para 50: 'The Crown's abuse of its stand-aside power (or its peremptory

In 2007 the Ontario Court of Appeal in *R v Amos* ('*Amos*') dismissed a conviction appeal that included a consideration of the Crown's use of peremptory challenges.²⁶⁷ In its brief reasons, the court referenced *Gayle* and upheld the trial judge's finding that there was 'no pattern in the Crown's actions that would suggest that the challenges had been exercised in an arbitrary manner nor did she see anything to suggest that the Crown exercised its discretion other than in conformity with Charter principles and values'.²⁶⁸ Thus, while the *Amos* decision lacked detailed analysis it confirmed that arguments regarding the misuse of peremptory challenges will be addressed at both trial and on appeal, so long as a proper foundation of evidence has been laid for the court's consideration. Overall, the dearth of reported cases raises a concern that counsel are not questioning the potential discriminatory use of peremptories to any significant degree.²⁶⁹

5.5 Conclusion

The court is aware that racism has infiltrated its domain.²⁷⁰ However, as Jai and Cheng point out, '[w]hile the existence of racism in society at large has been widely acknowledged, proving that a particular action was a result of racial discrimination is often very difficult.'²⁷¹ This is particularly the case when the suspected culprit is part of the legal establishment, that being the lawyer acting alone or in consort with the client.

It is unfortunate that a device that has the capacity to maintain a measure of representativeness in a petit jury has been misused by some. Unlike the general weaknesses of the cause challenge procedure, the peremptory challenge is compromised more so by improper motives than by impractical methods. While some would argue that

challenge power), may give rise to remedies at trial if, unlike here, the alleged abuse is raised at trial. Exclusion of potential jurors based on their sex may also implicate an accused's rights under s.15 of the Charter: *Batson v. Kentucky*, 476 U.S. 79 (1985) [*sic*].'

²⁶⁷ *R v Amos*, 2007 ONCA 672.

²⁶⁸ *ibid* para 3.

²⁶⁹ In *R v Cornell*, 2017 YKCA 12 the reviewing court found no prosecutorial misconduct in the use of its peremptory challenges. However, in the 2018 Saskatchewan prosecution of Gerald Stanley for the alleged murder of Colten Boushie, a young Indigenous male, it was reported in the press that the defence peremptorily challenged a number of visibly Indigenous jury candidates without objection from the Crown (nor was there any racial bias challenge for cause brought by either party). Mr. Stanley was found not guilty. See Kent Roach, 'The Urgent Need to Reform Jury Selection after the Gerald Stanley and Colten Boushie Case' (*Faculty Blog*, 28 February 2018) <<https://www.law.utoronto.ca/blog/faculty/urgent-need-reform-jury-selection-after-gerald-stanley-and-colten-boushie-case>> accessed 21 April 2018.

²⁷⁰ *Parks* (n 27) paras 42-88.

²⁷¹ Julie Jai and Joseph Cheng, 'The Invisibility of Race in Section 15: Why Section 15 of the Charter Has Not Done More to Promote Racial Equality' (2006) 5 J L & Equality 125, 143.

any opportunity to reconfigure a random outcome infuses unwanted subjectivity into the process, others would argue that chance is too unpredictable to be allowed to solely control who becomes a seated juror. If the latter argument is to prevail, some degree of control over the conduct of the challenger must be put in place. It would appear that counsel and the court can no longer ‘celebrate the process without focusing on the results’.²⁷²

Four potential options remain available regarding the peremptory challenge, each with its own strengths and weaknesses. The first option is to maintain the *status quo* and simply work to better educate counsel on their role in jury selection. Indeed, the indoctrination process in this regard would ideally start in law school when much of the ethical and moral foundations of budding trial lawyers begin to take shape. Upon being called to the Bar, as far as continuing legal education initiatives are concerned, going back to basics and considering trial fairness concepts in the context of a changing society always has currency.²⁷³ Reinforcing the messaging from Moldaver J in the *Yumnu* case, which is suggestive of the need for counsel to re-prioritize their goals during jury selection,²⁷⁴ is a good starting point. Commonality of effort and intention in empanelling an impartial jury must be the new focus. However, a lawyer is already expected within the practice of law to ‘try to improve the administration of justice’, which implies ‘a basic commitment to the concept of equal justice for all within an open, ordered and impartial system’.²⁷⁵ Thus, the obligations are not so much unknown as lacking in uniform adherence. No doubt the pressures to succeed in a litigious environment will always cause some to make poor choices that overlook the reputations of the justice system. Others will simply lack cultural competence and thus make or fail to make their challenges on the backdrop of social context knowledge.²⁷⁶ Consequently, while better education will hopefully make for more consistently high ethical standards, such a singular approach to the misuse of peremptory challenges will not suffice.

²⁷² Tania Tetlow, ‘Solving *Batson*’ (2015) 56 Wm & Mary L Rev 1858, 1939.

²⁷³ Consider the LSO initiatives which require its licensees to each year complete a minimum number of accredited programming hours focused on equity, diversity and inclusion which includes ways to recognize and counter unconscious bias. See <<https://lso.ca/about-lso/initiatives/edi/cpd-equality,-diversity-and-inclusion-requirement>>.

²⁷⁴ *Yumnu* (n 106) at para 71 where Moldaver J remarks that ‘the process is not governed by the strictures of the adversarial model, nor should it be.’

²⁷⁵ LSO (n 129) Rule 5.6-1 and Commentary [2], respectively.

²⁷⁶ See generally the discussions in Richard Devlin and David Layton, ‘Culturally Incompetent Counsel and the Trial Level Judge: A Legal and Ethical Analysis’ (2014) 60 Crim LQ 360.

Secondly, the court can be called upon to engage in greater oversight when peremptory challenges are being exercised. This is not to say that the function of the court should be transformed from that of neutral arbitration to that of the participatory status afforded counsel. Rather, the scrutiny needs to be more understated, but still obvious to the justice stakeholders. In particular, counsel need to be aware that the judge is indeed watching its court officers as they are selecting a jury, rather than the court leaving them with the impression that it is acquiescing to discriminatory selection practices as has been suggested by some.²⁷⁷

A common law mechanism has been in place in Canada for investigating suspect peremptory strikes for many years now, but its use has been quite limited. Whether the reason for its underuse is because counsel are unaware of the few reported precedents (unlikely the case given the ease of computer-assisted key word legal research methods), or as a result of a hesitancy to make the allegation of racism against a colleague in open court, is unclear. What is clear, however, is that the trial judge can bring the issue to the fore as a prophylactic measure during pre-trial discussions with counsel. Certainly, reminding lawyers of the proper use of the peremptory challenge could easily become part of standard opening comments by the court, commingled with other *pro forma* considerations such as inquiring on whether to issue an order excluding witnesses, whether to allow the accused to sit at counsel table (as opposed to remaining in the dock) during the trial and whether counsel are offering any admissions. At this time there could also be a discussion about the potential remedies available should the court find that there has been misconduct in the use of such challenges. These comments on their own may have the potential to achieve some degree of deterrence. In addition, Crown and defence counsel might then and there even indicate a willingness to work together by collectively using their peremptory challenges to attain a fair, impartial and representative jury. Indeed, collaboration in this regard would go a long way in dispelling any concerns over suspect selection intentions.

A third option is to legislate a reduction in the number of challenges afforded the parties so as to make it less likely that representativeness on the petit jury can be significantly impacted. The potential for each side to wield up to 20 peremptory challenges for certain

²⁷⁷ Wilson (n 23) 371.

offences can dramatically change what random selection has otherwise produced. It took centuries before England decided to totally abandon its peremptory challenge regime, but when it occurred it left Barristers with little to use to expose biased jurors given the limitations of the cause challenge.²⁷⁸ Thus, while fashioning a remedy involving a significant reduction in the available number of peremptory strikes appears viable, its effectiveness would need to be monitored with the assistance of concomitant empirical studies to see whether racially motivated challenging continued despite the reduced complement. Should abuses be found to persist, as was the perception in England when it was considering abolition as an option,²⁷⁹ then a similar fate might be appropriate for Canada. However, by combining options one and two above along with a restriction on the number of peremptory strikes (perhaps to as low as three²⁸⁰), their impact would be minimized while still keeping the opportunity for such a challenge in existence. The reduced quantum would also be suggestive that its use should be for rare, almost exigent circumstances, in an effort to improve as opposed to distort, representativeness.

Finally, there is the draconian option of complete abolition, leaving only the challenge for cause to address potential bias issues. As chapter 4 has suggested, leaving the gatekeeping function solely to the cause challenge is presently ill-advised. Abolition is a blunt form of remedy, somewhat similar to the logic in sentencing law that suggests that an incapacitating sentence²⁸¹ best protects society from the offender. The common flaw in both notions involves short-sightedness. While abolishing peremptory challenges will undoubtedly stop one form of racially motivated jury selection, it will also in its absence allow for biased potential jurors to more easily become seated. Indeed, abolition conjures the proverbial caution against ‘throwing the baby out with the bathwater’.²⁸² The famous saying relays ‘in an easily understandable metaphor the only too human inclination towards extreme reactions’.²⁸³ In 1989, shortly after the English peremptory

²⁷⁸ Gobert (n 19) 533-36.

²⁷⁹ Roskill Committee (n 182).

²⁸⁰ The Juries Act of England was amended in 1977, reducing the number of peremptory challenges to three. See the text to n 170. It will also be remembered that England still preserved a closely circumscribed stand-by procedure. See the text to n 193 – n 201.

²⁸¹ An incapacitating sentence is generally understood to be one of imprisonment. It tends to overshadow and render ineffective other sentencing principles such as restraint and rehabilitation.

²⁸² For a historical discussion about the famous warning see Wolfgang Mieder and Wayland D Hand, ‘“(Don’t) Throw The Baby Out With The Bathwater”: The Americanization of a German Proverb and Proverbial Expression’ (1991) 50 *West Folk* 361.

²⁸³ *ibid* 395.

challenge was discontinued, Gobert in a similar vein remarked that ‘if there were abuses in the exercise of peremptory challenges, they were clearly susceptible to less drastic solutions than abolition’.²⁸⁴

Whatever may be decided upon, it is important to recall ‘that many minority group members perceive unfairness in the administration of criminal justice’.²⁸⁵ One way to change that perception is to reconsider how juries are selected. Indeed, the quality of justice is arguably as much on display when a jury is being selected as when it renders its verdict.²⁸⁶ Moreover, as the following remarks indicate, the messages sent by the peremptory challenge are never lost on those subject to its exercise:

While the practice of challenging people without having to give a reason is sanctioned by the *Criminal Code*, we question the logic and fairness of allowing the practice to continue when its application can prevent Aboriginal people from sitting on a jury solely because they are Aboriginal.²⁸⁷

²⁸⁴ Gobert (n 19) 538.

²⁸⁵ Sheri Lynn Johnson, ‘Black Innocence and the White Jury’ (1985) 83 Mich L Rev 1611, 1613.

²⁸⁶ Frankfurter J in *Dennis v United States*, 339 US 162, 182 (1950) remarked that ‘[t]he appearance of impartiality is an essential manifestation of its reality.’

²⁸⁷ *Implementation Commission* (n 1) vol 1, ch 9, 7.

CHAPTER 6

CONCLUSIONS

Trial by jury has a celebrated history in common law countries. As an institution drawn directly from the citizenry, it is a valued form of popular adjudication that calls on the people to consider the conduct of one of their own. It stands apart from the more case-hardened form of justice that is meted out by a professional judge. Indeed, for many it is a once-in-a-lifetime opportunity to participate in the judging of a peer. Not everyone is able to join the ranks of a jury, due either to operation of statute or by determination of counsel. However, as has been discussed throughout this thesis, the rules and procedures that determine jury candidacy are vulnerable to overbroad application, ineffective engagement and general corruption. The aim of this research has been to critically expose these shortcomings in relation to IP and to make some measured suggestions for incremental change.

The recommended modifications to the current jury compilation regime in Canada that have been put forward in this thesis, while admittedly modest, remain important contributions toward addressing the overrepresentation of IP in prison. Indeed, each stop in the criminal justice journey allows for improvements to be made, both great and small, towards this important goal. Certainly other more robust remedies have been suggested to reduce incarceration rates earlier in the process¹ and also at the actual point of sentencing.² It is nonetheless submitted that a holistic approach to reducing custodial numbers should be pursued with each procedural ‘weigh station’ doing its part. While a pure business model assessment of my recommended changes would suggest that they will make only a slight impact on overrepresentation numbers, the welfare of the IP will nonetheless benefit. Indeed, it has been observed in other contexts where injustices have been investigated that ‘should a new technology . . . exclude one person from unjust . . .

¹ Obtaining judicial interim release correlates with whether a custodial sentence will be visited on an offender upon a subsequent finding of guilt. See generally Jillian Rogin, ‘*Gladue* and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada’ (2017) 95 Can Bar Rev 325.

² Scholars have emphasized approaches that include the use of more comprehensive *Gladue* reports as well as overhauling the sentencing legislation beyond what s 718.2(e) of the *Criminal Code* presently contemplates. See respectively, Alexandra Hebert, ‘Change in Paradigm or Change in Paradox? *Gladue* Report Practices and Access to Justice’ (2017) 43 Queen’s L J 149, 170-74 and Julian V Roberts and Andrew A Reid, ‘Aboriginal Incarceration in Canada since 1978: Every Picture Tells the Same Story’ (2017) 59 CJCCJ 313, 336-38.

conviction, the money will have been well spent'.³ Thus, the importance of the effort need not necessarily be measured by the statistical significance of the result.

Consistent with a controlled and incremental approach to changes to jury selection is my proposal that they be governed by common law developments rather than wholesale statutory enactments. By allowing the court to retain control over the determination of who is qualified to sit on a jury and how the candidate should be selected, the doctrines of precedent and *stare decisis* will oversee a 'decentralized evolution of law through primarily apolitical judicial decisions [which] is vastly preferable to centralized yet arbitrary lawmaking by legislatures'.⁴ Certainly Canadian courts have shown an adeptness for developing and refining workable procedures in areas as diverse as: fashioning a principled approach to the admission of hearsay evidence;⁵ articulating a test for the admissibility of expert evidence;⁶ and, setting out the steps to be followed for the production and disclosure of private records.⁷ Indeed, the Supreme Court of Canada 'has signalled its willingness to adapt and develop common law rules to reflect changing circumstances in society at large'.⁸

Engaging statutory reform on its own conjures a common and concerning refrain about partisan politics.⁹ Firstly, legislation is often criticized for the speed with which it is passed,¹⁰ particularly if done so by a majority government¹¹ controlled by a parliamentary

³ Ontario, *The Commission on Proceedings Involving Guy Paul Morin* (Queen's Printer 1998) vol 1, 324.

⁴ Nicola Gennaioli and Andrei Shleifer, 'The Evolution of Common Law' (2007) 115 JPE 43, 44.

⁵ See *R v KGB*, [1993] 1 SCR 740.

⁶ See *R v Mohan*, [1994] 2 SCR 9.

⁷ See *R v O'Connor*, [1995] 4 SCR 411.

⁸ *R v Salituro*, [1991] 3 SCR 654 at para 29. See also *Watkins v Olafson*, [1989] 2 SCR 750 at paras 13-23 for a discussion of when a common law change or a legislative change is more appropriate. Finally, consider more generally Jack G Day, 'Why Judges Must Make Law' (1976) 26 Case W Res L Rev 563.

⁹ See Anthony N Doob and Carla Cesaroni, 'The Political Attractiveness of Mandatory Minimum Sentences' (2001) 38 Osgoode Hall L J 287, 298 where the authors seem to agree with the position of Michael Tonry that politicians 'do not care' that statutes may take positions contrary to empirical evidence. Rather, it is said that 'politics, in recent years, has become a question of whose sound-bite attracts the most votes'.

¹⁰ At times called 'fast-track' legislation, concerns over a lack of detailed parliamentary scrutiny, leading to unsatisfactory legislation, are often raised. See the Select Committee on the Constitution, *Fast-track Legislation: Constitutional Implications and Safeguards* (HL 2008-09, 116-I) vol 1, 12-18 ('Select Committee'). See also the concerns over 'precipitous' legislation raised by Julian V Roberts in 'Reforming Conditional Sentencing: Evaluating Recent Legislative Proposals' (2006) 52 Crim LQ 18, 21-22.

¹¹ A one-party majority government draws its power from the fact that it is 'a single party administration which controls at least a simple majority of the seats in the Legislature'. See Valentine Herman and John Pope, 'Minority Governments in Western Democracies' (1973) 3 BJ Pol S 191, 192.

system that embraces solidarity and, at times, strict party discipline.¹² Without proper consideration, the public is often left with a poorly crafted statute because members of Parliament were ‘acting in haste’ and were now ‘repenting at [their] leisure’.¹³

Secondly, statutory compliance with the rights enshrined in the *Canadian Charter of Rights and Freedoms*¹⁴ is often found to be wanting by the courts. Hiebert has opined that a government’s failure to avert passing unconstitutional legislation is often the result of an amalgam of many things including: electoral majorities; political objectives designed to promote electoral fortunes; and, short-term objectives tied with political strategies for blaming the court when legislation does not pass constitutional muster.¹⁵ Certainly the recent striking down of various mandatory minimum sentence sections of the *Criminal Code* as unconstitutional, largely for the same reason (that the sentence constituted cruel and unusual punishment), speaks to a worrisome trend in Canada.¹⁶ Ultimately the courts have reverted back to sentencing law principles and precedent to fashion a fit and just sentence, unconstrained by the spectre of obligatory custodial terms.

Finally, it is worth mentioning the symbolic importance of the common law. It is submitted that the messaging that flows from a well-crafted judgment, even beyond its words, is more valuable to the public than a bald statutory proclamation.¹⁷ This is particularly the case when the matters in question are procedural in nature. As Gusfield explains, ‘[i]n analyzing law as symbolic we are oriented less to its behavioral consequences than to its meaning as an act or gesture important in itself, as a symbol.’¹⁸ Indeed, ‘[s]ymbolic behavior has meaning beyond its immediate significance in its

¹² See generally Jonathan Lemco, ‘The Fusion of Powers, Party Discipline, and The Canadian Parliament: A Critical Assessment’ (1988) 18 Presidential SQ 283.

¹³ Select Committee (n 10) 16.

¹⁴ *Canadian Charter of Rights and Freedoms*, being Part 1 of the *Constitution Act, 1982*, enacted by the *Canada Act, 1982* (UK) c 11 (‘*Charter*’).

¹⁵ Janet L Hiebert, ‘The Charter’s Influence on Legislation: Political Strategizing about Risk’ (2018) 51 Can J Pol Sci 727, 734-38.

¹⁶ See for example: *R v Nur*, [2015] 1 SCR 773 regarding possessing loaded prohibited firearms; *R v Lloyd*, [2016] 1 SCR 130 regarding possessing a schedule 1 substance – in this case crack cocaine, methamphetamine and heroin – for the purpose of trafficking; and, *R v Gordon*, 2018 ONSC 6217 regarding sexually interfering with a person under 16 years of age.

¹⁷ This is not to say that symbolic legislation does not exist. See John P Dwyer, ‘The Pathology of Symbolic Legislation’ (1990) 17 Ecology L Rev 233.

¹⁸ Joseph R Gusfield, ‘On Legislating Morals: The Symbolic Process of Designating Deviance’ (1968) 56 Cal L Rev 54, 57. Consider also the comments of Finlason JA in *R v Koh* (1998), 42 OR (3d) 668 at para 43 (CA) where he spoke of the ‘salutary effects’ that challenge for cause opportunities can have on ‘the justice system as a whole’.

connotation for the audience that views it.¹⁹ One need only juxtapose the final nine words of s. 718.2(e)²⁰ of the *Criminal Code* with the text of the iconic judgment in *R v Gladue* (*‘Gladue’*) to understand that the messaging and symbolic representations of the latter far exceed those of the former.²¹

6.1 Criminal Antecedents and Juror Disqualification

It is the norm to restrict the eligibility pool of jury candidates through various means. Although jurisdictional standards will differ, typically those with criminal records or who are before the courts accused of a crime are disqualified from serving on a jury. Arguments that focus on notions of jury probity and anti-state bias undergird the rationale. Thus, the mark of unworthiness will remain with those who have transgressed the law, suggesting that they are atypical of society in general. However, as chapter 3 exposed, roughly ten percent of Canadians have a criminal record of some sort. This speaks to what a contemporary cross-section of society resembles. Of particular importance to this thesis is the extrapolation of those general numbers to the Indigenous population. Given their overrepresentation in all aspects of the criminal justice system, they are even less likely to serve on a jury.

When a criminal sanction expires, the hope and indeed the expectation is that an offender will fully return to productive society. Parsimony and the need for definable limits to punishment encourage the rehabilitative ideal. Furthermore, criminal conduct presumptions that suggest that such individuals are of compromised character, particularly when based on a single aberrant act, are of doubtful accuracy. Certainly people without criminal records can be just as flawed as those with such antecedents. My research indicates that studies on the inherent bias of convicted felons is extremely limited and in need of further examination. However, what is apparent so far is that the presumption is an unfortunate generalization. As Binnall explains, the theoretical underpinnings of the notion are suspect, those being: ‘criminal acts reveal bad character

¹⁹ Gusfield *ibid.*

²⁰ See the text to n 28 in ch 2.

²¹ *R v Gladue*, [1999] 1 SCR 688.

. . . character is a fixed concept. And . . . good character is essential in making proper civic decisions'.²²

In Canada, inconsistent disqualification standards reflected in territorial, provincial and federal legislation suggest that there are fundamental disagreements about what the penal consequences for offending should be. While some jurisdictions calibrate disqualified status to expire with the sentence, others maintain the stigma forever, unless the state is called upon to grant a pardon/record suspension. Despite these precautions, occasionally a disqualified juror will erroneously serve on a jury. My research suggests that when this does occur, despite the rhetoric to the contrary, it is recognized that juries continue to function as expected.²³ Thus, initial concerns about the tainted character of a criminally convicted juror seem more symbolic than real. Additionally, systemic underfunding of Canada's national criminal record-keeping system suggests that the apprehension about the criminal antecedents of prospective jurors may be exaggerated. If it were otherwise, presumably such records would be better maintained resulting in the disqualification of more prospective jurors.

My research recommends two routes to redress the inequity that has resulted from the mandate designed to keep those with criminal records off juries: (1) bring a constitutional challenge by engaging the equality rights enshrined in s. 15 of the *Charter*;²⁴ and/or, (2) encourage the territorial, provincial and federal governments to make statutory changes. The momentum for change in the treatment of Indigenous accused persons inspired by the *Gladue*²⁵ case suggests that a court-controlled approach has particular currency. However, some doubt remains as to whether defendants have 'standing to assert [the] s. 15 rights of some other persons [i.e. prospective jurors] in the justice system'.²⁶ Nevertheless, the standing issue is worth revisiting in light of the philosophical and policy changes that have occurred in the Indigenous justice arena over the past two decades.

²² James M. Binnall, 'EG1900 . . . The Number They Gave Me When They Revoked My Citizenship: Perverse Consequences of Ex-Felon Civic Exile' (2008) 44 *Williamette L Rev* 667, 672.

²³ Text to n 180 - n 201 in ch 3.

²⁴ Text to n 203 - n 217 in ch 3.

²⁵ *Gladue* (n 21).

²⁶ *R v Church of Scientology of Toronto* (1997), 33 OR (3d) 65 at 111-12 (CA).

Returning to the standing issue as it was originally considered in the 1997 case of *R v Church of Scientology of Toronto*²⁷ is informative. At that time Rosenberg JA for the Ontario Court of Appeal remarked that no case had been provided to the panel on point despite the fact that some American jurisprudence is referenced in the reported decision. What is conspicuously absent in the list of cases that were considered is the case of *Powers v Ohio* ('*Powers*'), a decision of the United States Supreme Court.²⁸ Some six years earlier the *Powers* court had ruled that standing should be granted to defendants so that they could raise the issue of discriminatory jury selection practices against panelists. Essentially, the logic behind the decision was distilled by Kennedy J for the majority as follows: racial discrimination causes injury to an accused person and a potential juror because it casts doubt on the integrity of the system; there is a congruence of interests as between the accused person and the potential juror to thwart discrimination which suggests that the former will be an effective advocate for the latter's concerns; and, a juror during the selection process is in a disadvantageous position to seek redress at that time for being discriminated against.²⁹ Had the *ratio decidendi* of *Powers* been provided to Rosenberg JA, perhaps the equality issue would have been settled differently at that time. Given the willingness of Canadian courts to at least consider foreign constitutional jurisprudence, particularly American developments,³⁰ the prospect of a correlative decision was certainly a possibility.

More recent judicial and academic commentary further bolsters the potential for a successful equality rights-based constitutional challenge to the disqualifying legislation. The notion that the jury is akin to a communal property holding, which should galvanize litigants into a unified and singularly focused selection group,³¹ speaks to a return to an almost forgotten egalitarian norm (ie. sitting a fair, impartial and representative jury). Additionally, recognizing that jury selection is not to be 'governed by the strictures of the adversarial model'³² would suggest that standing to bring an equality rights-based argument is now much less likely to be a sticking point.

²⁷ *ibid.*

²⁸ *Powers v Ohio*, 499 US 400 (1991)

²⁹ *ibid* 402-16.

³⁰ See *R v Rahey*, [1987] 1 SCR 588 at para 108 and *R v Keegstra*, [1990] 3 SCR 697 at para 51.

³¹ See the text to n 124 – n 125 in ch 5.

³² *R v Yumnu*, 2012 SCC 73 at para 71.

In recommending statutory reforms, I propose using a triadic approach. Firstly, the aforementioned equality argument could again be offered as a lobbying focal point to help the state address the Indigenous criminal justice overrepresentation issue. Secondly, I would challenge the notion held by legislators that a criminal record necessarily means a lack of probity and respect for the state (the twin presumptions). In this regard, I would emphasize the paucity of supportive data and remind my audience of the general rehabilitative goals of sentencing (which Parliament codified) in an effort to encourage a reconsideration of the twin presumptions. Finally, I would submit that there should be an alternative to pursuing a record suspension that would allow for convicted offenders to requalify for juror candidacy. I maintain that the provinces and territories are better advised to discontinue their reliance on the federal government granting record suspensions and instead focus on the amount of time that has transpired since a sentence has concluded. Indeed, even present-day record suspension applicants must abide by mandatory waiting periods.³³ By reinstating candidacy after a requisite time period there will still be safeguards in place in the form of challenges for cause and peremptory challenges.

As was discussed in chapter 3, the court would be alive to the potential dangers that are associated with individuals who have been convicted of certain types of crimes becoming jurors. Those who have committed offences of dishonesty, offended against the administration of justice or engaged in crimes of moral turpitude would be subjected to closer scrutiny than those convicted of lesser crimes. Importantly, however, all previous offenders would be summoned for jury duty once their sentence was completed and their statutory ineligibility period had expired. The combination of a waiting period and *voir dire* questioning would act as an important check and balance since time alone may not have assuaged pro-criminal tendencies. Indeed, there may be those who so readily identify with an offending lifestyle that they might request to opt out of jury duty rather than be subjected to questioning. Perhaps those requests should be accommodated if made.

Without allowing counsel greater latitude to investigate potential jurors by incorporating more expansive advocacy techniques into the selection process, it would likely be unwise

³³ Text to n 168 - n 170 in ch 3.

to allow the criminally convicted onto a jury. The ability to expose unsuitable candidates, meaning those who maintain an orientation antithetical to objective adjudication, is thus an essential safeguard. Certainly the Saskatchewan model, which draws the line at incarceration as the sole disqualifying factor for those with criminal records, is dramatically at odds with the rest of Canada. Thus, there is room for compromise. By adjusting provincial and territorial legislation (and also the *Criminal Code*) to allow those with criminal records the chance to serve on juries, an important message will be sent. Individual and collective self-worth, in a small but meaningful way, will be returned to all who have criminal antecedents (and in particular IP), while leaving ultimate jury selection control with the litigants.

6.2 Exposing Partiality through Cause Challenges

In Canada, England and the USA a presumption exists that jurors will carry out their tasks in an impartial manner. Like all presumptions, they are convenient starting points that are largely policy-driven and expedient. Importantly, legal presumptions are rebuttable which is in essence why challenges for cause exist. Reported cases and research findings reveal that certain jurors will disregard their oath and pass judgment based on legally irrelevant factors. Of particular concern to this thesis is how to better protect against the selection of jurors who would bring discriminatory beliefs about IP to their deliberations.

My research revealed that a significant cultural divide exists between the Anglo-Canadian jury selection mentality and that which is espoused in the USA. While the American tendency is to immediately assail the impartial juror presumption, Canadians are inclined to retain considerable faith in the presumption and generally embrace a conservative approach to the issue. The Canadian model will not allow a cause challenge without first showing, via extrinsic evidence, that a realistic potential for partiality exists which is widespread in the community. Furthermore, trial safeguards such as various forms of admonition, recognition of the solemnity of the occasion and faith in the deliberative process militate against the granting of such applications. However, after repeated litigation of the racial bias issue at various court levels, the Supreme Court of Canada in the Indigenous accused person case of *R v Williams* concluded: 'It may not be necessary

to duplicate this investment in time and resources at the stage of establishing racial prejudice in the community in all subsequent cases.’³⁴

Given that the potential for racists occupying jury seats in Canada has been judicially conceded, this thesis investigated how serviceable the cause challenge has become in practice. In particular, the type, format, degree and overall utility of cause questioning was assessed with the assistance of some comparative law experiences. It is my opinion that the present challenge for cause process is largely ineffectual despite the availability of options to improve its performance.

My argument is that the prototypical cause challenge question consists of no more than an exercise in eliciting a less-than-enlightening promise. Where an oath or affirmation merely elicits a promise to tell the truth, the typical cause challenge question similarly induces only a superficial one-word answer. However, while agreeing to tell the truth provides a witness with testimonial standing, subsequent advocacy techniques such as cross-examination are designed to expose whether the initial promise was genuine. For the triers who must rule on juror partiality, one-word answers and limited demeanour evidence make for a paltry decision-making backdrop. If cross-examination is indeed ‘the greatest legal engine ever invented for the discovery of the truth’,³⁵ it is curious why it is not employed at this critical juncture. Indeed, it is submitted that there is a significant danger associated with making jury selection a completely benign process. While the Supreme Court of Canada has warned trial courts that when counsel are seating jurors they should not engage in a strict adherence to adversarialism,³⁶ it is submitted that the comments should not be interpreted as advocating for the abandonment of jury candidate scrutiny. Rather, the cautionary words of the court are better understood as encouraging litigant collaboration as opposed to cross-purpose posturing. Where once it was considered an unrealistic assertion that the Crown and the defence should make a ‘joint and concerted effort to empanel an independent and impartial tribunal’,³⁷ the court in *R v*

³⁴ *R v Williams*, [1998] 1 SCR 1128 at para 54.

³⁵ John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, vol 5 (3rd edn, Little, Brown and Company 1940) 29, para 1367.

³⁶ *Yumnu* (n 32) para 71.

³⁷ *R v Lines*, [1993] OJ No 3284 at para 26 (GD). While Hawkins J was referencing the use of peremptory challenges in his comments, he was clearly suggesting that jury selection was an adversarial, as opposed to collaborative, exercise with divergent goals.

*Yumnu*³⁸ has underscored that jury selection philosophy should embrace just such an effort. Thus, while an adversarial moratorium of sorts should settle into the selection *voir dire*, the advocacy skill sets of counsel still must remain engaged.

I argue that more effective juror scrutiny should logically result in higher partiality discovery rates. A tandem approach to this issue, with both parties engaged in a common goal, should streamline as opposed to prolong the exercise to the mutual satisfaction of all justice stakeholders. More expansive, yet at the same time focused questioning will provide triers with more salient information upon which to make their decisions. Without the extra detail that typically comes from context, illustration and elaboration, a conclusion based on a one-word reply is not much better than what chance would dictate. It puts the triers in an untenable position when they are called upon to decide, in any informed way, whether the proposed juror is indeed indifferent as between the Queen and the accused person.

Any inclination to allow for wider and more robust cause challenge hearings has been influenced by the *dicta* that exists in Canadian and English case law on the issue of American-style litigation practices. The apprehensive and at times *in terrorem* judicial commentary that is repeated time and again suggests that the methods of jury selection employed in the USA are to be avoided because of their inherent time requirements along with a need to insulate jurors from potentially intrusive and unpleasant questioning. However, the Supreme Court of Canada has pointed out that certain personal inconveniences and expenditures of time are ‘not too great a price for society to pay’³⁹ to ensure fair jury trials. Similarly, as discussed in chapter 1, the high regard that the general public has for the institution of the jury⁴⁰ may suggest that a tolerance of the selection process is part of the cost associated with the right to peer-driven adjudication in Canada. It is also important to emphasize that Canada guarantees that any person charged with an offence has the right to ‘a fair and public hearing by an impartial tribunal’⁴¹ and, in particular, ‘to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment’.⁴² The impartiality

³⁸ *Yumnu* (n 32).

³⁹ *R v Sherratt*, [1991] 1 SCR 509 at para 59.

⁴⁰ Text to n 20 - n 30 in ch 1.

⁴¹ *Charter* (n 14) s 11(d).

⁴² *ibid* s 11(f).

component is integral to a fair trial because it ensures, as best any human endeavor can, that dispassion and objectivity will be the measure employed by the jury in coming to its verdict.

By unnecessarily limiting counsel in challenging the presumption of impartiality, there can be no assurance that adjudicative neutrality will be entrenched within the petit jury. The hydraulic effect that pointed questioning has on a knowledge base is a well-known and fundamental tenet of trial advocacy. By exerting a modicum of interrogative pressure on a prospective juror, the corresponding field of information that results will be magnified. To curtail the use of marginally invasive questioning during a cause challenge would seem to suggest a willingness to sacrifice a process known to be effective for a concern over the possible discomfort that a jury candidate would suffer during the *voir dire*. A fairer balancing of interests would solve the issue that presently puts counsel and the accused person at a disadvantage in the selection of impartial jurors and thus avoid bringing the reputation of the administration of justice into question.

Although beyond the scope of this thesis, it would be worthwhile for future research to consider at what point support for trial by jury decreases as juror questioning increases. In any event, the oversight of the trial judge will provide the case-by-case controls on juror questioning.⁴³ These controls should include establishing time limits for questioning so that counsel are aware of their window of investigative opportunity. Such limitations could be apportioned *per* juror candidate or *per* panel at the behest of counsel so that, if desired, more time could be focused on any given candidate knowing that as a result less time will be left over for the remainder of the panel. Such time restraints would necessarily be published as court rules,⁴⁴ promulgated to regulate the duties of officers-of-the-court when selecting juries. In addition, I take the position that the best practice is to allow counsel to question potential jurors as trial questioning is their traditional province, they know the case better than the court and they will have a strategy mapped out beforehand to expose what they feel are the likely stereotypes to arise in the case at Bar.⁴⁵

⁴³ See the text to n 190 in ch 4 as an example of the expected stewardship of a judge in such circumstances.

⁴⁴ *Criminal Code*, RSC 1985, c C-46, s 482 authorizes a Superior Court to make rules regarding its procedures.

⁴⁵ See the text to n 141 – n 145 in ch 4.

An additional control that would alleviate some of the pressure on prospective jurors would be for the trial judge to consistently order that all jurors, both sworn and unsworn, be excluded from the courtroom during a cause challenge.⁴⁶ Such a control would encourage candour from, and avoid the tainting of, jurors. Presently such an order is discretionary and can only be made on the application of the accused.⁴⁷ I would recommend that Parliament reconsider this control and redraft the section so that the order is an automatic one without the need for a triggering request. As a result, while the public would remain in court to monitor the selection process, the remaining panelists and the selected jurors would be elsewhere. The coercive force flowing from their presence, which may cause certain prospective jurors to offer up pro-social but dishonest answers during cause questioning, would be attenuated.

The inscrutability of the jury generally does not allow for post-verdict questioning. Indeed, in Canada and England, but not in the USA, it is a crime for jurors to disclose their deliberations and for others to inquire about them. Until recently, the three countries had uniformly maintained the position that deliberations free of external influence, should they later become known, could never be used for verdict impeachment purposes. However, in 2017 under the mounting weight of evidence indicating that overt racial bias was occasionally being exhibited by jurors during deliberations, the United States Supreme Court lifted the absolute ban in that country on the self-impeachment rule.⁴⁸ It is my argument that such jurisprudential developments, while not binding in Canada, should encourage reflection on the jury inscrutability rule generally and, in particular, bring into question the efficacy of the Canadian cause challenge.

While encouragement of frank deliberations, litigation finality and protecting against societal backlash from the rendering of unpopular verdicts are pointed to as justifications for jury inscrutability,⁴⁹ a closer consideration of these individual rationales suggests that they may be explanations of convenience rather than substance. While it is true that frankness is often associated with environments that are unrestrained by expectations of social correctness and the potential for public disapprobation, such liberating

⁴⁶ See the text to n 159 – n 168 in ch 4.

⁴⁷ *Criminal Code* (n 44) s 640 (2.1).

⁴⁸ *Pena-Rodriguez v Colorado*, 137 S Ct 855 (2017).

⁴⁹ See the text to n 191 – n 194 in ch 4.

atmospheres can have their own issues in the area of accountability. For example, general verdicts militate against any appreciation by the public of the reasoning behind the decision other than what is implicit in the announcement (ie. the jury was, or was not, convinced beyond a reasonable doubt of the guilt of the accused). In contrast, judicial officers are open to the closest scrutiny when they render their judgments. If a judge sitting alone has misapplied or misinterpreted the law, those mistakes are subject to appellate review. The same cannot be said for a jury.⁵⁰ Allowing a juror to explain how they came to their verdict would go a long way to foreclosing or supporting an argument that jury instructions are actually followed.

Litigation finality as a concept should not be interpreted as detracting from the appeal process. Indeed, appellate review is integral to all common law jurisdictions. Such oversight helps ensure that the decisions that flow from the adversarial process are the best that humankind can make with the evidence and the law that is at the court's disposal at the time. Each check and balance makes the original judgment more likely to be the correct one. As such, if the concept of jury verdict finality is suggestive of the notion that it constitutes a proxy for less meaningful appellate scrutiny, it is a fundamentally flawed notion.

Finally, why societal backlash is any more likely when a jury as opposed to a judge renders a controversial decision is less than clear. While judges choose their calling and jurors have their function foisted upon them, both have equal protection under the law in a free and democratic society. Some would argue that as judicial figures they both enjoy exalted status. However, unlike an individual judge who does not enjoy anonymity, the identity of a juror or any information that could disclose their identity can be ordered not to be published in any document or broadcast or transmitted in any way.⁵¹ Thus, the potential for societal backlash can clearly be minimized.

It is for another study to revisit and fully assess the prudence of juror inscrutability protections over 200 years after Lord Mansfield first articulated his famous rule. In the meantime, the message that Canadian courts should take away from the American

⁵⁰ See the text to n 195 in ch 4.

⁵¹ *Criminal Code* (n 44) s 631 (6)(a).

decision of *Pena-Rodriguez v Colorado*⁵² is that more needs to be done in the area of juror bias detection. If intractable racial bias is making its way onto juries in the United States despite the hypervigilance of that country's jury selection measures, then the relative impotency of Canada's cause challenge mechanism needs to be addressed and its processes recalibrated. All Canadians and particularly IP deserve a 'gold standard' empanelment process rather than one that lacks the ability to search below the surface of a one-word assurance of indifference. Without providing counsel with better investigative options the right to an impartial jury will remain a hollow one, sacrificed on the mantle of the privacy interests and overall convenience of those called to possibly sit in judgment of a peer.

The challenge for cause needs to orient itself to a place where it can best achieve the goal of exposing bias. This can only be done through active but controlled questioning of those who respond to the call for jury duty, the typically hardy and resolute Canadian citizen. The steady hand of the trial judge will be there to restrain counsel if need be. Indeed, that safeguard has always been there to reassure those who come into contact with the justice system. What has not always been present is a reasonable opportunity to discover and expose the juror who is intractably partial. It is submitted that an informed public should be willing to allow that to happen. Consequently, I contend that the concerns over increasing the length and depth of the jury selection process are overblown.

6.3 Concerns over Peremptory Challenges

In theory, justifying the existence of the peremptory challenge is not difficult. Keeping in reserve a mechanism that can improve jury representativeness and remove partisan candidates is hard to argue against. However, the human condition is such that those charged with the use of the peremptory strike cannot be consistently relied upon to use it responsibly. Reported cases and empirical research confirm that abuses are prevalent. I argue that there is an undeniable connection between the ineffectiveness of the cause challenge at present and the need for the peremptory challenge. If it were otherwise peremptory challenges would be superfluous. With up to 20 peremptory challenges available per party in Canada, depending on the offence being prosecuted, the ability to

⁵² *Pena-Rodriguez* (n 48).

alter an otherwise randomly selected jury panel is immense. Its existence suggests more than simply providing counsel with gatekeeping powers. Arguably, it suggests governmental complacency by allowing a procedure to continue unchecked that is known in practice to be tied to stereotypical thinking. Indeed, Blackstone's oft-cited 'good opinion'⁵³ theory, that suggests accused persons should be satisfied with the jury that they helped select, is considered by many to really support choosing jurors who are favourably inclined towards a party or a cause.

The statutory infrastructure that produces jury panels encourages the gathering of background information. Panel lists are provided to litigants on request a number of days before jury selection is scheduled to begin, thus putting in motion the potential for more invasive inspection measures. The ability to search panel members online gives all persons tremendous investigative capabilities. In order to maintain its legitimacy, the logic behind vetting jurors must be anchored in the need to expose partiality so that some sort of in-court challenge may later be made. However, my research suggests that vetting practices are not motivated by a common goal to select only neutral arbiters. Indeed, the difficulties surrounding the use of the peremptory challenge in England and America suggest that the *bona fides* of the challenger are often suspect. While the will of the British Parliament was sufficient to see the peremptory challenge abolished in 1988,⁵⁴ American politicians were content during the same time period to have the issue decided by their Supreme Court.⁵⁵ As a result, a remedy exists for the misuse of peremptory challenges that now applies to incidents of racism and sexism, perpetrated by prosecution or defence counsel, in both criminal and civil jury selection contexts. However, I argue that the common law relief introduces a further level of complexity to the selection *voir dire*. As well, it incorporates an unseemly element to jury selection whereby lawyers accuse each other of improper motives that may induce pretextual responses. Additionally, privileged communications and the right to remain silent become vulnerable during such inquiries. Consequently, finding an acceptable remedy can be a difficult and uncertain exercise which, in the end, may fail to determine with any precision when lawyers are acting in bad faith.

⁵³ See the text to n 18 in ch 5.

⁵⁴ Criminal Justice Act 1988, s 118(1).

⁵⁵ *Batson v Kentucky*, 471 US 79 (1986).

There is no clearly defined line that demarcates, when exercising a peremptory challenge, where zealous advocacy⁵⁶ ends and discriminatory conduct⁵⁷ begins. While some have taken the position that the prosecution need not even exercise such challenges,⁵⁸ the same cannot necessarily be said of the defence. Indeed, the concept of ‘winning’ and ‘losing’ is clear to an accused person whose liberty may hang in the balance. As such, compiling a jury that at least meets Blackstonian standards may not be too much to ask. What remains problematic, however, no matter who wields the peremptory challenge, is when there is an open and conscious effort made to introduce specific bias into the petit jury. Such an approach will always be seen as adding a corrupting weight to the measure of justice.

While no doubt influenced by the historical developments in the USA and England, Canada has its own homegrown concerns that influence its tolerance of the peremptory challenge. Given that ‘judge shopping is alive and well in Canada’,⁵⁹ I have pointed out that if seeking a favourable judicial officer is an acceptable practice, then the same philosophy could conceivably apply to jury empanelment. Furthermore, the special status of Canada’s IP and the honourable conduct that the Crown must show such individuals arguably obliges at least the prosecution to seek out Indigenous jurors and reject those who appear unfavourably inclined towards them. Yet despite such local issues, Canada has failed to develop a robust body of case law in the area of the abuse of the peremptory challenge. My research suggests that opportunities have been missed.

As discussed in chapter 5, Canada has had a common law remedy in place to address peremptory challenge abuses for many years now.⁶⁰ As with all rules of procedure and evidence, knowledge of their existence to some extent can serve to deter their subsequent violation. While lawyers are presumed to know the applicable case law, I nonetheless recommend that the court should engage in a standardized discussion with counsel regarding the acceptable uses of peremptory challenges, before jury selection begins. This practice would tend to give the topic a heightened priority. While such a dialogue may be seen by some as unnecessarily pedantic, role discussions and expectations are not

⁵⁶ See the text in n 142 in ch 5.

⁵⁷ See the text to n 146 – n 150 in ch 5.

⁵⁸ See the text in n 107 in ch 5.

⁵⁹ *R v Arcand*, 2010 ABCA 363 para 8.

⁶⁰ See *R v Brown* (1999), 45 WCB (2d) 416 (OCGD).

entirely foreign to the realm of the empanelment of jurors.⁶¹ In addition to reminding the litigants that the goal in using a peremptory strike is to aid in establishing a neutral (as opposed to favourable) fact-finding body, the court can also at that time explain the process that is to be followed should counsel wish to question the *bona fides* of opposing counsel's choice in challenging a particular candidate. Despite its lack of precision, the test articulated by Trafford J in *R v Brown*⁶² remains a workable prototype, subject to adjustments that may be required due to the vicissitudes of a particular case.

The plight of IP in Canada has been a longstanding one. It continues to the present day. Racist and ethnocentric treatment often maligns their existence. In the context of the peremptory challenge, I have identified that the potential for discriminatory conduct does exist and can make the process unjust. Given the overrepresentation of IP at every stage of the criminal justice journey, all justice stakeholders are obliged to contribute to a solution. While the concept of random selection becomes skewed with the ability to make peremptory challenges, such challenges also have positive corrective capabilities that can recover a representativeness lost to chance. Certainly the approach in England saw a calculated reduction in such challenges as a reasonable compromise over a considerable number of years before that country ultimately opted for their complete abolition in 1988.⁶³ The question remains as to whether English Barristers presently feel that the quality of justice suffers as a result of the loss of the peremptory challenge option? If the answer is 'yes' then the question as to 'why' would naturally follow. These and other related inquiries could easily be addressed with the assistance of a survey, the results of which would be valuable to those countries considering the continued use of the peremptory challenge.⁶⁴ Other justice stakeholders and the general public would also need to be canvassed for their input. Relatedly, if the data exists, determining whether applications for cause challenges in England have increased since the demise of the peremptory challenge might also be a telling statistic. If cause challenging has remained static, then further research would be important to better understand why current English selection standards remain superficial and thus vulnerable to being compromised by certain jurors. Thus, it is my recommendation that until Canadian cause challenges

⁶¹ Recall the view of the House of Lords that jurors must be instructed on their own oversight obligations regarding improper juror behaviour. See *R v Connor and another; R v Mirza* [2004] UKHL 2 [148].

⁶² *Brown* (n 60). See the text to n 255 – n 262 in ch 5.

⁶³ See the text to n 170 – n 192 in ch 5.

⁶⁴ For instance Canada and the initiatives of Bill C-75 in this regard. See the text in n 65 below.

become better equipped to expose the racially partial juror, peremptory challenges should remain an option, albeit a more closely scrutinized one. In the meantime, Parliament should consider significantly reducing their number which would minimize their effects when they are, perhaps inevitably, misused.⁶⁵

In the final analysis, candidacy for jury service should involve logical, transparent and generally inclusive processes. The focus throughout must remain on empanelling a jury that is possessed of impartiality, independence and, as far as any 12 person group can reflect, representativeness. Procedures must be designed to best achieve those ends, with more emphasis on functionality and less on faith. By increasing opportunities to serve, more prospective jurors will experience a fundamental democratic institution. By adjusting the means by which the potential juror is scrutinized, less unacceptably biased individuals will be seated. That is the least that the IP of Canada should expect or accept from the criminal justice system.

⁶⁵ Parliament has recently proposed some dramatic corrective measures to address apparent flaws in the present jury selection regime. See 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, 2018, Summary cl (c) (Referral to Committee 2018-06-11) where the Liberal government would see, *inter alia*, the abolition of peremptory challenges, juror disqualification for those sentenced to jail for two years or more and the determination of cause challenges by the trial judge instead of by triers. Consider also the Debwewin Jury Review Implementation Committee, *Final Report* (April 2018) 44 <<https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/debwewin/>> accessed 2 May 2018 where the majority of this provincial (Ontario) Committee recommended, *inter alia*, the abolition of the practice of peremptory challenges.

APPENDIX

SELECTED SECTIONS OF THE *CRIMINAL CODE*, RSC 1985, c C-46, **RELATED TO JURIES**

139(1) Obstructing justice

Every one who wilfully attempts in any manner to obstruct, pervert or defeat the course of justice in a judicial proceeding,

- (a) by indemnifying or agreeing to indemnify a surety, in any way and either in whole or in part, or
- (b) where he is a surety, by accepting or agreeing to accept a fee or any form of indemnity whether in whole or in part from or in respect of a person who is released or is to be released from custody, is guilty of
- (c) an indictable offence and is liable to imprisonment for a term not exceeding two years, or
- (d) an offence punishable on summary conviction.

139(2) Idem

Every one who wilfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

139(3) Idem

Without restricting the generality of subsection (2), every one shall be deemed wilfully to attempt to obstruct, pervert or defeat the course of justice who in a judicial proceeding, existing or proposed,

- (a) dissuades or attempts to dissuade a person by threats, bribes or other corrupt means from giving evidence;
- (b) influences or attempts to influence by threats, bribes or other corrupt means a person in his conduct as a juror; or
- (c) accepts or obtains, agrees to accept or attempts to obtain a bribe or other corrupt consideration to abstain from giving evidence, or to do or to refrain from doing anything as a juror.

471 Trial by jury compulsory

Except where otherwise expressly provided by law, every accused who is charged with an indictable offence shall be tried by a court composed of a judge and jury.

473(1) Trial without jury

Notwithstanding anything in this Act, an accused charged with an offence listed in section 469 may, with the consent of the accused and the Attorney General, be tried without a jury by a judge of a superior court of criminal jurisdiction.

473(1.1) Joinder of other offences

Where the consent of the accused and the Attorney General is given in accordance with subsection (1), the judge of the superior court of criminal jurisdiction may order that any offence be tried by that judge in conjunction with the offence listed in section 469.

473(2) Withdrawal of consent

Notwithstanding anything in this Act, where the consent of an accused and the Attorney General is given in accordance with subsection (1), such consent shall not be withdrawn unless both the accused and the Attorney General agree to the withdrawal.

536(1) Remand by justice to provincial court judge in certain cases

Where an accused is before a justice other than a provincial court judge charged with an offence over which a provincial court judge has absolute jurisdiction under section 553, the justice shall remand the accused to appear before a provincial court judge having jurisdiction in the territorial division in which the offence is alleged to have been committed.

536(2) Election before justice in certain cases

If an accused is before a justice charged with an indictable offence, other than an offence listed in section 469, and the offence is not one over which a provincial court judge has absolute jurisdiction under section 553, the justice shall, after the information has been read to the accused, put the accused to an election in the following words:

You have the option to elect to be tried by a provincial court judge without a jury and without having had a preliminary inquiry; or you may elect to be tried by a judge without a jury; or you may elect to be tried by a court

composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. If you elect to be tried by a judge without a jury or by a court composed of a judge and jury or if you are deemed to have elected to be tried by a court composed of a judge and jury, you will have a preliminary inquiry only if you or the prosecutor requests one. How do you elect to be tried?

536(3) Procedure where accused elects trial by provincial court judge

Where an accused elects to be tried by a provincial court judge, the justice shall endorse on the information a record of the election and shall

- (a) where the justice is not a provincial court judge, remand the accused to appear and plead to the charge before a provincial court judge having jurisdiction in the territorial division in which the offence is alleged to have been committed; or
- (b) where the justice is a provincial court judge, call on the accused to plead to the charge and if the accused does not plead guilty, proceed with the trial or fix a time for the trial.

536(4) Request for preliminary inquiry

If an accused elects to be tried by a judge without a jury or by a court composed of a judge and jury or does not elect when put to the election or is deemed under paragraph 565(1)(b) to have elected to be tried by a court composed of a judge and jury or is charged with an offence listed in section 469, the justice shall, subject to section 577, on the request of the accused or the prosecutor made at that time or within the period fixed by rules of court made under section 482 or 482.1 or, if there are no such rules, by the justice, hold a preliminary inquiry into the charge.

536(4.1) Endorsement on the information

If an accused elects to be tried by a judge without a jury or by a court composed of a judge and jury or does not elect when put to the election or is deemed under paragraph 565(1)(b) to have elected to be tried by a court composed of a judge and jury or is charged with an offence listed in section 469, the justice shall endorse on the information and, if the accused is in custody, on the warrant of remand, a statement showing

- (a) the nature of the election or deemed election of the accused or that the accused did not elect, as the case may be; and
- (b) whether the accused or the prosecutor has requested that a preliminary inquiry be held.

536(4.2) Preliminary inquiry if two or more accused

If two or more persons are jointly charged in an information and one or more of them make a request for a preliminary inquiry under subsection (4), a preliminary inquiry must be held with respect to all of them.

536(4.3) When no request for preliminary inquiry

If no request for a preliminary inquiry is made under subsection (4), the justice shall fix the date for the trial or the date on which the accused must appear in the trial court to have the date fixed.

536(5) Jurisdiction

Where a justice before whom a preliminary inquiry is being or is to be held has not commenced to take evidence, any justice having jurisdiction in the province where the offence with which the accused is charged is alleged to have been committed has jurisdiction for the purposes of subsection (4).

554(1) Trial by provincial court judge with consent

Subject to subsection (2), if an accused is charged in an information with an indictable offence other than an offence that is mentioned in section 469, and the offence is not one over which a provincial court judge has absolute jurisdiction under section 553, a provincial court judge may try the accused if the accused elects to be tried by a provincial court judge.

555(1) Provincial court judge may decide to hold preliminary inquiry

Where in any proceedings under this Part an accused is before a provincial court judge and it appears to the provincial court judge that for any reason the charge should be prosecuted by indictment, he may, at any time before the accused has entered upon his defence, decide not to adjudicate and shall thereupon inform the accused of his decision and continue the proceedings as a preliminary inquiry.

555(2) Where subject-matter is a testamentary instrument or exceeds \$5,000 in value

Where an accused is before a provincial court judge charged with an offence mentioned in paragraph 553(a) or subparagraph 553(b)(i), and, at any time before the provincial

court judge makes an adjudication, the evidence establishes that the subject-matter of the offence is a testamentary instrument or that its value exceeds five thousand dollars, the provincial court judge shall put the accused to his or her election in accordance with subsection 536(2).

555(3) Continuing proceedings

Where an accused is put to his election pursuant to subsection (2), the following provisions apply, namely,

- (a) if the accused elects to be tried by a judge without a jury or a court composed of a judge and jury or does not elect when put to his or her election, the provincial court judge shall continue the proceedings as a preliminary inquiry under Part XVIII and, if the provincial court judge orders the accused to stand trial, he or she shall endorse on the information a record of the election; and
- (b) if the accused elects to be tried by a provincial court judge, the provincial court judge shall endorse on the information a record of the election and continue with the trial.

565(1) Election deemed to have been made

Subject to subsection (1.1), if an accused is ordered to stand trial for an offence that, under this Part, may be tried by a judge without a jury, the accused shall, for the purposes of the provisions of this Part relating to election and re-election, be deemed to have elected to be tried by a court composed of a judge and jury if

- (a) he was ordered to stand trial by a provincial court judge who, pursuant to subsection 555(1), continued the proceedings before him as a preliminary inquiry;
- (b) the justice, provincial court judge or judge, as the case may be, declined pursuant to section 567 to record the election or re-election of the accused; or
- (c) the accused does not elect when put to an election under section 536.

565(2) When direct indictment preferred

If an accused is to be tried after an indictment has been preferred against the accused pursuant to a consent or order given under section 577, the accused is, for the purposes of the provisions of this Part relating to election and re-election, deemed both to have elected to be tried by a court composed of a judge and jury and not to have requested a preliminary inquiry under subsection 536(4) or 536.1(3) and may re-elect to be tried by a judge without a jury without a preliminary inquiry.

565(3) Notice of re-election

Where an accused wishes to re-elect under subsection (2), the accused shall give notice in writing that he wishes to re-elect to a judge or clerk of the court where the indictment has been filed or preferred who shall, on receipt of the notice, notify a judge having jurisdiction or clerk of the court by which the accused wishes to be tried of the accused's intention to re-elect and send to that judge or clerk the indictment and any promise to appear, undertaking or recognizance given or entered into in accordance with Part XVI, any summons or warrant issued under section 578, or any evidence taken before a coroner, that is in the possession of the first-mentioned judge or clerk.

567 Mode of trial when two or more accused

Despite any other provision of this Part, if two or more persons are jointly charged in an information, unless all of them elect or re-elect or are deemed to have elected the same mode of trial, the justice, provincial court judge or judge may decline to record any election, re-election or deemed election for trial by a provincial court judge or a judge without a jury.

568 Attorney General may require trial by jury

Even if an accused elects under section 536 or re-elects under section 561 or subsection 565(2) to be tried by a judge or provincial court judge, as the case may be, the Attorney General may require the accused to be tried by a court composed of a judge and jury unless the alleged offence is one that is punishable with imprisonment for five years or less. If the Attorney General so requires, a judge or provincial court judge has no jurisdiction to try the accused under this Part and a preliminary inquiry must be held if requested under subsection 536(4), unless one has already been held or the re-election was made under subsection 565(2).

569(1) Attorney General may require a jury trial – Nunavut

Even if an accused elects under section 536.1 or re-elects under section 561.1 or subsection 565(2) to be tried by a judge without a jury, the Attorney General may require the accused to be tried by a court composed of a judge and jury unless the alleged offence is one that is punishable by imprisonment for five years or less. If the Attorney General so requires, a judge has no jurisdiction to try the accused under this Part and a preliminary

inquiry must be held if requested under subsection 536.1(3), unless one has already been held or the re-election was made under subsection 565(2).

569(2) Application to Nunavut

This section and not section 568, applies in respect of criminal proceedings in Nunavut.

598(1) Election deemed to be waived

Notwithstanding anything in this Act, where a person to whom subsection 597(1) applies has elected or is deemed to have elected to be tried by a court composed of a judge and jury and, at the time he failed to appear or to remain in attendance for his trial, he had not re-elected to be tried by a court composed of a judge without a jury or a provincial court judge without a jury, he shall not be tried by a court composed of a judge and jury unless (a) he establishes to the satisfaction of a judge of the court in which he is indicted that there was a legitimate excuse for his failure to appear or remain in attendance for his trial; or

(b) the Attorney General requires pursuant to section 568 or 569 that the accused be tried by a court composed of a judge and jury.

598(2) Election deemed to be waived

An accused who, under subsection (1), may not be tried by a court composed of a judge and jury is deemed to have elected under section 536 or 536.1 to be tried without a jury by a judge of the court where the accused was indicted and section 561 or 561.1, as the case may be, does not apply in respect of the accused.

626(1) Qualification of jurors

A person who is qualified as a juror according to, and summoned as a juror in accordance with, the laws of a province is qualified to serve as a juror in criminal proceedings in that province.

626(2) No disqualification based on sex

Notwithstanding any law of a province referred to in subsection (1), no person may be disqualified, exempted or excused from serving as a juror in criminal proceedings on the grounds of his or her sex.

626.1 Presiding judge

The judge before whom an accused is tried may be either the judge who presided over matters pertaining to the selection of a jury before the commencement of a trial or another judge of the same court.

627 Support for juror with physical disability

The judge may permit a juror with a physical disability who is otherwise qualified to serve as a juror to have technical, personal, interpretative or other support services.

629(1) Challenging the jury panel

The accused or the prosecutor may challenge the jury panel only on the ground of partiality, fraud or wilful misconduct on the part of the sheriff or other officer by whom the panel was returned.

629(2) In writing

A challenge under subsection (1) shall be in writing and shall state that the person who returned the panel was partial or fraudulent or that he wilfully misconducted himself, as the case may be.

631(1) Names of jurors on cards

The name of each juror on a panel of jurors that has been returned, his number on the panel and his address shall be written on a separate card, and all the cards shall, as far as possible, be of equal size.

631(2) To be placed in box

The sheriff or other officer who returns the panel shall deliver the cards referred to in subsection (1) to the clerk of the court who shall cause them to be placed together in a box to be provided for the purpose and to be thoroughly shaken together.

631(2.1) Alternate jurors

If the judge considers it advisable in the interests of justice to have one or two alternate jurors, the judge shall so order before the clerk of the court draws out the cards under subsection (3) or (3.1).

631(2.2) Additional jurors

If the judge considers it advisable in the interests of justice, he or she may order that 13 or 14 jurors, instead of 12, be sworn in accordance with this Part before the clerk of the court draws out the cards under subsection (3) or (3.1).

631(3) Cards to be drawn by clerk of court

If the array of jurors is not challenged or the array of jurors is challenged but the judge does not direct a new panel to be returned, the clerk of the court shall, in open court, draw out one after another the cards referred to in subsection (1), call out the number on each card as it is drawn and confirm with the person who responds that he or she is the person whose name appears on the card drawn, until the number of persons who have answered is, in the opinion of the judge, sufficient to provide a full jury and any alternate jurors ordered by the judge after allowing for orders to excuse, challenges and directions to stand by.

631(3.1) Exception

The court, or a judge of the court, before which the jury trial is to be held may, if the court or judge is satisfied that it is necessary for the proper administration of justice, order the clerk of the court to call out the name and the number on each card.

631(4) Juror and other persons to be sworn

The clerk of the court shall swear each member of the jury, and any alternate jurors, in the order in which his or her card was drawn and shall swear any other person providing technical, personal, interpretative or other support services to a juror with a physical disability.

631(5) Drawing additional cards if necessary

If the number of persons who answer under subsection (3) or (3.1) is not sufficient to provide a full jury and the number of alternate jurors ordered by the judge, the clerk of the court shall proceed in accordance with subsections (3), (3.1) and (4) until 12 jurors — or 13 or 14 jurors, as the case may be, if the judge makes an order under subsection (2.2) — and any alternate jurors are sworn.

631(6) Ban on publication, limitation to access or use of information

On application by the prosecutor or on its own motion, the court or judge before which a jury trial is to be held may, if the court or judge is satisfied that such an order is necessary for the proper administration of justice, make an order

- (a) directing that the identity of a juror or any information that could disclose their identity shall not be published in any document or broadcast or transmitted in any way; or
- (b) limiting access to or the use of that information.

632 Excusing jurors

The judge may, at any time before the commencement of a trial, order that any juror be excused from jury service, whether or not the juror has been called pursuant to subsection 631(3) or (3.1) or any challenge has been made in relation to the juror, for reasons of

- (a) personal interest in the matter to be tried;
- (b) relationship with the judge presiding over the jury selection process, the judge before whom the accused is to be tried, the prosecutor, the accused, the counsel for the accused or a prospective witness; or
- (c) personal hardship or any other reasonable cause that, in the opinion of the judge, warrants that the juror be excused.

633 Stand by

The judge may direct a juror who has been called pursuant to subsection 631(3) or (3.1) to stand by for reasons of personal hardship or any other reasonable cause.

634(1) Peremptory challenges

A juror may be challenged peremptorily whether or not the juror has been challenged for cause pursuant to section 638.

634(2) Maximum number

Subject to subsections (2.1) to (4), the prosecutor and the accused are each entitled to

- (a) twenty peremptory challenges, where the accused is charged with high treason or first degree murder;
- (b) twelve peremptory challenges, where the accused is charged with an offence, other than an offence mentioned in paragraph (a), for which the accused may be sentenced to imprisonment for a term exceeding five years; or

(c) four peremptory challenges, where the accused is charged with an offence that is not referred to in paragraph (a) or (b).

634(2.01) If 13 or 14 jurors

If the judge orders under subsection 631(2.2) that 13 or 14 jurors be sworn in accordance with this Part, the total number of peremptory challenges that the prosecutor and the accused are each entitled to is increased by one in the case of 13 jurors or two in the case of 14 jurors.

634(2.1) If alternate jurors

If the judge makes an order for alternate jurors, the total number of peremptory challenges that the prosecutor and the accused are each entitled to is increased by one for each alternate juror.

634(2.2) Supplemental peremptory challenges

For the purposes of replacing jurors under subsection 644(1.1), the prosecutor and the accused are each entitled to one peremptory challenge for each juror to be replaced.

634(3) Where there are multiple counts

Where two or more counts in an indictment are to be tried together, the prosecutor and the accused are each entitled only to the number of peremptory challenges provided in respect of the count for which the greatest number of peremptory challenges is available.

634(4) Where there are joint trials

Where two or more accused are to be tried together,

- (a) each accused is entitled to the number of peremptory challenges to which the accused would be entitled if tried alone; and
- (b) the prosecutor is entitled to the total number of peremptory challenges available to all the accused.

635(1) Order of challenges

The accused shall be called on before the prosecutor is called on to declare whether the accused challenges the first juror, for cause or peremptorily, and thereafter the prosecutor

and the accused shall be called on alternately, in respect of each of the remaining jurors, to first make such a declaration.

635(2) Where there are joint trials

Subsection (1) applies where two or more accused are to be tried together, but all of the accused shall exercise the challenges of the defence in turn, in the order in which their names appear in the indictment or in any other order agreed on by them,

- (a) in respect of the first juror, before the prosecutor; and
- (b) in respect of each of the remaining jurors, either before or after the prosecutor, in accordance with subsection (1).

638(1) Challenge for cause

A prosecutor or an accused is entitled to any number of challenges on the ground that

- (a) the name of a juror does not appear on the panel, but no misnomer or misdescription is a ground of challenge where it appears to the court that the description given on the panel sufficiently designates the person referred to;
- (b) a juror is not indifferent between the Queen and the accused;
- (c) a juror has been convicted of an offence for which he was sentenced to death or to a term of imprisonment exceeding twelve months;
- (d) a juror is an alien;
- (e) a juror, even with the aid of technical, personal, interpretative or other support services provided to the juror under section 627, is physically unable to perform properly the duties of a juror; or
- (f) a juror does not speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or both official languages of Canada, where the accused is required by reason of an order under section 530 to be tried before a judge and jury who speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or who speak both official languages of Canada, as the case may be.

638(2) No other ground

No challenge for cause shall be allowed on a ground not mentioned in subsection (1).

640(1) Objection that name not on panel

Where the ground of a challenge is that the name of a juror does not appear on the panel, the issue shall be tried by the judge on the *voir dire* by the inspection of the panel, and such other evidence that the judge thinks fit to receive.

640(2) Other grounds

If the ground of a challenge is one that is not mentioned in subsection (1) and no order has been made under subsection (2.1), the two jurors who were last sworn — or, if no jurors have been sworn, two persons present who are appointed by the court for the purpose — shall be sworn to determine whether the ground of challenge is true.

640(2.1) Challenge for cause

If the challenge is for cause and if the ground of the challenge is one that is not mentioned in subsection (1), on the application of the accused, the court may order the exclusion of all jurors — sworn and unsworn — from the court room until it is determined whether the ground of challenge is true, if the court is of the opinion that such an order is necessary to preserve the impartiality of the jurors.

640(2.2) Exclusion order

If an order is made under subsection (2.1), two unsworn jurors, who are then exempt from the order, or two persons present who are appointed by the court for that purpose, shall be sworn to determine whether the ground of challenge is true. Those persons so appointed shall exercise their duties until 12 jurors — or 13 or 14 jurors, as the case may be, if the judge makes an order under subsection 631(2.2) — and any alternate jurors are sworn.

640(3) If challenge not sustained, or if sustained

Where the finding, pursuant to subsection (1), (2) or (2.2) is that the ground of challenge is not true, the juror shall be sworn, but if the finding is that the ground of challenge is true, the juror shall not be sworn.

640(4) Disagreement of triers

Where, after what the court considers to be a reasonable time, the two persons who are sworn to determine whether the ground of challenge is true are unable to agree, the court

may discharge them from giving a verdict and may direct two other persons to be sworn to determine whether the ground of challenge is true.

641(1) Calling persons who have stood by

If a full jury and any alternate jurors have not been sworn and no cards remain to be drawn, the persons who have been directed to stand by shall be called again in the order in which their cards were drawn and shall be sworn, unless excused by the judge or challenged by the accused or the prosecutor.

641(2) Other persons becoming available

If, before a person is sworn as a juror under subsection (1), other persons in the panel become available, the prosecutor may require the cards of those persons to be put into and drawn from the box in accordance with section 631, and those persons shall be challenged, directed to stand by, excused or sworn, as the case may be, before the persons who were originally directed to stand by are called again.

642(1) Summoning other jurors when panel exhausted

If a full jury and any alternate jurors considered advisable cannot be provided notwithstanding that the relevant provisions of this Part have been complied with, the court may, at the request of the prosecutor, order the sheriff or other proper officer to summon without delay as many persons, whether qualified jurors or not, as the court directs for the purpose of providing a full jury and alternate jurors.

642(2) Orally

Jurors may be summoned under subsection (1) by word of mouth, if necessary.

642(3) Adding names to panel

The names of the persons who are summoned under this section shall be added to the general panel for the purposes of the trial, and the same proceedings shall be taken with respect to calling and challenging those persons, excusing them and directing them to stand by as are provided in this Part with respect to the persons named in the original panel.

642.1(1) Substitution of alternate jurors

Alternate jurors shall attend at the commencement of the presentation of the evidence on the merits and, if there is not a full jury present, shall replace any absent juror, in the order in which their cards were drawn under subsection 631(3).

642.1(2) Excusing of alternate jurors

An alternate juror who is not required as a substitute shall be excused.

643(1) Who shall be the jury

The 12, 13 or 14 jurors who are sworn in accordance with this Part and present at the commencement of the presentation of the evidence on the merits shall be the jury to hear the evidence on the merits.

643(1.1) Names of jurors

The name of each juror, including alternate jurors, who is sworn shall be kept apart until the juror is excused or the jury gives its verdict or is discharged, at which time the name shall be returned to the box as often as occasion arises, as long as an issue remains to be tried before a jury.

643(2) Same jury may try another issue by consent

The court may try an issue with the same jury in whole or in part that previously tried or was drawn to try another issue, without the jurors being sworn again, but if the prosecutor or the accused objects to any of the jurors or the court excuses any of the jurors, the court shall order those persons to withdraw and shall direct that the required number of cards to make up a full jury be drawn and, subject to the provisions of this Part relating to challenges, orders to excuse and directions to stand by, the persons whose cards are drawn shall be sworn.

643(3) Sections directory

Failure to comply with the directions of this section or section 631, 635 or 641 does not affect the validity of a proceeding.

644(1) Discharge of juror

Where in the course of a trial the judge is satisfied that a juror should not, by reason of illness or other reasonable cause, continue to act, the judge may discharge the juror.

644(1.1) Replacement of juror

A judge may select another juror to take the place of a juror who by reason of illness or other reasonable cause cannot continue to act, if the jury has not yet begun to hear evidence, either by drawing a name from a panel of persons who were summoned to act as jurors and who are available at the court at the time of replacing the juror or by using the procedure referred to in section 642.

644(2) Trial may continue

Where in the course of a trial a member of the jury dies or is discharged pursuant to subsection (1), the jury shall, unless the judge otherwise directs and if the number of jurors is not reduced below ten, be deemed to remain properly constituted for all purposes of the trial and the trial shall proceed and a verdict may be given accordingly.

645(1) Trial continuous

The trial of an accused shall proceed continuously subject to adjournment by the court.

645(2) Adjournment

The judge may adjourn the trial from time to time in the same sittings.

645(3) Formal adjournment unnecessary

No formal adjournment of trial or entry thereof is required.

645(4) Questions reserved for decision

A judge, in any case tried without a jury, may reserve final decision on any question raised at the trial, or any matter raised further to a pre-hearing conference, and the decision, when given, shall be deemed to have been given at the trial.

645(5) Questions reserved for decision in a trial with a jury

In any case to be tried with a jury, the judge before whom an accused is or is to be tried has jurisdiction, before any juror on a panel of jurors is called pursuant to subsection

631(3) or (3.1) and in the absence of any such juror, to deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn.

647(1) Separation of jurors

The judge may, at any time before the jury retires to consider its verdict, permit the members of the jury to separate.

647(2) Keeping in charge

Where permission to separate under subsection (1) cannot be given or is not given, the jury shall be kept under the charge of an officer of the court as the judge directs, and that officer shall prevent the jurors from communicating with anyone other than himself or another member of the jury without leave of the judge.

647(3) Non-compliance with subsection (2)

Failure to comply with subsection (2) does not affect the validity of the proceedings.

647(4) Empanelling new jury in certain cases

Where the fact that there has been a failure to comply with this section or section 648 is discovered before the verdict of the jury is returned, the judge may, if he considers that the failure to comply might lead to a miscarriage of justice, discharge the jury and

(a) direct that the accused be tried with a new jury during the same session or sittings of the court; or

(b) postpone the trial on such terms as justice may require.

647(5) Refreshment and accommodation

The judge shall direct the sheriff to provide the jurors who are sworn with suitable and sufficient refreshment, food and lodging while they are together until they have given their verdict.

648(1) Restriction on publication

After permission to separate is given to members of a jury under subsection 647(1), no information regarding any portion of the trial at which the jury is not present shall be published in any document or broadcast or transmitted in any way before the jury retires to consider its verdict.

648(2) Offence

Every one who fails to comply with subsection (1) is guilty of an offence punishable on summary conviction.

649 Disclosure of jury proceedings

Every member of a jury, and every person providing technical, personal, interpretative or other support services to a juror with a physical disability, who except for the purposes of

(a) an investigation of an alleged offence under subsection 139(2) in relation to a juror, or

(b) giving evidence in criminal proceedings in relation to such an offence, discloses any information relating to the proceedings of the jury when it was absent from the courtroom that was not subsequently disclosed in open court is guilty of an offence punishable on summary conviction.

650.1 Pre-charge conference

A judge in a jury trial may, before the charge to the jury, confer with the accused or counsel for the accused and the prosecutor with respect to the matters that should be explained to the jury and with respect to the choice of instructions to the jury.

651(1) Summing up by prosecutor

Where an accused, or any one of several accused being tried together, is defended by counsel, the counsel shall, at the end of the case for the prosecution, declare whether or not he intends to adduce evidence on behalf of the accused for whom he appears and if he does not announce his intention to adduce evidence, the prosecutor may address the jury by way of summing up.

651(2) Summing up by accused

Counsel for the accused or the accused, where he is not defended by counsel, is entitled, if he thinks fit, to open the case for the defence, and after the conclusion of that opening to examine such witnesses as he thinks fit, and when all the evidence is concluded to sum up the evidence.

651(3) Accused's right of reply

Where no witnesses are examined for an accused, he or his counsel is entitled to address the jury last, but otherwise counsel for the prosecution is entitled to address the jury last.

651(4) Prosecutor's right of reply where more than one accused

Where two or more accused are tried jointly and witnesses are examined for any of them, all the accused or their respective counsel are required to address the jury before it is addressed by the prosecutor.

652(1) View

The judge may, where it appears to be in the interests of justice, at any time after the jury has been sworn and before it gives its verdict, direct the jury to have a view of any place, thing or person, and shall give directions respecting the manner in which, and the persons by whom, the place, thing or person shall be shown to the jury, and may for that purpose adjourn the trial.

652(2) Directions to prevent communication

Where a view is ordered under subsection (1), the judge shall give any directions that he considers necessary for the purpose of preventing undue communication by any person with members of the jury, but failure to comply with any directions given under this subsection does not affect the validity of the proceedings.

652(3) Who shall attend

Where a view is ordered under subsection (1) the accused and the judge shall attend.

652.1(1) Trying of issues of indictment by jury

After the charge to the jury, the jury shall retire to try the issues of the indictment.

652.1(2) Reduction of number of jurors to 12

However, if there are more than 12 jurors remaining, the judge shall identify the 12 jurors who are to retire to consider the verdict by having the number of each juror written on a card that is of equal size, by causing the cards to be placed together in a box that is to be thoroughly shaken together and by drawing one card if 13 jurors remain or two cards if 14 jurors remain. The judge shall then discharge any juror whose number is drawn.

653(1) Disagreement of jury

Where the judge is satisfied that the jury is unable to agree on its verdict and that further detention of the jury would be useless, he may in his discretion discharge that jury and direct a new jury to be empanelled during the sittings of the court, or may adjourn the trial on such terms as justice may require.

653(2) Discretion not reviewable

A discretion that is exercised under subsection (1) by a judge is not reviewable.

653.1 Mistrial – rulings binding at new trial

In the case of a mistrial, unless the court is satisfied that it would not be in the interests of justice, rulings related to the disclosure or admissibility of evidence or the *Canadian Charter of Rights and Freedoms* that were made during the trial are binding on the parties in any new trial if the rulings were made – or could have been made – before the stage at which the evidence on the merits is presented.

654 Proceeding on Sunday, etc., not invalid

The taking of the verdict of a jury and any proceeding incidental thereto is not invalid by reason only that it is done on Sunday or on a holiday.

669.3 Jurisdiction when appointment to another court

Where a court composed of a judge and a jury, a judge or a provincial court judge is conducting a trial and the judge or provincial court judge is appointed to another court, he or she continues to have jurisdiction in respect of the trial until its completion.

670 Judgment not to be stayed on certain grounds

Judgment shall not be stayed or reversed after verdict on an indictment

- (a) by reason of any irregularity in the summoning or empanelling of the jury; or
- (b) for the reason that a person who served on the jury was not returned as a juror by a sheriff or other officer.

671 Directions respecting jury or jurors directory

No omission to observe the directions contained in any Act with respect to the qualification, selection, balloting or distribution of jurors, the preparation of the jurors'

book, the selecting of jury lists or the drafting of panels from the jury lists is a ground for impeaching or quashing a verdict rendered in criminal proceedings.

672.26 Trial of issue by judge and jury

Where an accused is tried or is to be tried before a court composed of a judge and jury,

- (a) if the judge directs that the issue of fitness of the accused be tried before the accused is given in charge to a jury for trial on the indictment, a jury composed of the number of jurors required in respect of the indictment in the province where the trial is to be held shall be sworn to try that issue and, with the consent of the accused, the issues to be tried on the indictment; and
- (b) if the judge directs that the issue of fitness of the accused be tried after the accused has been given in charge to a jury for trial on the indictment, the jury shall be sworn to try that issue in addition to the issues in respect of which it is already sworn.

695(1) Order of Supreme Court of Canada

The Supreme Court of Canada may, on an appeal under this Part, make any order that the court of appeal might have made and may make any rule or order that is necessary to give effect to its judgment.

695(2) Election if new trial

Subject to subsection (3), if a new trial ordered by the Supreme Court of Canada is to be held before a court composed of a judge and jury, the accused may, with the consent of the prosecutor, elect to have the trial heard before a judge without a jury or a provincial court judge. The election is deemed to be a re-election within the meaning of subsection 561(5) and subsections 561(5) to (7) apply to it with any modifications that the circumstances require.

724(1) Information accepted

In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentencing proceedings and any facts agreed on by the prosecutor and the offender.

724(2) Jury

Where the court is composed of a judge and jury, the court

- (a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and
- (b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.

724(3) Disputed facts

Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,

- (a) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;
- (b) the party wishing to rely on a relevant fact, including a fact contained in a presentence report, has the burden of proving it;
- (c) either party may cross-examine any witness called by the other party;
- (d) subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and
- (e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.

745.2 Recommendation by jury

Subject to section 745.3, where a jury finds an accused guilty of second degree murder, the judge presiding at the trial shall, before discharging the jury, put to them the following question: You have found the accused guilty of second degree murder and the law requires that I now pronounce a sentence of imprisonment for life against the accused. Do you wish to make any recommendation with respect to the number of years that the accused must serve before the accused is eligible for release on parole? You are not required to make any recommendation but if you do, your recommendation will be considered by me when I am determining whether I should substitute for the ten year period, which the law would otherwise require the accused to serve before the accused is eligible to be considered for release on parole, a number of years that is more than ten but not more than twenty-five.

745.21(1) Recommendation by jury — multiple murders

Where a jury finds an accused guilty of murder and that accused has previously been convicted of murder, the judge presiding at the trial shall, before discharging the jury, put

to them the following question: You have found the accused guilty of murder. The law requires that I now pronounce a sentence of imprisonment for life against the accused. Do you wish to make any recommendation with respect to the period without eligibility for parole to be served for this murder consecutively to the period without eligibility for parole imposed for the previous murder? You are not required to make any recommendation, but if you do, your recommendation will be considered by me when I make my determination.

745.21(2) Application

Subsection (1) applies to an offender who is convicted of murders committed on a day after the day on which this section comes into force and for which the offender is sentenced under this Act, the *National Defence Act* or the *Crimes Against Humanity and War Crimes Act*.

745.3 Persons under sixteen

Where a jury finds an accused guilty of first degree murder or second degree murder and the accused was under the age of sixteen at the time of the commission of the offence, the judge presiding at the trial shall, before discharging the jury, put to them the following question: You have found the accused guilty of first degree murder (or second degree murder) and the law requires that I now pronounce a sentence of imprisonment for life against the accused. Do you wish to make any recommendation with respect to the period of imprisonment that the accused must serve before the accused is eligible for release on parole? You are not required to make any recommendation but if you do, your recommendation will be considered by me when I am determining the period of imprisonment that is between five years and seven years that the law would require the accused to serve before the accused is eligible to be considered for release on parole.

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