

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

B E T W E E N :

HER MAJESTY THE QUEEN

Appellant

- and -

CLIFFORD KOKOPENACE

Respondent

FACTUM OF THE APPELLANT

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PART I - FACTS

A. Overview

1. The jury belongs to everyone: to individual accused facing trial on serious criminal offences, and to all of society interested in seeing serious offences tried rigorously but fairly. The Attorney General for Ontario comes before this Court because a majority of the Ontario Court of Appeal interpreted and applied the concept of jury representativeness as so broad and powerful that it has potential to drastically change our approach to the jury system, affecting core principles such as random selection, the protection of juror privacy, and the presumption of impartiality. Further, the majority sets no clear constitutional minimum standard that the state must meet, generating considerable uncertainty in the law, and holding the state to account for results beyond its control.

2. Everyone who has been involved in this case has been struck by the low participation of Aboriginal people in the jury process, and their simultaneous over-representation in the criminal justice system as accused and victims. The Court of Appeal was understandably motivated to respond with whatever legal tools it had to remedy this serious problem. Unfortunately, the tool before it – the concept of jury representativeness – is ill-suited to the task. It applies to everyone charged with an offence, and must be interpreted in a manner that applies to all, consistent with how the jury operates in the Canadian criminal justice system.

3. Properly understood, jury representativeness has a particular and highly qualified meaning in the Canadian jury system. It does not mean proportionate representation. Rather, it is essentially a negative prohibition against improper exclusions. To the extent that it has a positive aspect, it requires the state to access and use, or make reasonable efforts to access and use, broad-based lists when compiling the jury roll. In other words, to cast a net broadly and avoid the exclusion of any distinct group. Whether this standard has been met will turn on an objective review of all the circumstances, focusing on the efforts made and not the results achieved. While poor results may require the state to inquire into the reasons why, and to make reasonable efforts to address the cause, the focus is on the efforts made.

4. When the efforts to ensure representation of First Nations reserve residents in this case are objectively considered based on what was known at the time, they were reasonable, and there

was no constitutional violation. In the alternative, if there was a breach of s.11(f) of the *Charter*, the appropriate remedy was a declaration, not a new trial.

B. Facts

5. The Court of Appeal released its decision on the jury representativeness issue in this case on June 14, 2013. Each Justice wrote separate reasons. Justices LaForme and Goudge combined to form a majority, concluding that the Ministry of the Attorney General failed to make adequate efforts to include First Nations reserve residents in Kenora in the jury roll process, and violated Mr. Kokopenace's section 11(d) and 11(f) *Charter* rights. They ordered a new trial. Mr. Justice Rouleau, in dissent, found no violation of Mr. Kokopenace's *Charter* rights and would have dismissed the appeal. Given his conclusion, Mr. Justice Rouleau did not speak to remedy. This Court granted leave to appeal on November 21, 2013.

6. The appellant relies on the facts set out in the three opinions of the Court of Appeal, with the additions and clarifications set out below.

7. Specifically, the history of the proceedings is set out in Justice LaForme's opinion at paragraphs 1-3, 13, and 52-58.

8. Responsibility for the jury system is shared between the provinces and territories and the federal government. Provincial/territorial legislation governs the "out of court" procedures (such as the compilation of source lists and the summoning and assembling of the jury panel). The *Criminal Code* governs the "in court" procedures relating to the actual selection of the petit jury that hears the case.¹

9. An overview of the jury process in Ontario, and what the judicial district of Kenora looks like, is provided at paragraphs 4-11, 59-64, and 65-66 of Justice LaForme's opinion. For ease of reference, a *jury roll* constitutes the master list from which *jury panels* or *arrays* are drawn throughout the year. Individual jurors are then selected from the jury panels for the *jury* or *petit jury* for the purposes of civil and criminal trials in Superior Court, as well as for other purposes,

¹ See Langston Sibbles, *Report on Jury Representativeness in Ontario*, Draft Working Paper, (Toronto: Commission on Systemic Racism in the Ontario Criminal Justice System, 1993) at 1-16. See also *R. v. Barrow*, [1987] SCJ no 84, per Dickson CJC at paras 29-32 and McIntyre J's dissent at paras 67- 70.

such as for proceedings under the *Coroners Act*.² Only one jury roll is certified each year for each court district.

10. The Ontario *Juries Act* takes a proportionate approach to creating the jury roll. Section 6(2) directs that names of people to receive questionnaires (also called jury service notices) are to be selected at random from municipal assessment lists, proportionate to the municipality's share of the population in the judicial district.³ These lists are intended to capture everyone living off reserve, including Aboriginal people. Under section 6(8), a separate procedure is provided for persons residing on First Nations reserves because these individuals' names are not included on the municipal assessment lists. The sheriff is required to collect names of people living on the reserve as if the reserve were a municipality and, in so doing, the sheriff may obtain the names from "any record available".⁴ Up until 2001, the record used was band lists provided by Indian and Northern Affairs Canada ("INAC").⁵

11. The proportionate approach embodied by the Ontario *Juries Act* reflects the concept of "cluster sampling".⁶ Cluster sampling occurs when a population group is subdivided into smaller subgroups, usually based on geography, for the purpose of the random selection process.⁷ Each subgroup is dealt with separately with a specific and proportionate number of names being selected. For example, if 100 prospective jurors was needed from a region of 1000 eligible people, containing 10 different neighbourhoods, a cluster sampling approach would select 10 prospective jurors from each neighbourhood rather than 100 jurors from the entire region. This approach ensures that each geographic subgroup will be proportionately represented in the overall random selection process. Without cluster sampling, random selection from the global population group may result in disproportionately as between geographic subgroups or may even result in the exclusion of some geographic subgroups entirely. In addition to guaranteeing the inclusion of First Nations reserves in the random selection process, the cluster sampling

² *Coroners Act*, RSO 1990, c C-37.

³ The text of section 6(2), *Juries Act*, RSO 1990, c J-3 is set out in Part VII of this Factum.

⁴ The text of section 6(8) of the *Juries Act* is set out in Part VII of this Factum.

⁵ Now called "Aboriginal Affairs and Northern Development Canada" ("AANDC").

⁶ David Pomerant, *Multiculturalism, Representation and the Jury Selection Process in Canadian Criminal Cases* (Canada: Research and Statistics Directorate, 1994) at 38. For a technical explanation of why it enhances representativeness, see Hiroshi Fukurai, Edgar Butler, "Cross-Sectional Jury Representation or Systematic Jury Representation? Simple Random and Cluster Sampling Strategies in Jury Selection" (1991), 19 *Journal of Criminal Justice* at 31-48.

⁷ The idea being that ethnic groups often live together in "clusters" and may be under-sampled, or missed entirely, by ordinary random sampling.

approach in Ontario *also* allows the results achieved in the First Nations jury process to be singled out and tracked, and makes it possible to easily target this group with extra efforts.

12. The fresh evidence and argument before the Court of Appeal focused on the efforts by the Courts Services Division of the Ministry of the Attorney General (“CSD”) to obtain lists of reserve residents under s.6(8) of the *Juries Act* after INAC stopped providing them in 2001. These efforts, as well as efforts directed at improving Aboriginal representation on juries, are accurately described in Justice LaForme’s opinion at paragraphs 90-93, 95-98, 100-120, 162-164, 189-194, with the exception foot-noted below.⁸ The efforts, addressed further in this factum at paragraphs 75-77, were substantial and sought to improve low response rates through better lists, education and community outreach, and also sought to facilitate participation in the late stages of the jury process.

13. In the Court of Appeal, counsel for Mr. Kokopenace argued that the state should have been asking INAC for band lists and not the bands themselves. The fresh evidence suggested that the bands were the most accurate source for lists. Especially post-*Corbiere*,⁹ the bands had to know how to contact their members, both on and off reserve, in order to run fair elections.¹⁰ CSD’s decision to seek lists directly from the bands, instead of going “behind their backs” and using health records for example, was also part of its efforts to try and develop mutual understanding and trust, and to achieve the goal of increasing Aboriginal participation on juries.¹¹ Further, after 2002, INAC would only share information from its “Indian Register” (such as band lists) where this was essential to confer a benefit which flowed from registration status.¹² Policy changes also made the accuracy of their information questionable, and the Indian

⁸ See *R. v. Kokopenace*, 2013 ONCA 389. At paragraph 66 of the decision, Justice LaForme counts the reserve population as about 1/3 of the total population in the district. However, as Justice Rouleau points out at paragraph 292: “[t]he on-reserve *adult* population actually makes up 21.5% to 31.8% of the total adult population of Kenora, which is a significantly lower proportion than that expressed by [Justice LaForme].”

⁹ *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203.

¹⁰ *Indian Band Election Regulations*, CRC, c 952, ss 4.2, 4.2(1) and 4.1(3). See also Cross-examination of Joan Mainville, Appellant’s Record, Vol XXXII, p 24-27. Joan Mainville, a long time band electoral officer, explained that elections are important events for the community, and it is important that they be both fair, and perceived as fair. Although the state was asking the right people for lists, they did not appreciate the significance of *R. v. Corbiere*, and thus were not necessarily asking for the right lists (they asked for electoral lists rather than lists of who lived on reserve).

¹¹ Affidavit of Sheila Bristo, Appellant’s Record, Vol XXXVII, p 118 at para 22. See also: Cross-examination of Sheila Bristo, Appellant’s Record, Vol XXXIX, pp 229-30.

¹² Prior to 2002, information in the Indian Register could be used, among other things, to “compile lists of Indians who may be selected to serve as jurors in the courts or for the purpose of administering or enforcing any law or carrying out a lawful investigation”. See the 2001-2002 edition of Info Source, Appellant’s Record, Vol XXXVI,

Registrar believed that the bands and not INAC had the most accurate information about who lived on reserve.¹³

14. Other fresh evidence – data carefully examined for the purposes of the appeal - showed that deficiencies in the lists being used did not explain the low response rates from First Nations reserves. Fresh evidence about mail delivery in the north showed no obvious correlation between the currency of the list being used and the number of questionnaires returned to the post-office (RPO) – see chart at Appendix A to this factum.¹⁴ Fresh evidence about the First Nations jury process in Simcoe County,¹⁵ showed that even with perfect lists and no problems with mail delivery the “no response” rate from the First Nations reserves was disproportionately high when compared with the “no response” rate for the off-reserve population – see charts comparing this at Appendix B to this factum. Further, data admitted and examined on the appeal showed that the response rate declined most sharply *before* INAC stopped providing lists in 2001 – see chart at Appendix C to this factum. Other data showed that the “no response” rate did not decline with the use of more current lists – see chart at Appendix D to this factum.

p 186. These guidelines changed, however, in 2002. The 2002-2003 edition of Info Source removed any reference to serving as a juror, and re-defined “Consistent Use” as: “The information in this bank may be used in the very limited circumstances by provincial governments for the purposes of administering or enforcing provincial laws, *the applicability of which depends upon whether or not individuals are registered as Indians*” [emphasis added]. See the 2002-2003 edition of Info Source, Exhibit 20 to the Cross-examination of Allan Tallman, Appellant’s Record, Vol XXXVI, p 3.

¹³ After 2003, INAC was no longer using the “residence code” (showing whether a registrant lived on or off reserve) to determine funding. There was no obligation to maintain this code, or otherwise report address or contact information, and Allan Tallman, the Indian Registrar, did not know how up to date or accurate information contained in the Indian Register about it would be. As a result, it is uncertain how accurate the information contained in the “Indian Register Population” tables is (in Amber Khan Affidavit). See Cross-examination of Allan Tallman, Appellant’s Record, Vol XXXIV, pp 68-70 and Exhibits 11 and 19 to the Cross-examination of Allan Tallman, Vol XXXV, p 181 and Vol XXXVI, p 1.

¹⁴ A considerable amount of evidence was called about mail delivery in the north. In a nutshell, Canada Post makes best efforts to deliver mail in the north through a process called “knowledge sort”. Postal clerks, who often know everyone in a small community, make best efforts to deliver mail based on all the knowledge available. See Affidavit of Allison Forsyth, Appellant’s Record, XXXII, p 56; see also Cross-examination of Allison Forsyth, Appellant’s Record, Vol XXXII, p 63.

¹⁵ In Simcoe County, every year local CSD staff has asked for and has received a list of Aboriginal on-reserve residents over the age of 18 from the two First Nations communities in the judicial district - The Chippewas of Rama (Mnjikaning) First Nation and the Beausoleil First Nation. See Affidavit of Cheryl McCalmont, sworn July 20, 2011, Appellant’s Record, Vol XXVII, p 136 at para 11. The efforts made in Simcoe County to compile the 2007 jury roll formed part of the fresh evidence before the Court of Appeal because the Court heard this case together with *R. v. Spiers* (arising in Simcoe county) as they both raised the issue of jury representativeness as a matter of fresh evidence. The appeal in *R.v. Spiers* was allowed, on other grounds, before the release of the Iacobucci Report - see *R. v. Spiers*, [2012] OJ no 5450 (CA). As a result, it may be that the Court neglected to revisit the evidence from Simcoe County at the time that it delivered judgement on the *Kokopenace* jury roll issue.

15. Perhaps most importantly, the Report of the Independent Review Conducted by the Honourable Frank Iacobucci (the “Iacobucci Report”),¹⁶ showed that the causes of the low response rate were far more varied and complex than lists. Specifically, the Iacobucci Report exposed factors that contribute to the low participation of First Nations reserve residents in the jury process. In so doing, the Report illustrated that there are no quick or immediate solutions available. As Justice LaForme explained:

In the Iacobucci Report, several factors are identified as possible reasons for the reluctance of Aboriginal on-reserve residents to participate in the jury selection process. These include conflicting views regarding the traditional approaches to conflict resolution; systemic discrimination experienced by First Nations people within the justice system; a lack of knowledge about the justice system generally and of the jury system in particular; the desire, expressed by First Nations leaders, to assume greater control of justice matters in their communities; and concerns for the protection of privacy rights with respect to the disclosure of personal information....¹⁷

Respecting the conflicting views of conflict resolution, Justice Iacobucci wrote, among other things, that “*First Nations observe the Canadian justice system as devoid of any reflection of their core principles or values, and view it as a foreign system that has been imposed upon them without their consent.*”¹⁸ Justice Goudge also referred to the Iacobucci Report, noting:

[Justice Iacobucci] described a number of reasons contributing to the low response rates that were identified by Aboriginal leaders. He leaves no doubt that the problem is complex. He concludes that it reflects broader issues like the dissonance between traditional Aboriginal approaches to conflict resolution and the approaches of the Canadian justice system, the historic discrimination in that system experienced by Aboriginal peoples, and their lack of understanding of the system.¹⁹

For his part, Justice Rouleau noted, among several references to the Iacobucci Report:

That problem [of low response rates] is highly complex and will require very different solutions that will take time to implement. As the Iacobucci Report found, the low return rates and consequent underrepresentation of on-reserve residents on the jury roll are symptoms of a much broader problem. As Mr. Iacobucci explained, at 2 [para.15]:

An examination of that problem [the underrepresentation of individuals living on reserves on Ontario’s jury roll] leads inexorably to a set of broader and systemic issues that are at the heart of the current dysfunctional relationship between Ontario’s justice system and Aboriginal peoples in this province. It is these broad

¹⁶ *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci* (Toronto: February 2013), Appellant’s Record, Vol XLII, p 27. The Iacobucci Report was released while the Court was on reserve but admitted into fresh evidence on consent of all the parties.

¹⁷ *R.v. Kokopenace*, *supra*, at para 68. See also the Iacobucci Report, Vol XLII, p 27 at paras 209-231.

¹⁸ Iacobucci Report, Vol XLII, p 27 at para 210.

¹⁹ *R. v. Kokopenace*, *supra*, at para 272.

problems that must be tackled if we are to make any significant progress in dealing with the underrepresentation of First Nations individuals on juries.²⁰

16. The Attorney General for Ontario has implemented the first recommendation in the Iacobucci Report, the creation of an Implementation Committee responsible for the oversight and implementation of the recommendations and related matters. As of the date of writing, the second recommendation, the creation of an Advisory Group to the Attorney General on matters affecting First Nations peoples and the Justice System, was well underway, with the co-chairs having been announced.²¹

PART II – QUESTIONS IN ISSUE

(A) What is the meaning of jury representativeness, and how is it assessed?

(B) In the present case, did the state fulfil its “representativeness” obligation in compiling the jury roll in Kenora in 2008?

(C) What is the appropriate approach to remedy if there is a problem with jury representativeness?

PART III - ARGUMENT

A. What is the meaning of jury representativeness, and how is it assessed?

17. The concept of jury representativeness has never been specifically defined in Canada. However, its purpose and meaning emerge from a review of: the purpose of the jury; the various provincial juries acts which govern out of court jury proceedings; the *Criminal Code* provisions that govern in court jury proceedings; *Charter* rights relating to the jury; jurisprudence relating to jury representativeness from this court and appellate courts across the country; and finally, core principles relating to the operation of the jury in Canada. These sources show that the concept of jury representativeness has a particular and highly qualified meaning in the Canadian criminal

²⁰ *R. v. Kokopenace*, *supra*, at para 329; see also paras 284 and 288.

²¹ Many of the relevant public statements are included in an Affidavit filed by the respondent in its response to the leave application in this case, but can also be found on the internet at “news.ontario.ca” under “improving-ontarios-jury-system”.

justice system. It seeks to avoid the exclusion of any distinct group and to cast a broad net, but does not go further and mandate any sort of proportional representation on the jury roll.

18. This section also considers the approaches taken to jury representativeness in England and the United States. England takes a similar approach to Canada, eschewing proportionate representation, and prioritizing random selection as essential to guaranteeing impartiality. In contrast, the United States does aim to achieve proportionate representation, but with this concept comes an entirely different approach to the jury, in which impartiality is guaranteed not by random selection, but by intense scrutiny during an elaborate pre-trial *voir dire*.

19. Adopting proportionate representation in Canada would affect our entire jury system. It would require us to move away from random selection as the guarantor of impartiality, and toward the American system of extensive *voir dire*s to examine and ensure juror impartiality. Our system has thus far consciously avoided such an approach, for good reasons.

i) The purpose of the jury in Canada

20. Despite significant changes in the composition and use of juries in the twentieth century, the purpose of the jury has stood constant, and it remains the mode of trial for the most serious offences in the *Criminal Code*.²² The jury serves two broad and related purposes: enhancing both the fairness of the particular trial and public faith and confidence in the administration of justice as a whole. In its 1982 *Report on the Jury*, the Law Reform Commission of Canada summarized the purpose of the jury as follows:

First, because the jury is composed of a number of people with a wide diversity of experience and because it reaches a collective decision only after deliberating seriously and often robustly about the evidence, the jury is likely to be an excellent fact finder. Second, because it represents a cross-section of the community, the jury is able to act as the conscience of the community, ensuring that individual criminal cases are justly resolved. Third, the jury can act as the citizen's ultimate protection against oppressive laws and the oppressive enforcement of the law. When a properly instructed jury acting

²² Section 11(f) of the *Charter* guarantees accused persons the right to trial by jury in cases where the maximum punishment of the offence is imprisonment for five years or more (except cases tried under military law). Section 471 of the *Criminal Code* provides that every accused person who is charged with an indictable offence shall be tried by a court composed of a jury and judge, subject to exceptions provided by law. It is an individual right which can, in most circumstances, be waived through elections/re-elections made under sections 536, 561, 565(2) and 473 of the *Criminal Code*. However, in certain circumstances, it cannot be waived. For section 469 offences, the combined effect of sections 468 and 471 is that the mode of trial will be by judge and jury unless there is consent of both the accused and the Attorney General. See *R. v. Turpin and Siddiqui*, [1989] SCJ no 47. See also section 568 of the *Criminal Code* that provides that the Attorney General may require trial by jury for offences punishable by more than five years, notwithstanding any elections made to the contrary.

judicially acquits an accused, no judge or state official can reverse its decision. Fourth, because the jury involves the public in the central task of the criminal justice system, it provides a means whereby the public can learn about, and critically examine, the functioning of the criminal justice system. For the public, it acts as a window on the criminal justice system. Finally, by involving the public in judicial decision-making, the jury undoubtedly increases the public's trust in the system.²³

ii) *Provincial legislation*

21. This Court has held that the provincial and territorial legislation governing the creation of jury rolls ensures the representativeness of Canadian juries by providing that jury rolls are created by selecting names at random from sources providing a representative cross-section of the community.²⁴ None of this legislation is challenged on this appeal. It demonstrates that representativeness is a heavily qualified concept, profoundly limited by both practical considerations and the overarching need for an impartial jury. The various schemes all take a broad inclusive approach which does not exclude any distinct groups. More specifically, the legislation generally directs random selection from either a universal list, such as health care data, or multiple lists (the legislation relating to jury source lists is set out at Appendix E to this factum). Ontario is the *only* province that takes a proportionate approach to the assembling of the jury roll. Although the schemes have been criticized,²⁵ they speak to practical realities in the Canadian context, and our particular approach to the jury. The limitations they place on the concept of representativeness include the following features:

- The presumption in Canada is that an offence is tried where it was committed, but what the corresponding community looks like depends on how the judicial district is defined and the circumstances. Each roll is based on a particular geographic judicial district, which may be arbitrarily drawn, and may or may not be representative of the community where the offence occurred, the background of the accused, or broader Canadian society. Offences committed in remote locations may be tried in larger centres, such as was the procedure in the instant case, and practical realities may result in cases being tried in

²³ *Report on the Jury* (Ottawa: Law Reform Commission of Canada, 1982) at 5. See also J. Hostettler, *The Criminal Jury Old and New* (Winchester: Waterside Press, 2004) at 8, 11, 134, 145-6; The Honourable Sir Patrick Devlin, *Trial by Jury*, 3d ed. (London: Stevens & Sons, 1966) at 160; The Right Honourable Lord Justice Auld, *A Review of the Criminal Courts of England and Wales*, (2001) <http://www.criminal-courts-reveiw.org.uk> at paras 99, 100. The Honourable Mr. Justice Watt, *Helping Jurors Understand*, (Toronto, Carswell) at 2-3.

²⁴ *R. v. Sherratt*, [1991] SCJ no 21 at paras 35-36 (hereafter referred to as “*Sherratt*”); *R. v. Find*, [2001] SCJ no 34 at para 20. See also *Pierre v. McRae*, 2011 ONCA 187 at para 29.

²⁵ Pomerant, *supra*, at 38, 42. Pomerant lists deficiencies in provincial jury legislation existing at the time of *R. v. Sherratt*, many of which persist today, including significant discretion resting with the Sherriff in some cases. See also Perry Schulman and Edward Myers, “Jury Selection: A Report to the Law Reform Commission of Canada” in *Studies on the Jury* (Ottawa: Law Reform Commission of Canada, 1979) at 410-422.

neighbouring districts.²⁶ As discussed below, the *Criminal Code* may also provide for a change of venue in certain circumstances.²⁷

- Limitations on juror eligibility and a long list of exemptions significantly erode the pool the jury roll draws from, and thus how accurately it can “represent” the community in a proportionate fashion. Eligibility is generally limited to Canadian citizens over the age of majority who reside in the province.²⁸ A long list of exemptions excludes whole classes of individuals, including those involved in the legal system, elected officials, those convicted of criminal offences, and numerous professions (such as clergy, medical and dental practitioners, nurses, veterinarians, pharmacists, members of the armed forces, firefighters).²⁹ These limitations may be significant for potential “distinct groups”. In the case of *R. v. Scientology*, for example, the trial judge found that the citizenship requirement excluded all landed immigrants, many of whom were visible minorities, and who represented a significant portion of the population of Toronto.³⁰ The Court of Appeal found that this did not impair the representativeness of the roll.³¹
- The “Sheriff” typically has the discretion to exempt individuals from jury service where it poses a hardship, either to themselves or another person.³² This may have a greater effect on certain groups, such as those living in remote locations. Similarly, where there is a shortage of jurors, the Sheriff may add to the roll.³³

²⁶ In the instant case, for examples, Laura Loohuizen’s evidence was that she believed that Landsdowne House and Marten Falls were serviced by Thunder Bay while Attawapiskat, Fort Hope, Peawanuk and Kashechewan were serviced by Cochrane, notwithstanding that they fell within Kenora District. Affidavit of Laura Loohuizen, sworn July 18, 2011, Appellant’s Record, Vol XI, p 124, n 5. See also: Cross-examination of Laura Loohuizen, Appellant’s Record, Vol XXVII, p 124-133.

²⁷ Pomerant, *supra*, at 31-37; and *Alvarado v State of Alaska* 486 P (2d) 891 at 900-906 (Alaska Sup. Ct. 1971).

²⁸ Non-citizens are qualified to serve as jurors in Manitoba. Permanent Residents are qualified to serve in the Northwest Territories and Nunavut. Jurors in Quebec, Nunavut and Yukon need not reside in the territory or province. Jury Act, RSA 2000, c J-3, s 3 (“Alberta Act”); Jury Act, RSBC 1996, c 242, s 3 (“British Columbia Act”); Jury Act, CCSM c J30, s 3 (“Manitoba Act”); Jury Act, SNB 1980, c J-3.1, s 3 (“New Brunswick Act”); Jury Act, 1991, SNL 1991, c 16, s 4 (“Newfoundland Act”); Jury Act, RSNWT 1988, c J-2, s 4 (“Northwest Territories Act”); Juries Act, SNS 1998, c 16, s 3 (“Nova Scotia Act”); Jury Act, RSNWT (Nu) 1988, c J-2, s 4 (“Nunavut Act”); Juries Act, RSO 1990, c J.3, s 2 (“Juries Act”); Jury Act, RSPEI 1988, c J-5.1, s 4 (“PEI Act”); Jurors Act, CQLR, c J-2, s 3 (“Quebec Act”); Jury Act, 1981, SS 1980-81, c J-4.1, s 3 (“Saskatchewan Act”); Jury Act, RSY 2002, c 129, s 4 (“Yukon Act”).

²⁹ For exemptions, see the Alberta Act, ss 4-5; British Columbia Act, ss 3, 4, 6(1), 7, 8, 13; Manitoba Act, ss 3, 5, 25(1); New Brunswick Act, ss 3, 5; Newfoundland Act, ss 4-7, 9; Northwest Territories Act, ss 4-7, 17; Nova Scotia Act, ss 4-5; Nunavut Act, ss 4-7, 17; Juries Act, ss 3(1), 4(a), 8(2), 23; PEI Act, ss 5-6; Quebec Act, ss 4-5; Saskatchewan Act, ss 4-6; Yukon Act, ss 4-7, 13, 21(1)(a). See also the comparison of provincial eligibility and exclusion requirements in Schulman and Myers, *supra*, Table 1 at pp. 406-407.

³⁰ *R. v. Church of Scientology*, [1997] OJ no 1548 (CA). See also *R. v. Barrow*, *supra*, per Dickson CJC at paras 31, 35 in which he discusses the disqualifications and exemptions in provincial juries legislation.

³¹ *R. v. Church of Scientology*, *supra*.

³² The North West Territories and Nunavut Acts do not refer specifically to hardship, but provide that the sheriff may excuse any person with “good reason”. In Quebec, any persons having “reasonable cause” may apply for excusal. See Alberta Act, s 5(c); British Columbia Act, s 6(1)(b); Manitoba Act, s 25(1)(b); New Brunswick Act, ss 5(e), (f); Newfoundland Act, ss 7(1)-(2); Northwest Territories Act, s 17; Nova Scotia Act, s 5; Nunavut Act, s 17; Ontario *Juries Act*, s 23(2); PEI Act, s 6(c); Quebec Act, ss 5(g)-(h); Saskatchewan Act, s 5; Yukon Act, s 21(1)(b).

³³ See, for example, ss 11 and 30 of the Ontario *Juries Act*, *supra*. See also Newfoundland Act, s 25; Quebec Act s 43; Saskatchewan Act, s 28; and Yukon Act, s 22.

- Random selection is required throughout the jury process, by both provincial jury legislation, and the *Criminal Code*. In Ontario, it occurs: when names are selected from source lists to receive questionnaires for potential inclusion in the roll; when names are selected from the jury list or roll for inclusion in the panel or array summoned to court; and when names are drawn from the panel or array to come forward to be considered for participation on the petit or trial jury.³⁴

iii) *Relevant Criminal Code Provisions*

22. The scheme set out in the *Criminal Code* for selecting a petit or trial jury is not challenged on this appeal.³⁵ The following aspects of the scheme illustrate the nuanced and limited application of the concept of representativeness:

- The jury panel or array may only be challenged on the ground of “partiality, fraud or wilful misconduct on the part of the sherriff or other officer by whom the panel was returned”. Such a challenge must be brought *before* jury selection begins.³⁶ In its 1982 *Report on the Jury*, the Law Reform Commission of Canada explicitly chose not to recommend amending s.629 to allow a challenge on the basis that the panel did not represent a cross-section of the community, explaining:

The challenge to the panel is restricted to the means by which it was selected. The provincial procedures for selecting the jury panel virtually guarantee that the panel will be randomly selected from among the community. Thus the ability to challenge the representativeness of the panel would add little to ensure that a representative jury panel was obtained.³⁷

- The *Criminal Code* provides for different procedures in certain circumstances, such as a change of venue where “expedient to the ends of justice” (generally to ensure an impartial jury where a matter has received considerable pre-trial publicity),³⁸ or for a trial in another official language or a bilingual trial.³⁹
- Judges have broad discretion to excuse those summonsed for jury service on the basis of personal interest in the matter to be tried, a relationship with any of the parties involved in the trial, personal hardship or “any other reasonable cause that, in the opinion of the judge, warrants that the juror be excused”.⁴⁰ As discussed above, this may disproportionately exclude certain groups, such as the self-employed and those living in remote areas.

³⁴ See *Criminal Code*, s 631. For randomness in provincial legislation see Ontario *Juries Act*, ss 6(2), 6(8), 17, 18; see also, for example: Alberta Act, ss 8(2); Manitoba Act, ss 7(2); New Brunswick Act, s 13(2); Nova Scotia Act, s 7(1); and Saskatchewan Act, ss 6(2)-(3).

³⁵ The full text of the provisions described below is set out in Part VII of the Factum.

³⁶ Limits on the timing and basis for a challenge to a panel or array are set out in ss 629, 631(3) of the *Criminal Code*.

³⁷ *Report on the Jury* (Ottawa: Law Reform Commission of Canada, 1982) at 35.

³⁸ Change of venue, *Criminal Code*, s 599.

³⁹ Change of venue, *Criminal Code*, s 531.

⁴⁰ Excusing jurors, *Criminal Code*, s 632.

- The prosecution and the defence are entitled to challenge a juror for cause, for a number of listed reasons, including a lack of impartiality.⁴¹
- Both the prosecution and defence have an equal number of peremptory challenges.⁴² Case law in Ontario prohibits the Crown from exercising the challenge for any reason based on race or ethnicity (for good or ill), though nothing prevents the defence from using the challenge to increase the representative quality of the jury.⁴³
- If the panel is exhausted before a full jury is picked, the court may direct the sheriff or other proper officer to summon a number of other persons, whether qualified as jurors or not, including “*by word of mouth if necessary*”. Those names are added to the general panel, and then treated in the same fashion as everyone else on the panel.⁴⁴
- 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. As long as the number of jurors is not reduced below ten, and the trial judge does not direct otherwise, the jury shall be deemed to remain properly constituted for all purposes of the trial and the trial shall proceed and a verdict may be given accordingly.⁴⁵ This provision has been found constitutional, and not a violation of s.11(f):

The mere reduction in the number of jurors from 12 to 11 and even to 10, does not prevent it from fulfilling its functions, that is, to decide questions of fact, reach a verdict reflecting contemporary social values, to act as a watch-dog against state oppression, to maintain the credibility of the judicial system and to serve in the education of the public.⁴⁶

iv) Charter protections for the jury trial

23. There is no Charter right to a “representative jury”, but two important Charter rights deal with juries.⁴⁷ Sections 11(d) and 11(f) read as follows:

Any person charged with an offence has the right

⁴¹ Challenge for cause, *Criminal Code*, s 638.

⁴² Peremptory challenge, *Criminal Code*, s 634. The number depends on the nature of the offence, and the number of jurors sworn, varying from 4, 12 or 20, with the possibility of 1 or 2 more if additional jurors are sworn.

⁴³ See for example *R. v. Gayle*, [2001] OJ no 1559 (CA). The theory behind the challenge is that it enhances the parties’ confidence in the jury and sense of justice, and no explanation for its exercise need be provided.

⁴⁴ Summoning other jurors when panel exhausted - *Criminal Code*, s 642.

⁴⁵ Discharge of juror - *Criminal Code*, s 644.

⁴⁶ *R. v. Lessard* (1992), 74 CCC (3d) 552 (Que CA) at 559; see also *R. v. Genest* (1990), 61 CCC (3d) 251 (Que CA).

⁴⁷ Section 7 has often been raised in relation to juries as well, but it merely reflects the specific guarantees in sections 11(d) and (f), and provides no greater protection - see *R. v. Church of Scientology*, *supra* at para 127. In the words of Lamer J (as he then was): “[s]ections 8 to 14 are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice”. See *Reference Re Motor Vehicle Act (British Columbia)*, [1985] SCJ No 73, per Lamer J at paras 28-29.

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by *an independent and impartial tribunal*;

(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.

24. Unlike the Sixth Amendment in the United States, which protects the right to a jury trial “of the State and district wherein the crime shall have been committed” (described further below), the *Charter* right to a jury trial does not include any reference to the place of trial.

a) 11(d) of the Charter

25. Impartiality refers to the state of mind or attitude of the tribunal in relation to the issue or parties in a particular case, and requires the absence of any interest, or prejudice, real or perceived. Independence refers not only to a state of mind, but a status or relationship to the parties, and requires freedom from control, interference or influence. Independence is essential to achieving impartiality. The test for determining both independence and impartiality is essentially the test for a reasonable apprehension of bias: would a reasonable person, fully apprised of the circumstances, have an apprehension of bias?⁴⁸

26. Representativeness is not directly relevant to independence.⁴⁹ It has a complex relationship with impartiality. Representativeness can *enhance* impartiality,⁵⁰ but it can also *detract* from it through interference aimed at enhancing representativeness. For example, in a high-publicized and “racially charged” murder trial of a black man accused of killing a white woman in a robbery, in which the trial judge was concerned that “the accused and the people of Toronto” have confidence in the jury’s verdict, the trial judge called groups of potential jurors containing persons of colour forward first for jury selection. The Court of Appeal explicitly disapproved of the practice, noting that it should not be used in the future, but found that the interference was sufficiently minor that it did not undermine the “inherent random nature of the jury” thus a new trial was not required.⁵¹ Representativeness is certainly not *required* for

⁴⁸ *R. v. Bain*, [1992] SCJ no 3 per Cory J at para 1, Gonthier J at para 21, and Stevenson J at para 110. See also *R. v. Valente*, [1985] SCJ no 77 at paras 11-22; *R. v. Lippé*, [1990] SCJ no 128 at paras 41, 43-44.

⁴⁹ This Court lists the essential conditions of judicial independence as: security of tenure, financial security, and institutional independence regarding matters affecting adjudication. Representativeness is not on the list.

⁵⁰ In *R. v. Williams*, [1998] SCJ no 49 at para 47, challenge for cause, representative jury pool, and jury instructions were referred to as safeguards of the 11(d) right to a fair and impartial jury.

⁵¹ *R. v. Brown*, [2006] OJ no 5077 (CA).

impartiality - judge alone trials are held in the vast majority of cases across Canada with no requirement whatsoever for representativeness.⁵² While judges as a group should broadly represent the community as a matter of public policy, a single judge presiding over a trial does not and cannot “represent” any community. For many of these cases, including relatively serious ones, a jury trial is not even an available option.

b) 11(f) of the Charter

27. There has been limited consideration of the s.11(f) *Charter* right to a jury, but a number of principles have emerged. The common law purpose of the jury continues, and the jury continues to serve societal interests in addition to protecting the individual accused.⁵³ Nonetheless, the right to a jury trial is an *individual* right, which can be waived, in contrast to the American approach which views it as a *collective* right, which cannot be waived by an individual.⁵⁴ Unlike impartiality, which is essential to a fair trial, a jury is not. As just noted, serious cases are routinely and fairly tried by judge alone. Even a murder can be properly and fairly tried by a judge alone.⁵⁵ Not surprisingly, unlike s.11(d), s.11(f) is subject to limitation under s.1.⁵⁶

v) *The Supreme Court of Canada*

28. This Court has never directly considered the meaning of “jury representativeness”, or what it requires or how it is protected. It has certainly never labeled it, or considered it, as a stand-alone right. Rather, in the course of explaining how the modern jury operates, so as to consider the challenge for cause, a four member majority in *R. v. Sherratt* concluded that “representativeness” was an important characteristic of the modern jury:

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

⁵² Most criminal matters are tried by judge alone. See David M. Tanovich, et al., *Jury Selection in Criminal Trials: Skills, Science and the Law* (Irwin Law, Toronto: 1997) at 28.

⁵³ See *R. v. Turpin and Siddiqui*, *supra*, at para 12.

⁵⁴ See *R. v. Turpin and Siddiqui*, *supra*, at paras 12, 22, 24-29. The unanimous Court went on to conclude, however, that there was no corresponding right to a trial by judge alone, hence the *Criminal Code* provisions mandating a jury trial in certain situations (described above) applied.

⁵⁵ For example, further to section 473(1), an accused charged with a section 469 offence (including murder) may be tried without a jury with the consent of both the accused and the Attorney General.

⁵⁶ See *R. v. Lee*, [1989] SCJ no 125, where the *Criminal Code* provision providing for deemed re-election to trial by judge alone where an accused fails to appear for his jury trial (then s 526.1 now s 598) was held to violate s 11(f), but held to be a justifiable limit under s 1.

whereby the public increases its knowledge of the criminal justice system and it increases, through the involvement of the public, societal trust in the system as a whole.

These rationales or functions of the jury continue to inform the development of the jury and our interpretation of legislation governing the selection of individual jurors. The modern jury was not meant to be a tool in the hands of either the Crown or the accused and indoctrinated as such through the challenge procedure, but rather was envisioned as *a representative cross-section of society*, honestly and fairly chosen....⁵⁷

...
The perceived importance of the jury and the *Charter* right to a jury trial is meaningless without some guarantee that it will perform its duties impartially and *represent, as far as is possible and appropriate in the circumstances, the larger community*. Indeed, without the two characteristics of impartiality and representativeness, a jury would be unable to perform properly many of the functions that make its existence desirable in the first place. *Provincial legislation guarantees representativeness, at least in the initial array. The random selection process, coupled with the sources from which this selection is made, ensures the representativeness of Canadian criminal juries....* Thus, little if any objection can be made regarding this crucial characteristic of juries....[American Bar Association standards provide that] ‘The names of those persons who may be called for jury service should be selected at random from sources which will furnish a representative cross-section of the community’. Canadian laws by and large have long met the standard.⁵⁸

29. These statements about representativeness are not clear. The italicized passages appear to refer to representativeness in different senses – the petit jury, the initial array, the source lists. From the outset, the concept of representativeness has been controversial. Justice Stevenson wrote a separate concurring decision in *R. v. Sherratt*, agreeing with the result but restricting his concurrence “to that point lest I be thought to be passing upon the discussion of the collateral questions, notably that of the ‘representative’ nature of the jury.”⁵⁹ Justice Stevenson subsequently softened his comments in *R. v. Bain*, dealing the Crown power to stand aside jurors, agreeing that “while the Canadian law has not adopted a theory of representativeness” a jury should both be, and be seen to be, “impartial, representative and competent”.⁶⁰ In a separate concurring judgment in *R. v. Biddle*, Justice McLachlin, as she then was, responded to the concurring judgement of Gonthier J., in which he reiterated identical comments from *R. v. Bain* that a jury must be “impartial, representative and competent” (the majority did not address the issue of representativeness). She stated:

⁵⁷ *R. v. Sherratt*, *supra*, per L’Heureux-Dubé J at paras 30-31. Justice L’Heureux-Dubé draws heavily on the work of the Law Reform Commission of Canada, quoted in part at the outset of this section.

⁵⁸ *R. v. Sherratt*, *supra*, at para 35.

⁵⁹ *R. v. Sherratt*, *supra*, at para 70.

⁶⁰ *R. v. Bain*, [1992] SCJ no 3 at para 141.

I agree that a jury must be impartial and competent. But, with respect, the law has never suggested that a jury must be representative. For hundreds of years, juries in this country were composed entirely of men. Are we to say that all these juries were for that reason partial and incompetent?

To say that a jury must be representative is to confuse the means with the end. I agree that representativeness may provide extra assurance of impartiality and competence. I would even go so far as to say that it is generally a good thing. But I cannot accept that it is essential in every case, nor that its absence automatically entitles an accused person to a new trial.

To say that a jury must be representative is to set a standard impossible of achievement. The community can be divided into a hundred different groups on the basis of variants such as gender, race, class and education. Must every group be represented on every jury? If not, which groups are to be chosen and on what grounds? If so, how much representation is enough? Do we demand parity based on regional population figures? Or will something less suffice? I see no need to start down this problematic path of the representative jury, provided the impartiality and competence of the jury are assured. Representativeness may be a means to achieving this end. But it should not be elevated to the status of an absolute requirement.⁶¹

30. Justice L’Heureux-Dubé explicitly agreed with these comments, and respectfully disagreed with those of Gonthier J., suggesting she was departing from *R. v. Sherratt*, or had in mind a very limited concept of jury representativeness in that case.⁶²

31. Subsequent references to the concept of representativeness have accepted that it is an important characteristic of the modern jury, *without elaboration*, but also that it is adequately provided for by provincial legislation *ensuring random selection from the greater community*. In *R. v Find*, McLachlan C.J.C., writing on behalf of the Court, explained that jury selection falls into two stages, both of which :

embody procedures designed to ensure jury impartiality. The “pre-trial” stage advances this objective by *randomly* assembling a jury pool of appropriate candidates from the greater community. This is assured by provincial legislation addressing qualifications for jury duty; compilation of the jury list; the summoning of panel members; selection of jurors from the jury list; and conditions for being excused from jury duty. These procedures furnish, so far as possible, a representative jury pool: *R. v. Sherratt*; P. Schulman and E.R. Myers “Jury Selection” in *Studies on the Jury* (1979) a report to LRCC at p.408.⁶³ [emphasis added]

⁶¹ *R. v. Biddle*, [1995] SCJ no 22, per McLachlin J (as she then was) at paras 56-58.

⁶² *R. v. Biddle*, *supra*, per L’Heureux-Dubé J at para 41.

⁶³ *R. v. Find*, *supra*, at para 20.

vi) Provincial appellate courts

32. Until this case, it has been left to lower courts to grapple with the actual meaning of jury representativeness. Canadian courts have consistently held that there is no right to a petit or trial jury composed in a particular way.⁶⁴ There was no suggestion otherwise in this case.

33. Beyond what representativeness does *not* mean, only a handful of provincial courts have considered what it does mean, and what it requires.⁶⁵ The most detailed discussion occurs in *R. v. Church of Scientology*, in which Justice Rosenberg frames the test for representativeness in *negative* terms, concluding that a truly representative jury roll is neither possible nor desirable, but that the state cannot “systematically exclude distinct groups” from participation in the jury:

The right to a representative jury roll is not absolute in the sense that the accused is entitled to a roll representative of all the many groups that make up Canadian society. This level of representativeness would be impossible to obtain. There are a number of practical barriers inherent in the selection process that make complete representativeness impossible. The roll is selected from a discrete geographic district which itself may or may not be representative of the broader Canadian society.

Further, the critical characteristic of impartiality in the petit jury is ensured, in part, by the fact that the roll and the panel are produced through a random selection process. To require the sheriff to assemble a fully representative roll or panel would run counter to the random selection process. The sheriff would need to add potential jurors to the roll or the panel based upon perceived characteristics required for representativeness. The selection process would become much more intrusive since the sheriff in order to carry out the task of selecting a representative roll would require information from potential jurors as to their race, religion, country of origin and other characteristics considered essential to achieve representativeness. The point of this is not to demonstrate that a jury panel or roll cannot or should not be representative, but that the right to a representative panel or roll is an inherently qualified one. There cannot be an absolute right to a representative panel or roll.

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....

⁶⁴ *R. v. Bradley and Martin (No.2)* (1973), 23 CRNS 39 (Ont SC). See also *R. v. Kent, Sinclair and Gode* (1986), 27 CCC (2d) 405 (Man CA) per Monnin CJ at para 73 where it is stated that requiring representation of the accused’s race on a trial panel would “...balkanize the citizenry of this country for the purpose of jury selection” and, as per Matas JA at para 46, would “run counter to Canada’s multicultural and multiracial heritage and the right of every person to serve as a juror...[I]t would mean the imposition of inequality”. See also *R. v. Scientology, supra*; *R. v. Laws* (1998), 128 CCC (3d) 516 (Ont CA) at 538; *R. v. Gayle, supra*, at para 57; *R. v. Lamirande*, [2002] MJ no 133 (C.A.) at paras 150-59; *R. v. Teehuis-Moar*, [2010] MJ no 342 (CA) at para 143. See also *R. v. Bain, supra*, at para 33, where Gonthier J, in dissent, noted that an accused cannot positively choose the jury – he has no right to a jury of his or her choice, but only an impartial jury. However, the accused can exclude prospective jurors by exercising his or her right to peremptory challenges under section 634 of the *Criminal Code*.

⁶⁵ *R. v. Church of Scientology, supra*; *R. v. Lamirande, supra*; *R. v. Teehuis-Moar, supra*.

The essential quality that the representativeness requirement brings to the jury function is the possibility of different perspectives from a diverse group of persons. *The representativeness requirement seeks to avoid the risk that persons with these different perspectives, and who are otherwise available, will be systematically excluded from the jury roll.* [emphasis added]⁶⁶

vii) Core principles in the Canadian jury system

34. Fundamental principles crucial to the operation of the jury system in Canada further limit the possible scope of the concept of jury representativeness. First, proportionate representation would undermine random selection. Random selection has been held to be essential to the critical requirement that a jury be impartial.⁶⁷ It promotes impartiality by ensuring “an indifferent rather than a favourable jury”.⁶⁸ As noted above, courts across the country have resoundingly eschewed any attempts to manufacture more representativeness in the jury, including at the roll stage, as an improper interference with random selection. As one commentator noted:

If our continued use of juries reflects a belief that representatives of the community can and should decide certain matters, then it must be the case that arrays are drawn from the community as a whole at random, promiscuously and indiscriminately, otherwise juries in individual cases are not truly representative of the community.⁶⁹

35. Second, insisting on proportionate representation would significantly erode juror privacy. At a minimum, it would require information about a prospective juror’s race and or ethnicity, as is done in the United States. This would run counter to the powerful theme running through Canadian law of respecting juror privacy as much as possible. Justice Moldaver’s recent remarks in *R. v. Yumnu* succinctly summarize the essence of this approach:

Jury duty is precisely that – a duty. People are not asked to volunteer; they are selected at random and required to serve unless they are otherwise exempted or excused. Once selected, jurors become judges of the facts. Their personal lives at that point are no more relevant than that of the presiding judge.⁷⁰

⁶⁶ *R. v. Church of Scientology*, *supra*, at paras 146-151.

⁶⁷ *R. v. Scientology*, *supra*, at para 147. See also *R. v. Find*, *supra*, at para 20.

⁶⁸ *R. v. Barrow*, *supra*, per McInyre J at para 71 (although in dissent, this discussion about how provincial juries legislation works do not appear to have been in issue).

⁶⁹ Dean Lynn Smith, “Charter Equality Rights: Some General Issues and Specific Applications in British Columbia to Elections, Juries and Illegitimacy” (1984), 18.2 UBC LR 351 at 495, quoted in *R. v. Born With a Tooth*, [1994] 2 CNLR 96 (Alta QB) at para 11. See also *R. v. Laws*, *supra*, at paras 59-60; *R. v. Brown*, at paras 22, 25-26.

⁷⁰ *R. v. Yumnu*, [2012] 3 SCR 777 at paras 41-42. See also *R. v. Find*, *supra*, at para 26; Ontario Information and Privacy Commission, *Excessive Background Checks Conducted on Prospective Jurors: A Special Investigation Report* (Toronto: The Commissioner, 2009); and *R. v. Davey*, [2012] 3 SCR 828 at para 33 and note 3.

36. Third, perhaps most importantly, proportionate representation would require moving from a system where impartiality is presumed and jury privacy scrupulously protected, to an American approach where “every candidate for jury duty may be challenged and questioned as to preconceptions and prejudices....”⁷¹ There is a strong presumption of juror impartiality in Canada.⁷² So strong that it can only be displaced where it is “clear and obvious” that the person is partial or where there exists a “realistic potential” for juror partiality.⁷³ In this respect our system is fundamentally at odds with the American approach that “treats all members of the jury pool as presumptively suspect, and hence includes a preliminary voir dire process whereby prospective jurors are frequently subjected to extensive questioning, of a highly personal nature, to guide the respective parties in exercising their peremptory challenges and challenges for cause.”⁷⁴ Moving to a system of proportionate representation would potentially change this. Instead of choosing prospective jurors in spite of who they are, they would be chosen, at least in part, because of who they are. Having ensured an individual is included because of her characteristics, the implication of these characteristics may need to be explored in an American-style *voir dire*. In addition, this approach involves the stereotypical assumption that a person who is part of a distinct group brings a particular perspective. As an English commentator noted:

The idea of representation contains an ambiguity. In one sense a representative selection is merely a reflection or reproduction on a smaller scale of some larger entity or group. But in another sense, one who is representative may take himself to have the duty of protecting or supporting the interest of the section or group that he is considered to represent....⁷⁵

viii) Conclusion about the meaning of jury representativeness in Canada

37. In light of all these considerations, jury representativeness is best conceived of as a negative prohibition on improper exclusions. To the extent that the concept has a positive dimension, it remains the position of the Attorney General for Ontario that it requires the state to

⁷¹ *R. v. Williams*, [1998] SCJ no 49 at paras 12-13.

⁷² *R. v. Find*, *supra* at para 26; *R. v. Williams*, *supra* at para 12; *R. v. Parks*, [1993] OJ no 2157 (CA), leave dismissed [1993] SCCA 481 at paras 21-22, 32.

⁷³ *R. v. Find*, *supra* at para 30-34; *R. v. Williams*, *supra*, at para 57; *R. v. Hubbert*, (1975), 29 C.C.C. (2d) 279 (Ont.C.A.), *aff'd* [1977] SCJ no 4, at paras 18-45; *R. v. Gayle*, *supra*, at paras 43-44; *R. v. A.B.* (1997), 115 CCC (3d) 421 (Ont CA) at 448-49.

⁷⁴ *R. v. Find*, *supra* at para 26.

⁷⁵ Marshall, G. “The Judgment of One’s Peers: Some Aims and Ideals of Jury Trial.” In N. Walker (ed.) *The British Jury System* (Cambridge, England: University of Cambridge Institute of Criminology, 1975) at p.4, quoted in *Pomerant*, *supra* at 18.

access and use, or to make reasonable efforts to access and use, a broad-based list, when compiling a jury roll. Ultimately, as Justice Rosenberg concluded, it is about a fair *process*.⁷⁶

38. Whether the standard has been met will depend on an objective assessment of the circumstances known at the time, focusing on the efforts made. While results may be considered, it is for the purpose of assessing the reasonableness of the efforts, and not as an end in themselves. For example, if there is a poor response rate, the state may need to look into why, and make reasonable efforts, within its power, to address the cause or causes, such as an issue with the delivery of questionnaires, or a problem understanding the questionnaire due to its technical nature. What is required of the state must be reasonable, must reflect the qualified or limited nature of the concept of representativeness, and must be within its control. If jury trials are to continue, the test cannot be so high that the state cannot put together a jury roll for a given year.

ix) *The English approach*

39. The English jury fulfills the same essential purposes as the jury in Canada⁷⁷ but with no requirement for representativeness.⁷⁸ While reforms opening eligibility to all citizens greatly improved the representative quality of juries, this is not seen as essential to the jury's function. At most, an accused has the right to demand that a jury be drawn from a list that does not deliberately exclude some subset of the population:

Since juries are chosen at random from jury lists, a non-discriminatory method of compilation of the jury lists is an essential ingredient of a fair trial by jury. This is inherent in the concept of a fair trial by an impartial jury. Fairness is achieved in the composition of a jury by random selection from a list which is itself fairly constituted.....A jury list compiled on a basis which, without any objective justification, excludes from jury service virtually one half of the otherwise eligible population is a jury list compiled on a discriminatory basis. A jury list compiled on this basis is the antithesis of a fairly constituted jury list. Trial by a jury derived from such a list does not satisfy the constitutional requirement of a fair trial by an independent and impartial court.⁷⁹

⁷⁶ See *R. v. Church of Scientology*, *supra*, at paras 147-48, quoted above.

⁷⁷ Devlin, *supra*, at 154-164.

⁷⁸ For years, as Lord Devlin pointed out in his famous mid-century series of speeches lauding the jury, the jury achieved its essential purposes without being remotely representative: "The jury is not really representative of the nation as a whole. It is predominantly male, middle-aged, middle-minded and middle-class. This is due mainly to the property qualification and to some extent to the character of exemptions." See Devlin, *supra*, at 20.

⁷⁹ *Rojas v. Berllaque* (A-G for Gibraltar intervening), [2003] UKPC 76 at para 14. Specifically, the majority found that fair trial rights under the Constitution of Gibraltar were infringed by legislation which made jury service compulsory for men but voluntary for women.

40. The English Court of Appeal has emphatically rejected any attempt to alter the composition of a jury panel to better represent the particular demographic make-up of the community. First, trial judges do not have the discretion to interfere with the composition of a jury panel in order to improve its representativeness. This is an administrative matter, not a judicial matter. Second, and more fundamentally, *randomness* is the cornerstone of jury selection and the key to a fair and impartial jury. Any interference with it is improper:

Our philosophy is that the jury should be selected at random, from a panel of persons who are nominated 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...The parties must take them as they come.⁸⁰

41. Further, the English Court of Appeal also held that “there is no principle that a jury should be racially balanced” for this “would depend on an underlying premise that jurors of a particular racial origin or holding particular religious beliefs are incapable of giving an impartial verdict in accordance with the evidence.”⁸¹

42. As Lord Justice Auld succinctly noted, random selection is “the best means we have...of trying to secure an impartial and fair jury.”⁸²

x) *The American approach*

43. The Sixth Amendment of the United States Constitution guarantees a criminal defendant a trial by an “impartial jury of the State and district wherein the crime shall have been committed.” The Supreme Court has held that the right to an “impartial jury” includes, among other things, the right to a jury venire drawn from “a representative cross section of the community.”⁸³ In *Duren v. Missouri* the Court held that a *prima facie* “fair cross-section” violation is established by showing

(1) that the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.⁸⁴

⁸⁰ From Lord Denning MR’s judgment in *R. v. Crown Court at Sheffield, ex p Brownlow* [1980] 2 All ER 444 at 452-453, quoted in *R. v. Ford* [1989] 3 All ER 445 (C.A.) at 448. See also summary of commonwealth approach to representativeness in *R. v. Ellis NZ*, [2011] NZCA 90.

⁸¹ See *R. v. Ford, supra*, at 449-50.

⁸² Auld, *supra*, at para 58.

⁸³ *Taylor v. Louisiana*, 419 US 522 at 528 (1975).

⁸⁴ *Duren v. Missouri*, 439 US 357 at 364 (1979).

44. Meeting these three prongs does not itself demonstrate a Sixth Amendment violation. Instead, the burden shifts to the state to justify its jury selection system. It is only when the state cannot rationalize the disparity and show that “attainment of a fair cross-section [is] incompatible with a significant state interest” that a constitutional problem arises.

45. In order to understand the *Duren* test, it is necessary to understand the social and legal context from which the American right to a representative jury emanates. The Fourteenth Amendment was enacted to protect the rights of certain “suspect classes”, namely women, racial minorities, and in some cases religious minorities, from unjustifiable and invidious discrimination, and to that end included an “equal protection” guarantee designed to eradicate *intentional* acts of discrimination. The rule applied to jury selection (at the state level), meaning that, post-reconstruction, jury systems needed to be “race-and gender-neutral.”⁸⁵ However, the equal protection clause was interpreted very early on by the U.S. Supreme Court as saying nothing about discriminatory effects, as opposed to discriminatory intent. The U.S. Supreme Court soon recognized the need for a new means by which to scrutinize invidious jury selection practices, and settled on the concept of the “representative jury.”⁸⁶ Beginning in the 1940s, the Court began breathing life into the notion that the state had responsibilities in jury selection that went beyond avoiding intentional discrimination, noting, in particular, that juries needed to reflect the composition of the community.⁸⁷ In *Taylor v. Louisiana* the Court shifted its focus from the need to ensure the equal protection rights of certain groups to participate in the judicial process to the protection of the defendant’s individual fair trial right to be tried by a jury drawn from a representative cross-section of the community. Four years later the Court confirmed the new right in *Duren v. Missouri*, establishing the now-canonical three-part test (set out above).

46. Notwithstanding that racial minorities remain underrepresented in jury systems across the United States, albeit to a lesser extent than before *Duren*,⁸⁸ each of *Duren*’s requirements have been interpreted narrowly, and modern fair cross-section claims are almost always unsuccessful.

⁸⁵ See Nina W. Chernoff, “Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It With Equal Protection,” (2012) 64 Hastings LJ 141 at 151; see also *Peters v. Kiff*, 407 US 493 500 n 9 (1972).

⁸⁶ See e.g. Sanjay K. Chhablani, “Re-Framing the ‘Fair Cross-Section’ Requirement” (2011), 34 J Const L 931 at 939-942; Stephen E. Reil, “Who Gets Counted? Jury List Representativeness for Hispanics in Areas with Growing Hispanic Populations Under *Duren v. Missouri*” (2007), BYUL Rev 201 at 204

⁸⁷ See *Smith v. Texas* 311 US 128 (1940); *Glasser v. United States*, 315 US 60 at 86 (1942); *Thiel v. So. Pac.Co.*, 328 US 217 at 220 (1946); *Ballard v. United States*, 329 US 187 at 192 (1946). In the two decades after these cases were decided, Congress passed the Jury Service and Selection Act, 28 U.S.C. § 1861-1878, requiring that federal courts adopt a written plan ensuring the random selection of jurors from a “fair cross-section of the community”.

⁸⁸ See e.g. Chernoff, *supra*, at 145.

A survey of 167 fair cross-section cases decided by federal and state supreme courts between 2000 and 2011 revealed that not a single court found a violation.⁸⁹

47. The concept of a “distinctive” group, the first prong of *Duren*, has not been precisely defined. The general approach tracks the one employed in the equal protection context - asking whether the impugned law discriminates on the basis of some suspect (i.e., immutable) classification.⁹⁰

48. The second prong of *Duren*, requiring that the defendant prove that representation of the identified group is not fair and reasonable compared to the proportion of that group in the community,⁹¹ has proven to be highly contentious. It involves a comparison of the ethnic/racial make-up of the jury pool with the ethnic/racial make-up of the underlying community of eligible jurors (a relatively exclusive group to begin with, as eligible jurors must be citizens, reside in the geographic area, and speak English).⁹² This in turn involves requiring jurors to provide personal information about their race and/or ethnicity in the juror questionnaire.⁹³ Different mathematical approaches have been developed to calculate and assess how much deviation is acceptable.⁹⁴

49. Under *Duren*’s crucial third prong, which requires that the discrepancy be due to “systematic exclusion”, the state will be held responsible only for those representation problems “inherent” to its jury system. This requirement has been interpreted to require a causal link between the state’s jury selection system and the underrepresentation. In *Berguis v. Smith*, the

⁸⁹ Chernoff, *supra*, at 166.

⁹⁰ See e.g. Chhablani, *supra*, at 947.

⁹¹ See *Duren*, *supra*, at 374.

⁹² See e.g. Paula Hannaford-Agor, “Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must be Expanded” (2011), 59 Drake L Rev 761 at 766.

⁹³ See eg. *U.S. v. Salvador Hernandez-Estrada* USCA (9th Cir 2012).

⁹⁴ There is no one size fits all mathematical standard for measuring the reasonableness of a distinctive group’s representation – see *Alexander v. Louisiana*, 405 US 625 at 630 (1972). The two tests used most frequently are the “absolute disparity” test and the “comparative disparity” test. As a general matter absolute disparity looks at the difference between the group’s representation in the community and its representation in the jury pool. In *Duren* the absolute disparity was 31%, for example — the community was 46% female and the resulting venire was 15% female. By contrast, comparative disparity measures the amount by which the jury pool falls short of the expected representation given the community’s composition. In *Duren* that number was 67% — the community group (46%) less the jury group (15%) divided by the jury-eligible population (46%). In other words, the jury pool was 67% less female than expected, given the community makeup. Both measurements (absolute and comparative disparity) perform poorly when the distinctive group composes only a small percentage of the relevant population. In many cases a number of additional measures are presented, often times by expert witnesses. These secondary measures tend to include statistical significance tests that purport to indicate whether the alleged disparity is significant or simply the result of random chance in the selection process. See e.g. Richard Seltzer, “Fair Cross-Section Challenges in Maryland: An Analysis and Proposal” (1996), 25 U Balt L Rev 127 at 141. No court has ever accepted a standard deviation analysis as determinative of a Sixth Amendment challenge. *Berghuis v. Smith*, 130 S Ct 1382 at 1393.

U.S. Supreme Court’s latest pronouncement on the fair cross-section right, the defendant argued that he need only show “that the underrepresentation is persistent and produced by the method or system used to select jurors, rather than by chance.” The Court disagreed, stating that “[n]o ‘clearly established’ precedent of this Court” allows a defendant to show a prima facie fair cross-section violation by pointing to underrepresentation and “a host of factors that, individually or in combination, might contribute to a group’s underrepresentation.”⁹⁵

50. Courts have also held that the state is not responsible for underrepresentation arising from social and cultural factors beyond the state’s immediate control. The list of factors causing underrepresentation that do not amount to “systematic exclusion” include: the use of voter registration lists,⁹⁶ undeliverable questionnaires and notices,⁹⁷ and fail-to-appear and nonresponse rates.⁹⁸ As one court has said, “the Sixth Amendment does not impose an affirmative obligation on the [state] to counteract such private sector influences as voting patterns, demographic trends, and cultural differences.”⁹⁹

B. In the present case, did the state fulfil its “representativeness” obligation in compiling the jury roll in Kenora in 2008?

51. There is much that is important and helpful in the majority opinions about how to approach the problem of low Aboriginal participation in the jury system from a policy point of view, and regarding contextual factors that must be considered in assessing the reasonableness of state conduct in assembling a jury roll. However, the majority made significant errors in their interpretation and application of the concept of representativeness.

i) Errors in the majority approach

a) Treating representativeness as meaning proportionate representation

52. The Court below concluded that the “distinct perspectives that make up the community” must be provided “a fair opportunity to be included in the jury roll, and to be brought into the

⁹⁵ *Berghuis v. Smith*, *supra*, at 1395.

⁹⁶ See e.g. *United States v. Bates*, 2009 US Dist LEXIS 117073 at *35 (ED Mich 2009); *United States v. Odeneal*, 517 F 3d 406 at 412 (6th Cir 2008); *United States v. Lewis*, 10 F 3d 1086 at 1089-90 (4th Cir 1993); *United States v. Cecil*, 836 F 2d 1431 at 1444-56 (4th Cir 1988).

⁹⁷ *Rivas v. Thaler*, 432 F App’x 395 at 402-03 (5th Cir 2011); *Bates*, *supra*, at 8-9.

⁹⁸ See e.g. *Bates*, *supra*, at 41, 43-44.

⁹⁹ *United States v. Rioux*, 930 F Supp 1558 at 1578 (D Conn 1995).

jury function”.¹⁰⁰ On first reading, the test seems reasonable enough – the language of “fair opportunity” is used in the American jurisprudence and seems familiar and reasonable. The difficulty is how to measure it. The majority teeters between efforts and results. To the extent they focus on results, the approach runs counter to how we have always approached the jury process in Canada, and amounts to a significant re-casting of the hitherto limited concept of jury representativeness in Canada.

53. For example, Justice LaForme explains that “[a]ny assessment of the state’s efforts must....look to whether the state was aware of the need to achieve *real equity* in respect of Aboriginal participation on juries...”¹⁰¹[emphasis added] Further, he suggests that different First Nations may each represent “distinct perspectives” and the exclusion of even one, no matter the size or cause, “weakens representativeness”.¹⁰² Similarly, he notes that off-reserve Aboriginals “may potentially have different perspectives than Aboriginal on-reserve residents”, and their wrongful inclusion is problematic in terms of achieving representativeness.¹⁰³

54. As noted above, until now, the concept of jury representativeness in Canada has operated as a negative prohibition on improper exclusions. Representativeness is achieved by random selection from a representative cross-section of the community, without deliberate interference. It is about a fair process. In re-casting the concept of representativeness into a positive obligation, and measuring the reasonableness of efforts to achieve it by the results, the majority appears to view representativeness as meaning proportionate representation, requiring a certain level of inclusion.

55. Further, this analysis appears to presume that the “cluster sampling” proportionate approach to the jury process in section 6(2) and 6(8) of the Ontario *Juries Act* is constitutionally required. More than that, it assumes that the practice of the CSD in Kenora of separately randomly selecting names from *each* First Nation reserve - *cluster sampling within cluster sampling* – was constitutionally required. Neither was, or is, required. No other province or territory takes a proportionate “cluster sampling” approach like Ontario. Further, although

¹⁰⁰ *R. v. Kokopenace*, *supra* at paras 40, 42, 50, 240.

¹⁰¹ *R. v. Kokopenace*, *supra* at para 151.

¹⁰² *R. v. Kokopenace*, *supra* at para 173 – “Although I have used the phrase ‘the distinct perspectives of Aboriginal on-reserve residents’ in setting out the representativeness issue, I do not mean to suggest that all Aboriginal on-reserve residents in Ontario, or all those within Kenora District, are a homogeneous group that shares uniform perspectives. Each reserve is a separate community and the exclusion of one – or in this case, three – weakens representativeness.”

¹⁰³ *R. v. Kokopenace*, *supra* at para 176.

Ontario approaches the jury process in a proportionate way, there is no constitutional requirement for Ontario to *succeed* in achieving proportionality.

56. Justice Goudge finds that Ms. Loohuizen's efforts with respect to the lists were reasonable because, as imperfect as her lists were, they did provide an opportunity for the distinct perspective of Aboriginal on-reserve residents to be included. However, he too fell into the error of measuring the reasonableness of efforts by the results achieved. He concluded that the low return rates had an "obvious" impact on representativeness and the state did not respond in a reasonable way. However, what really seems to drive his conclusion is that the state response was unsuccessful. The state was explicitly attempting to address the response rate problem, and was just learning that its approach of increasing the numbers of questionnaires being sent was not effective. To conclude that the state behaved unreasonably in these circumstances suggests a reliance on straight results.

57. The implications of the majority approach are enormous. What is the relevant community? How is its demography measured? Which "distinct groups" must be included? As Justice Rosenberg noted in *R. v. Brown*, "[t]here are an almost infinite number of characteristics that one might consider should be represented in the petit jury: age, occupation, wealth, residency, country of origin, colour, sex, sexual orientation, marital status, ability, disability and so on."¹⁰⁴ How to identify if someone is a member of the distinct group? How do we measure their presence? How do we measure whether a fair opportunity has been provided? What is acceptable? How to account for random selection? It is currently possible to tell how many people living on First Nations reserves end up on the jury roll in Ontario (mainly but not exclusively Aboriginal peoples) by virtue of how Ontario currently assembles its jury rolls. For other groups, including Aboriginal people living off-reserve, however, it would require collecting personal information about race and/or ethnicity (as the Americans do), which, as noted above, would run counter to the venerable body of jurisprudence and policy seeking to protect juror privacy.¹⁰⁵

¹⁰⁴ *R. v. Brown*, *supra*, at para 22. A recent challenge has been launched in Ontario in *R. v. Pan* on the basis that the *low rates of payment* for jurors infringes the right to be tried by a "representative" jury because so many jurors (around 25%) are excused on the basis of financial hardship. Such a challenge has been made in the U.S. under their approach to representativeness (see eg. *Rivas v. Thaler*, *supra*) but appears novel in Canada.

¹⁰⁵ *R. v. Find*, *supra*, at para 26; Ontario Information and Privacy Commission, *Excessive Background Checks Conducted on Prospective Jurors: A Special Investigation Report* (Toronto: The Commissioner, 2009); *R. v. Yumnu*, *supra*, at paras 41-42; *R. v. Davey*, *supra*, at para 33 and n 3.

58. Further, the majority focus on “*fair opportunity*” for on-reserve residents to be included in the jury roll, and achieving “*real equity*” in respect of Aboriginal participation on juries, evokes the language and concerns underlying the American approach. It shifts the focus from the appellant’s entitlement to a fair trial process to the equal treatment of distinct groups of prospective jurors, something which does not sit easily within s. 11. As explained above, s. 11 is about a fair adjudicative process.

b) Ignoring the importance of causation

59. The majority focus on results is exacerbated by the absence of any type of causation analysis. A test focused on results must have a causation requirement to ensure that the impugned results are attributable to the state. The majority asks whether a fair opportunity has been extended at the various stages of the jury roll process – getting lists, sending out questionnaires to the correct addresses, and receiving them back completed – and measures this largely against the results achieved to conclude that efforts were not sufficient. This is not coherent. While a failure to address results can make efforts unreasonable, as noted above, the focus must be on the reasonableness of the efforts. Here the majority focuses on straight results, without consideration of causation. In so doing, they fail to provide an understandable constitutional minimum standard. Bluntly, the state cannot be held to account for things that it cannot control. As Justice Rouleau explained in dissent:

The government has to offer all groups with a distinct perspective a reasonable opportunity to have their views included on the jury roll. The fact that a particular group responds in lower numbers to the invitation to participate, and this despite the offer and encouragement of the government, does not mean that they have ‘a significantly reduced *opportunity* for inclusion’ (emphasis added). In other words, a low response rate does not necessarily mean the government has failed to perform its constitutional obligations. As observed in the Iacobucci Report, the reasons for which on-reserve residents choose not to participate in the jury process are complex. No doubt there are many other groups that, for their own reasons, also respond in lower numbers to that offered opportunity. The reasonable efforts of the government must be viewed in the context of their efforts to offer all Ontario residents the opportunity to participate in the jury process and to encourage them to respond favourably....¹⁰⁶

60. Well-known tests focusing on results include a causation requirement. The first step of the test for whether s.15 of the *Charter* has been breached requires a causal link or nexus

¹⁰⁶ *R. v. Kokopenace*, *supra*, per Rouleau JA at para 317.

between the impugned law or state conduct and the allegedly discriminatory outcome.¹⁰⁷ As Justice Iacobucci explained in *Symes*:

We must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision.¹⁰⁸

Similarly, as explained above, the last step of the American test, which focuses on results, requires that the state be responsible for any discrepancy in the representation of a distinct group in the jury roll.

61. The point is that the results-based equality focus of the majority is unworkable and unfair without any means of distinguishing between what the state can control, or be expected to control, and external factors. A statistical outcome alone cannot prove that inequality resulted from state conduct. Indeed the record here, which included the Iacobucci Report, shows the enormous complexity of the problem of increasing the numbers of people from First Nations reserves on jury rolls, including profound cultural differences.¹⁰⁹ That Report, coupled with the data described in paragraph 14 above, demonstrates that the causes are well beyond the process of getting questionnaires into the hands of recipients.

c) *Gladue principles have a meaningful but focused role*

62. *Gladue* principles may appropriately inform what will amount to reasonable efforts to access and use broad lists. But they cannot require that the state achieve a certain result in the jury roll, such as proportionate representation in terms of Aboriginal participation.

¹⁰⁷ The test under s.15 of the Charter can be briefly summarized as follows: 1) Does the law (or state conduct) create a distinction based on an enumerated or analogous ground? 2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? See eg. *R. v. Kapp*, [2008] 2 SCR 483 at para 17; *Withler v. Canada (A.G.)*, 2011 SCC 12 at paras 62, 65; and *Quebec (Attorney General) v. A.*, [2013] SCJ no 5.

¹⁰⁸ *Symes v. Canada*, [1993] 4 SCR 695 at para 134. See also *R. v. Nur*, [2011] OJ no 3878 (SCJ) per Code J at paras 79-80, appeal allowed on other grounds 2013 ONCA 677; *Native Council of Nova Scotia v. Canada (Attorney General)*, [2011] 2 CNLR 138 (FC (TD)) per Zins J at paras 46-57.

¹⁰⁹ See, for example, *R. v. Kokopenace*, *supra*, at paras 68, 272, 283-284; Iacobucci Report, Vol XLII, p 27, at paras 210, 213, 242, 244. The fresh evidence before the Court of Appeal also spoke to: high mobility rates of people living on First Nations reserves; reasons for reserve residents to be away when questionnaires arrive, such as being out on the land; the practical difficulties of leaving home when people are depending on you; the time involved in travel to Superior Court locations from remote communities; apprehension on the part of some residents to leave small communities; and pressing social issues in the community. See Exhibit H to Affidavit of Amber Khan, Appellant's Record, Vols II-IX for mobility statistics. See Cross-examination of David Gibson, Appellant's Record, Vol XI, pp 37-83 for a discussion of the realities facing First Nations reserve residents and also the Affidavit of Laura Loohuizeen, Vo XI, p 124 at paras 33 and 35.

63. In *R. v. Gladue* this Court concluded that s.718 of the *Criminal Code* mandates a different process when sentencing Aboriginal offenders. In reaching this conclusion, this Court made a number of powerful observations, including:

- “[C]ourts must take judicial notice of such matters as the history of colonialism, displacement and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.”¹¹⁰
- Widespread bias and racism towards Aboriginal people within Canada “has translated into systemic discrimination in the criminal justice system”.¹¹¹
- The confluence of these things has resulted in a grossly disproportionate incidence of crime and incarceration amongst Aboriginal peoples.¹¹²
- Perhaps most importantly, the different sentencing process is not reverse discrimination entitling Aboriginals to a break, but rather a means to avoid or neutralize the discrimination that otherwise often flows from the failure of the justice system to address their special circumstances.¹¹³

64. These observations can be loosely referred to as “*Gladue* principles”. They have been extended beyond the context of sentencing to address the need to “ensure appropriate treatment for Aboriginal people as they interact with the justice system”.¹¹⁴ They must undoubtedly be considered in determining, and assessing, what will amount to reasonable efforts by the state to access and use a broad-based list when preparing a jury roll. For example, *Gladue* principles can require a translated explanatory letter to accompany the questionnaire, education about the jury and the criminal justice system, and encouragement to respond to questionnaires and participate in the jury process. This is very different, however, from the way the majority uses them – to require different treatment to achieve “real equity”. *Gladue* cannot mandate success or proportionate representation on the roll. This would interfere with random selection and potentially undermine the impartiality of the jury.

¹¹⁰ *R. v. Ipeelee*, [2012] SCJ no 13 at para 60; see also *R. v. Gladue*, [1999] SCJ no 19 at para 67.

¹¹¹ *R. v. Williams*, *supra*, at para 58.

¹¹² *R. v. Gladue*, *supra*, at para 64.

¹¹³ *R. v. Gladue*, *supra*, at paras 87-88; *R. v. Ipeelee*, *supra*, at paras 71 and 75; *United States of America v. Leonard*, 2012 ONCA 622, leave to appeal dismissed [2012] SCCA 490, 543 at paras 51-60.

¹¹⁴ In *R. v. Gladue*, *supra*, at para 65, this Court suggested that *Gladue* principles should be considered by “decision-makers who have power to influence the treatment of aboriginal offenders in the justice system”. See the following cases for examples of how: *United States of America v. Leonard*, *supra*, at paras 53, 88. *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*, [2008] OJ no 2651 (CA), leave to appeal to SCC refused [2008] SCCA no 357 at para 57; and *R. v. Sim*, [2005] OJ no 4432 (CA) at para 16.

d) *Honour of the Crown is not engaged*

65. The majority went beyond *Gladue* principles and also concluded that the Honour of the Crown was engaged. While unquestionably an important doctrine, it was not engaged in this case.

66. The Honour of the Crown is a constitutional doctrine aimed at reconciling the pre-existence of Aboriginal peoples with the assertion of Crown sovereignty.¹¹⁵ At the assertion of sovereignty, a duty arose to treat Aboriginal peoples fairly and honourably.¹¹⁶ The specific content of this duty varies with context. This Court has held that the duty: (1) gives rise to a fiduciary duty when the Crown takes discretionary control over a specific Aboriginal interest; (2) assists in the definition of Aboriginal rights in s.35 of the *Constitution Act*, 1982, and requires consultation and potentially accommodation in advance of Crown actions which could adversely affect unproven Aboriginal rights; (3) governs the conclusion and implementation of treaties; and (4) requires the Crown to act in a way that accomplishes the intended purposes of treaty or statutory grants to Aboriginal peoples.¹¹⁷ It is an important part of this Court's reconciliation toolbox.

67. The Honour of the Crown is not engaged by all interactions between the Crown and Aboriginal people.¹¹⁸ This Court has held that it is engaged by an "explicit obligation to an Aboriginal group that is enshrined in the Constitution".¹¹⁹ As this Court recently explained in *Manitoba Métis*:

[T]he obligation must be explicitly owed to an Aboriginal group. The honour of the Crown will not be engaged by a constitutional obligation in 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.¹²⁰

¹¹⁵ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 25-26, 32; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 24; and *Manitoba Métis Federation v. Canada (Attorney General)*, [2013] SCJ no 14 at para 66.

¹¹⁶ *Mitchell v. MNR*, 2001 SCC 33 at para 9.

¹¹⁷ *Manitoba Métis Federation v. Canada (Attorney General)*, *supra*, at paras 73.

¹¹⁸ *Manitoba Métis Federation v. Canada (Attorney General)*, *supra*, at para 68.

¹¹⁹ *Manitoba Métis Federation v. Canada (Attorney General)*, *supra*, at para 70.

¹²⁰ *Manitoba Métis Federation v. Canada (Attorney General)*, *supra*, at para 72. See also para 68.

68. In addition to being constitutional in nature and owed to an Aboriginal group, the obligation must seek to reconcile Aboriginal peoples with the Crown's assertion of sovereignty. The Honour of the Crown will not be engaged simply by a constitutional obligation that exists alongside or in conjunction with the goal of reconciliation. Rather, the constitutional obligation must itself be directed towards such reconciliation. As this Court said in *Manitoba Métis*:

An analogy may be drawn between such a constitutional obligation and a treaty promise. An "intention to create obligations" and a "certain measure of solemnity" should attach to both....Moreover, both types of promises are made for the overarching purpose of reconciling Aboriginal interests with the Crown's sovereignty.¹²¹

69. Both majority opinions concluded that the doctrine of the Honour of the Crown applied in this case, and gave rise to a duty to act diligently and to consult. Justice LaForme recognized that the "right" to a representative jury is grounded in s.11 of the *Charter*, but concluded that because Ontario chose to

implement this constitutional obligation through a statutory scheme – s.6(8) of the Juries Act – that explicitly treats Aboriginals (specifically, those living on reserve) separately and differently from the remainder of the population...the principle of the honour of the Crown is engaged to the extent that this historical context must be kept in mind when assessing Ontario's conduct for constitutional sufficiency.¹²²

Justice Goudge added:

While the constitutional right to representativeness is the appellant's, it requires the state to provide Aboriginal on-reserve residents with their fair opportunity to be included in the jury roll. The state has chosen to discharge its obligation by a statutory mechanism that addresses Aboriginal on-reserve residents discretely. In my view, the state's interaction with Aboriginal people that this necessitates engages the honour of the Crown and is a factor informing what is constitutionally required of the state.¹²³

70. These conclusions are in error. With respect, the majority confounded the constitutional obligation with the particular mechanism chosen to satisfy it. Assuming there is a constitutional right to a representative jury, it rests primarily within the s.11(f) right to a jury trial. The rights set out in section 11 of the *Charter* apply to "any person charged with an offence". As such, the constitutional obligation is not directed to either an Aboriginal group or to the reconciliation of the assertion of Crown sovereignty over Aboriginal peoples.

¹²¹ *Manitoba Métis Federation v. Canada (Attorney General)*, *supra*, at para 71. See also para 68.

¹²² *R. v. Kokopenace*, *supra*, per LaForme JA at para 241(b).

¹²³ *R. v. Kokopenace*, *supra*, per Goudge JA at para 241(b).

71. The existence of s.6(8) in the Ontario *Juries Act* does not change this. While it exists to satisfy, in part, any constitutional obligation to ensure a representative jury roll, and could perhaps be described as aiming to reconcile the Crown's assertion of sovereignty and the pre-existence of Aboriginal peoples, it is not itself a constitutional obligation. Ontario can alter the way it assembles juries, including s.6(8), without constitutional fetter. While Ontario has committed to consultation with Aboriginal peoples about jury representativeness through its adoption of the first recommendation in the Iacobucci Report – the creation of an Implementation Committee – this is a policy decision and not a constitutional imperative.

72. The majority approach is particularly problematic in the context of s.11(f) and the principle of random selection. It provides certain groups of people with a constitutional entitlement to extra efforts aimed at their proportionate inclusion in a jury roll. For example, on the majority approach, the duty to act with diligence and to consult with respect to the jury roll is owed only to people living on First Nations reserves in Ontario,¹²⁴ but not to Aboriginal people living elsewhere in Ontario. Nor does it apply to Aboriginal people living in all other provinces and territories, which generally use either universal source lists like health records or multiple records aimed at capturing everyone.¹²⁵ The difficulty with this approach is that s.11(f) is not about, and cannot be about, proportionate representation, for all the reasons set out above. This would undermine random selection, the protection of juror privacy, and the presumption of impartiality. However, this does not mean that the special situation of Aboriginal people is not considered when determining what efforts are reasonable in the circumstances. As explained, *Gladue* principles address the need to ensure appropriate treatment of Aboriginal people as they interact with the justice system.

e) *An unduly complex and confusing approach to disclosure*

73. There is language in both majority judgments that suggests comprehensive historical disclosure is necessary to properly apply the test for representativeness. For instance, Justice LaForme asserts that the reasonableness of the state's efforts will be informed by the change in Federal policy in 2000 that caused the provision of band lists to cease, and the continuing decrease in the rates of return of jury service notices by Aboriginal on-reserve residents:

¹²⁴ This group consist mainly of, but not exclusively, Aboriginal people.

¹²⁵ With the possible exception of Quebec which, like Ontario, has separate provisions for First Nations reserves.

The analysis is an iterative one. That is, it will include an examination of the state's efforts in the year 2000 and each following year in order to assess the appropriateness of its response to the constitutional issue.¹²⁶

74. This reflects how this case was litigated. The Crown made comprehensive historical disclosure in order to assist the Court of Appeal in fashioning an approach to the concept of representativeness.¹²⁷ However, once a test is established, and the historical analysis done, it is not reasonable or necessary to require a similar volume of material to assess whether a particular roll is representative. Yet the language of the majority is being relied on by defence counsel to demand massive historical disclosure for the purpose of “Kokopenace Applications”, spawning significant litigation around the province, and potentially side-tracking both the courts and CSD.¹²⁸ Our justice system needs an approach that is fair to both sides and workable in practice.

ii) Application of the reasonableness test to the facts in this case

75. When the state's efforts are considered in light of the appellant's test: reasonable efforts to access and use a broad based list, based on the circumstances known at the time, there was no constitutional violation. The appellant relies on and adopts Justice Rouleau's analysis at paragraphs 306-326 in support of this conclusion.

76. In addition to efforts to get the most up to date lists possible, CSD also made substantial, meaningful, and well-intentioned efforts to address low response rates from reserve residents, and improve Aboriginal participation in the jury process in Kenora in 2007 (for the 2008 jury roll). These included: substantially increasing the number of questionnaires sent to reserve residents (exceeding the proportionality approach in the *Juries Act*); conducting in-person visits to 15 remote reserves by CSD staff and a native court liaison worker; and efforts to engage in similar discussions with the leadership of many of the other reserves within Kenora District. These efforts built upon efforts from earlier years to engage the Nishnawbe Aski Nation [NAN]¹²⁹ and a community elder in the process. Pre-existing practices were also continued in

¹²⁶ *R. v. Kokopenace*, *supra*, at para 81. See also paras 82, 159, 241.

¹²⁷ The Court referred to the fresh evidence materials as “massive” and “...voluminous, encompassing many thousands of pages”, see *R. v. Kokopenace*, *supra*, per Rouleau JA at para 307 and LaForme JA at para 81.

¹²⁸ For example, *R. v. Wabason*, 2014 ONSC 1201 (Ont.Sup.Ct) relating to Thunder Bay, and *R. v. Enosse*, (Ont.Sup.Ct.) relating to Gore Bay.

¹²⁹ NAN (formerly known as “Grand Council Treaty 9”) was established in 1973 as a political territorial organization representing the political, social and economic interests of First Nations communities to all levels of government. Of the 46 reserves located in the Kenora District, 30 are represented by NAN: Affidavit of Deputy

2007 such as including explanatory letters with jury questionnaires sent to reserve residents, translated into Ojibway and Oji-Cree native syllabics.¹³⁰ The opening paragraph of the covering letter reads as follows:

We are trying to involve more First nation members in jury duty so we can have the benefit of their wisdom. To help us, it is important that you fill out the paper we are sending you and return it to us as soon as possible. To help you, we have enclosed a stamped envelope with our address on it.¹³¹

77. These measures, directed at getting questionnaires into the hands of reserve residents, were complemented by practical measures directed toward assisting prospective jurors throughout the later stages of the jury process. These measures included: changing the jury selection schedule so as to dramatically shorten the travel time required for those coming from remote reserves; calling prospective jurors to help with travel arrangements and ensure they understood that they did not have to pay to attend; and including a toll-free number on juror summons to encourage recipients to call with questions.¹³²

78. In the circumstances known to Ontario at the time, and in the context of the constitutional standard proposed by the appellant, these were reasonable efforts. Although the problem of low-response rates was not solved by the substantial efforts made, that ought not to compel a different conclusion. As we know from the Iacobucci Report, and the data outlined above, the factors contributing to the low response rates are varied, complex, and reach beyond the immediate control of the state. No violation of the respondent's *Charter* rights occurred.

C. What is the appropriate approach to remedy if there is a problem with jury representativeness?

79. If there was a *Charter* violation in this case, it was of the s.11(f) right to a jury. There was no allegation of actual bias or partiality in this case, and the Court found “no support in the circumstances” for a reasonable apprehension of bias or partiality, thus s.11(d) does not appear to have been engaged, let alone violated. The Court found no violation of s.15.¹³³ While the Court skipped over the causation requirement imbedded in the first step of the s.15 analysis (despite the

Grand Chief Waboose, Motion Record filed with the Court of Appeal by the Intervenor NAN [not placed in the record before this Court].

¹³⁰ Affidavit of Laura Loohuizen, sworn July 18, 2011, Appellant's Record, Vol XI, p 24 at paras 27, 50, 66, 82-101.

¹³¹ Affidavit of Laura Loohuizen, sworn July 18, 2011, Appellant's Record, Vol XI, p 24 at para 27.

¹³² Affidavit of Laura Loohuizen, sworn July 18, 2011, Appellant's Record, Vol XI, p 24 at paras 28, 33-35.

¹³³ The test is set out above at footnote 105.

Crown explicitly arguing that the causes of the low return rate were complex and could not be causally connect to CSD conduct at a sufficient level to meet the first step of s.15), it found that that the second step was not met as there was no evidence in the record of disadvantage:

[T]he appellant argues that the state's actions significantly diminished the likelihood of Aboriginal persons appearing on the jury panel of the appellant, thereby "exacerbating [his] existing disadvantage". The nature of that disadvantage is not articulated, nor is there anything in the record that suggests what that might be. There can be no doubt about the general systemic discrimination suffered by Aboriginal people in the criminal justice system. However, without evidence, I cannot conclude that this appellant suffered disadvantage because of the make-up of his petit jury or of the jury roll from which it was deprived.¹³⁴

80. Assuming that s.11(f) was violated, the remedy falls to be determined under s.24(1) of the *Charter*. The onus remains on the applicant. Section 24(1) confers tremendous discretion on a court to craft "such remedy as the court considers appropriate and just in the circumstances." A purposive approach must be taken, carefully considering the entire context of the case: the nature of the right and the situation of the claimant; the nature of the infringement; the facts of the case; and the application of the relevant legal principles.¹³⁵

81. Further, the remedy must be sufficiently connected to the breach, must not be precluded because it falls outside a court's role in adjudicating disputes (i.e. because it trenches on the function of the legislature or executive), and must be fair to all parties.¹³⁶ In addition, at least in the criminal justice context, the remedy should be the least intrusive necessary to safeguard the fairness of the trial process and the integrity of the justice system.¹³⁷ To that end, a new trial should be ordered only where it is established that there is prejudice or partiality in the trial, a reasonable apprehension of partiality or bias, or the appearance of unfairness such that public confidence in the integrity of the justice system would be undermined.¹³⁸

82. The majority of the Court of Appeal erred by equating sections 11(d) and 11(f) of the *Charter*, and assuming that a breach relating to representativeness "necessarily" undermines

¹³⁴ *R. v. Kokopenace*, *supra*, at para 218.

¹³⁵ *Doucet- Boudreau v. Nova Scotia (Minister of Education)*, [2003] SCJ no 63 at para 52. See also *R. v. Gamble*, [1988] SCJ no 87 at para 66; *Edmonton Journal v. Alberta (Attorney General)*, [1989] SCJ no 124 at para 51; *R. v. Bjelland*, [2009] SCJ no 38; *R. v. Dixon* (1998), 122 CCC (3d) 1 (SCC); and *R. v. Tran*, (1994) 92 CCC (3d) 218 (SCC).

¹³⁶ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, *supra*, at para 56-57; *Canada (Prime Minister) v. Khadr*, [2010] SCJ no 3 at paras 27, 32-33.

¹³⁷ *R. v. Bjelland*, *supra*, at para 19.

¹³⁸ *R. v. Dixon*, *supra* at paras 23-24, 35; *R. v. Tran*, *supra* at 1009; *R. v. Bjelland*, *supra*, at para 22; *R. v. Harrer*, [1995] 3 SCR 562 per McLachlin J (as she then was) at para 45; *R. v. Snow* (2004), 190 CCC (3d) 356 (CA) per Doherty JA at paras 29-53; and *R. v. Cameron* (1991), 64 CCC (3d) 96 (Ont CA).

public confidence in the administration of justice and “the only effective remedy” is a new trial.¹³⁹ In doing so, they failed to properly account for the distinction between sections 11(d) and (f) and the limited scope of the concept of representativeness, the absence of prejudice, and the importance of other principles in this case, such as the failure to raise a challenge to the constitution of a Court at the earliest opportunity. Careful consideration of the circumstances of this case suggests that the appropriate remedy is a declaration, as it will be in most cases where there is a pure representativeness problem, as opposed to a problem that also gives rise to a concern about partiality. If successive declarations are ignored, a more dramatic remedy such as a new trial may be required, but we are a long way from that situation here.

i) The nature of the right

83. Unlike a breach of s.11(d), which invariably requires a new trial, a breach of s.11(f) will not normally be associated with any prejudice to the individual accused, or to society. The Court below supports this argument in their unanimous conclusion that even if s.15 of the *Charter* was engaged, there was no evidence of any “disadvantage”.¹⁴⁰ As noted above, there is a long line of authority to the effect that an accused is entitled to an impartial jury, but not one of any particular composition. In this particular case, for example, a perfectly representative roll could yield the exact same jury that tried the case.

84. The lack of prejudice is also supported by the more robust role accorded to the *Criminal Code* jury saving provisions (sections 670 and 671)¹⁴¹ in relation to out of court jury errors, and errors not raised at trial. While Courts have generally interpreted these provisions narrowly in relation to jury errors at trial,¹⁴² the same is not true for jury errors occurring outside the trial process. Similarly, the failure to raise an error at trial is an important factor.¹⁴³ Chief Justice Dickson referred to the provincial procedures for assembling an array of eligible citizens to serve on the jury as “largely an administrative task”.¹⁴⁴ Albeit pre-*Charter*, this Court has saved pre-court errors in the jury process, even where they could potentially affect the constitution of the

¹³⁹ See *R. v. Kokopenace*, *supra*, per LaForme JA at paras 227-28.

¹⁴⁰ *R. v. Kokopenace*, *supra*, per LaForme JA at para 219.

¹⁴¹ In *R. v. Barrow*, *supra*, at para 37, Dickson CJC explained that the “import of these two provision is that an irregularity of form which does not affect the substance of a trial cannot be used to challenge the result.” See the text of ss. 670-671 set out in Part VII of this Factum.

¹⁴² See eg. *R. v. Rowbotham*, (1988) 41 CCC (3d) 1 (Ont CA) and *R. v. Katoch* (2009), 246 CCC (3d) 423 (Ont CA).

¹⁴³ See eg. *R. v. Barrow*, *supra*, per Dickson C.J.C. at paras 36-40; *R. v. Katoch*, *supra*, at paras 39, 42, 49; *R. v. Kakegamic*, *supra*, at para 38.

¹⁴⁴ *R. v. Barrow*, *supra*, per Dickson CJC at para 30.

court.¹⁴⁵ While these saving provisions are not directly applicable to a *Charter* breach, they are part of the context to be considered in fashioning an appropriate remedy under s.24(1).

ii) *The nature of the infringement*

85. As summarized above, CSD in Kenora made extraordinary efforts to get lists from First Nations reserves, use them reasonably (including trying to increase response rates), and facilitate actual participation on the jury. Not only were their efforts at all times characterized by good faith, they were also extremely thoughtful and many of the approaches taken have become models for the First Nations jury process around the province.

iii) *The facts of the case*

86. The respondent had a fair trial in front of an impartial jury. His grounds of appeal on the record were dismissed by the Court of Appeal in a separate decision preceding the hearing of the fresh evidence appeal. There was no suggestion that the actual petit jury that heard the case was partial, or flawed in any way.

87. At trial, defence counsel appeared to give considerable thought to the jury but made no challenge to the array. He challenged a number of prospective jurors, and explicitly commented that the array contained fewer women than he would expect, and no young people. However, he immediately qualified this by noting “It was, I’m sure, random....I cast no aspersions on it, but I don’t know if it reflects the changing demographics of this region in an extreme way....Just so we’re clear, ‘cause I’m *not* raising an objection to the panel....”¹⁴⁶ [emphasis added]

88. While defence counsel did not know that INAC had stopped providing band lists to CSD for the purpose of creating jury rolls at this time, he did know enough to challenge the jury process if he wanted. He knew that the array did not appear to contain people from First Nations reserves in anywhere near their percentage of the district population, and that this was not unusual in his experience. He also knew that historically there had been a problem with response rates. His significant experience dealing with First Nations in the area made him well-positioned

¹⁴⁵ In *Reference Re Coffin*, [1956] SCR 191, for example, a majority of this Court readily saved a failure to draw the jury from the correct geographic area, even where more English speakers could have been obtained without the error.

¹⁴⁶ Cross-examination of David Gibson, Appellant’s Record, Vol XI, p 56. First Supplementary Transcript, Jury Selection May 27, 2008, pp 60-63 [not included in Appellant’s Record].

to question the original state plan to address this.¹⁴⁷ Notwithstanding any of this knowledge, he did not even make a disclosure request in relation to the jury array.¹⁴⁸ Instead he chose to press on with the trial. While he noted in cross-examination that he would never take short-cuts, he explained that his client was in custody, was not a candidate for bail, and was anxious to get on with his trial.¹⁴⁹ The point of this recitation is not to be critical of the experienced, capable and thoughtful defence counsel (now a provincial court judge), but because these factors relate to the fairness of the trial proceedings and prejudice, and these circumstances are relevant to what remedy is appropriate.¹⁵⁰

iv) The application of relevant legal principles

89. The fair and efficient functioning of the criminal justice system requires that complaints about the validity or constitution of a court convened to hear a case must be raised at the very earliest opportunity. In the context of juries, this means before or during jury selection. As noted above, ss.629 and 631(3) of the *Criminal Code* explicitly require that a challenge to the array be brought *before* jury selection commences.

90. A failure to exercise due diligence is significant in assessing prejudice, both in relation to the actual trial, and more broadly to the integrity of the criminal justice system. In *R.R.*, for example, Justice Doherty explained that there is a “strong onus” on an accused to raise an objection going to the validity of the court constituted to try the case “*at the outset of trial*.” Otherwise it must appear that an accused was content to be tried by the court as constituted and seeks only to question the conviction after receiving an adverse result.”[Emphasis added].¹⁵¹

¹⁴⁷ The original efforts to address the low response rate are set out in *R. v. AF* (1994) 30 CR (4th) 333 (Ont.Ct.(Gen.Div.)) per Stach J at paras 53-54: including an explanatory letter in aboriginal syllabics with the questionnaire; on-going education in First Nations reserves about the nature and importance of the jury process; having travel and accommodation expenses directly billed to the sherriff if a potential juror is unable to pay or await reimbursement. David Gibson noted that the case was notorious in the area and the subject of much discussion when he began practicing. See Cross-examination of David Gibson, Appellant’s Record, Vol XI, pp 24-25.

¹⁴⁸ The PJC began breaking down the Kenora return rates by reserve in 2009. The data necessary to do this for the 2008 roll was available in 2008, with an 18 month retention rate. See Re-examination of Shaun Joy, Appellant’s Record, Vol XXV at p 155-156. However, no request was made for it until this appeal.

¹⁴⁹ Cross-examination of David Gibson, Appellant’s Record, Vol XI, pp 83-84.

¹⁵⁰ *R. v. Dixon*, *supra*, at para 37; *R. v. Tran*, *supra*, at 1010; *R. v. Kakegamic*, *supra*, at para 38.

¹⁵¹ *R. v. R.R.* (1994), 91 CCC (3d) 193 (Ont CA), per Doherty JA at 199. See also *R. v. Gayle*, *supra*, per Sharpe JA at paras 54-72; *R. v. Brown*, *supra*, per Rosenberg JA at para 16; *R. v. Katoch* (2009), 246 CCC (3d) 423 (Ont CA) per Rosenberg JA at paras 42 and 45; and *R. v. Kakegamic* (2010), 265 CCC (3d) 420 (Ont CA) per Doherty JA at para 38. See also *R. v. Brown* 1993 83 CCC (3d) 129, per L’Heureux-Dubé J in dissent at para 11, emphasizing the importance of finality.

91. The respondent was tried on charges of second degree murder in relation to the stabbing death of his friend. He ran a defence of accident and/or drunkenness, and the jury convicted him of manslaughter. The single stab wound looked like a chest wound but in reality was a neck wound - the knife entered the left chest and then traveled “upwards, inwards and backwards” into the neck, cutting both the left sub-clavian artery, which pumps blood into the brain, and the internal jugular vein, which carries blood from the brain back to the heart. It was a killing blow. While the seriousness of the offence does not always militate in favour of the Crown when considering a *Charter* remedy,¹⁵² it does here where there was a fair trial in front of an impartial jury.

92. When all these circumstances are considered, the appropriate remedy is a declaration. This is an “effective and flexible remedy for the settlement of real disputes”.¹⁵³ It would vindicate the right, while recognizing that the breach worked no unfairness in the trial, and that society has a strong interest in upholding a conviction for a serious offence which followed a fair trial before an impartial jury.

D. Conclusion

93. The concept of jury representativeness has a particular and highly qualified meaning in the Canadian jury system. It seeks to cast a broad net and avoid the exclusion of any distinct group, but does not go further and mandate any sort of proportional representation on the jury roll. Such an approach would require a radical over-haul of the Canadian jury system. This aspect of the jury system cannot be changed without affecting other aspects of the system such as random selection, the protection of juror privacy and the presumption of impartiality. Proportionate representation would require the system to move closer to the American system of extensive *voir dres* examining juror partiality at the outset of jury selection, something our system has scrupulously avoided. This is not to say that the goal of proportionate representation cannot or should not be pursued as a matter of public policy. However, this is different from the minimum constitutional standard that the state must meet when putting together a jury roll. This must be knowable, achievable and consistent with the way the jury system works in Canada. The test proposed by the Attorney General for Ontario - reasonable efforts to access and use a broad-based list, objectively assessed by effort and not results - provides a workable standard

¹⁵² See eg *R. v. Grant*, [2009] SCJ no 32.

¹⁵³ *R. v. Khadr*, *supra*, at para 46 and *R. v. Gamble*, *supra*, at 649.

consistent with our jury system. When the circumstances of this case are assessed in light of what was known at the time, this test has been met.

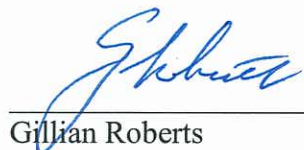
PART IV – SUBMISSIONS ON COSTS

94. The appellant makes no submissions as to costs.

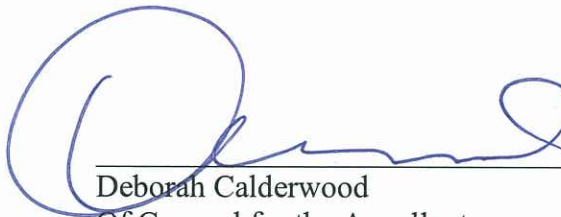
PART V – ORDER SOUGHT

95. The appellant respectfully requests that the appeal be allowed and the conviction restored.

ALL OF WHICH is respectfully submitted by



Gillian Roberts
Of Counsel for the Appellant



Deborah Calderwood
Of Counsel for the Appellant

Date: February 27, 2014

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PART VII: STATUTORY PROVISIONS

Juries Act

R.S.O. 1990, CHAPTER J.3

Consolidation Period: From June 30, 2010 to the e-Laws currency date.

Last amendment: 2009, c. 33, Sched. 2, s. 38.

Jury service notices

Selection of persons notified

6(2) The persons to whom jury service notices are mailed under this section shall be selected by the Director of Assessment at random from persons who, from information obtained at the most recent enumeration of the inhabitants of the county under section 15 of the *Assessment Act*,

(a) at the time of the enumeration, resided in the county and were Canadian citizens; and

(b) in the year preceding the year for which the jury is selected, are of or will attain the age of eighteen years or more,

and the number of persons selected from each municipality in the county shall bear approximately the same proportion to the total number selected for the county as the total number of persons eligible for selection in the municipality bears to the total number eligible for selection in the county, as determined by the enumeration. R.S.O. 1990, c. J.3, s. 6 (2).

Indian reserves

6(8) In the selecting of persons for entry in the jury roll in a county or district in which an Indian reserve is situate, the sheriff shall select names of eligible persons inhabiting the reserve in the same manner as if the reserve were a municipality and, for the purpose, the sheriff may obtain the names of inhabitants of the reserve from any record available. R.S.O. 1990, c. J.3, s. 6 (8).

Loi sur les jurys

L.R.O. 1990, CHAPITRE J.3

Période de codification : Du 30 juin 2010 à la date à laquelle Lois-en-ligne est à jour.

Dernière modification : 2009, chap. 33, annexe 2, art. 38.

Avis de sélection de juré

Sélection des personnes avisées

6(2) Le directeur de l'évaluation sélectionne au hasard les personnes à qui sont envoyés, aux termes du présent article, les avis de sélection de juré, parmi les personnes qui, selon le dernier recensement des habitants du comté effectué en vertu de l'article 15 de la *Loi sur l'évaluation foncière*, remplissent les conditions suivantes :

a) au moment du recensement elles avaient la citoyenneté canadienne et résidaient dans le comté;

b) elles étaient âgées d'au moins dix-huit ans ou ont atteint cet âge au cours de l'année précédant celle pour laquelle le jury est choisi.

Le rapport entre le nombre de personnes sélectionnées dans chaque municipalité du comté et le nombre de personnes sélectionnées dans le comté est approximativement égal au rapport entre le nombre de personnes habiles à être jurés dans la municipalité et le nombre de personnes habiles à l'être dans le comté, d'après les données du recensement. L.R.O. 1990, chap. J.3, par. 6 (2).

Réserve indienne

6(8) Pour dresser une liste de jurés pour un comté ou un district où se trouve une réserve indienne, le shérif sélectionne le nom des habitants de la réserve habiles à être membres d'un jury comme si la réserve était une municipalité et, à cette fin, il peut obtenir le nom des habitants de la réserve en consultant tout registre disponible. L.R.O. 1990, chap. J.3, par. 6 (8).

Criminal Code**R.S.C., 1985, c. C-46****Change of Venue****Reasons for change of venue**

599. (1) A court before which an accused is or may be indicted, at any term or sittings thereof, or a judge who may hold or sit in that court, may at any time before or after an indictment is found, on the application of the prosecutor or the accused, order the trial to be held in a territorial division in the same province other than that in which the offence would otherwise be tried if

(a) it appears expedient to the ends of justice; or

(b) a competent authority has directed that a jury is not to be summoned at the time appointed in a territorial division where the trial would otherwise by law be held.

...

Challenging the Array**Challenging the jury panel**

629. (1) 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.

In writing

(2) 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.

...

R.S., 1985, c. C-46, s. 629; R.S., 1985, c. 27 (1st Suppl.), s. 130

Code criminel**L.R.C. (1985), ch. C-46****Renvoi de l'affaire devant le tribunal d'une autre circonscription territoriale****Motifs du renvoi**

599. (1) Un tribunal devant lequel un prévenu est ou peut être mis en accusation à l'une de ses sessions, ou un juge qui peut tenir ce tribunal ou y siéger, peut, à tout moment avant ou après la mise en accusation, à la demande du poursuivant ou du prévenu ordonner la tenue du procès dans une circonscription territoriale de la même province autre que celle où l'infraction serait autrement jugée, dans l'un ou l'autre des cas suivants :

a) la chose paraît utile aux fins de la justice;

b) une autorité compétente a ordonné qu'un jury ne soit pas convoqué à l'époque fixée dans une circonscription territoriale où le procès aurait lieu autrement, en vertu de la loi.

Récusation du tableau des jurés**Récusation du tableau**

629. (1) Le poursuivant ou l'accusé ne peut demander la récusation du tableau des jurés que pour l'un des motifs suivants : partialité, fraude ou inconduite délibérée du shérif ou des autres fonctionnaires qui ont constitué le tableau.

Par écrit

(2) Une récusation faite sous le régime du paragraphe (1) se fait par écrit et déclare que celui qui a rapporté la liste a été partial, a agi frauduleusement ou s'est mal conduit volontairement, selon le cas.

...

L.R. (1985), ch. C-46, art. 629; L.R. (1985), ch. 27 (1er suppl.), art. 130.

Empanelling Jury

Names of jurors on cards

631. (1) 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.

To be placed in box

(2) 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.

Alternate jurors

(2.1) 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).

Additional jurors

(2.2) 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).

Cards to be drawn by clerk of court

(3) 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.

Formation de la liste du jury

Inscription sur des cartes

631. (1) Le nom de chaque juré figurant au tableau, son numéro au tableau et son adresse sont inscrits sur une carte; les cartes sont de format identique.

Déposées dans une boîte

(2) Le shérif ou autre fonctionnaire qui rapporte la liste remet les cartes mentionnées au paragraphe (1) au greffier du tribunal, et ce dernier les fait placer dans une boîte fournie à cette fin et mêler complètement ensemble.

Jurés suppléants

(2.1) S'il estime indiqué, dans l'intérêt de la justice, qu'il y ait un ou deux jurés suppléants, le juge l'ordonne avant que le greffier procède au tirage en vertu des paragraphes (3) ou (3.1).

Jurés supplémentaires

(2.2) S'il estime indiqué, dans l'intérêt de la justice, que treize ou quatorze jurés plutôt que douze soient assermentés en conformité avec la présente partie, le juge l'ordonne avant que le greffier ne procède au tirage en application des paragraphes (3) ou (3.1).

Tirage par le greffier du tribunal

(3) Si le tableau des jurés n'est pas récusé, ou s'il l'est mais que le juge n'ordonne pas la présentation d'une nouvelle liste, le greffier du tribunal tire, en pleine audience, l'une après l'autre les cartes mentionnées au paragraphe (1), appelle au fur et à mesure le numéro inscrit sur chacune d'elles et confirme auprès de la personne répondant à l'appel qu'elle est bien celle dont le nom figure sur la carte, jusqu'à ce que le nombre de personnes ayant répondu soit, de l'avis du juge, suffisant pour constituer un jury complet et disposer du nombre de jurés suppléants éventuellement ordonné par le juge, après qu'il a été pourvu aux dispenses, aux

récusations et aux mises à l'écart.

Exception

(3.1) 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.

Juror and other persons to be sworn

(4) 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.

Drawing additional cards if necessary

(5) 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.

Ban on publication, limitation to access or use of information

(6) 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.

R.S., 1985, c. C-46, s. 631; R.S., 1985, c. 27 (1st Supp.), s. 131; 1992, c. 41, s. 1; 1998, c. 9, s. 5; 2001, c. 32, ss. 38, 82; 2002, c. 13, s. 52; 2005, c. 32, s. 20; 2011, c. 16, s. 7.

Procédure exceptionnelle

(3.1) Le tribunal ou le juge du tribunal devant qui doit se tenir le procès avec jury peut, s'il estime que cela servirait la bonne administration de la justice, ordonner que le nom inscrit sur la carte soit également appelé par le greffier.

Chaque juré est assermenté

(4) Le greffier du tribunal assermente chaque membre du jury et, le cas échéant, chaque juré suppléant, suivant l'ordre dans lequel les cartes des jurés ont été tirées ainsi que toute personne qui fournit une aide technique, personnelle ou autre, ou des services d'interprétation, aux membres du jury ayant une déficience physique.

Tirage d'autres cartes au besoin

(5) Lorsque le nombre de ceux qui ont répondu à l'appel en conformité avec les paragraphes (3) ou (3.1) ne suffit pas pour constituer un jury complet et disposer du nombre de jurés suppléants éventuellement ordonné par le juge, le greffier du tribunal procède en conformité avec les paragraphes (3), (3.1) et (4) jusqu'à ce que douze jurés — ou, si le juge rend l'ordonnance visée au paragraphe (2.2), treize ou quatorze jurés, selon le cas, — et les jurés suppléants, s'il en est, soient assermentés.

Demande de non-publication ou de restriction à l'accès ou l'usage de renseignements

(6) Sur demande du poursuivant ou de sa propre initiative, le tribunal ou le juge du tribunal devant qui doit se tenir le procès avec jury peut, s'il est convaincu que la bonne administration de la justice l'exige :

- a) interdire de publier ou de diffuser de quelque façon que ce soit l'identité d'un juré ou des renseignements qui permettraient de la découvrir;
- b) limiter l'accès à ces renseignements ou l'usage qui peut en être fait.

L.R. (1985), ch. C-46, art. 631; L.R. (1985), ch. 27 (1^{er} suppl.), art. 131; 1992, ch. 41, art. 1; 1998, ch. 9, art. 5; 2001, ch. 32, art. 38 et 82; 2002, ch. 13, art. 52; 2005, ch. 32, art. 20; 2011, ch. 16, art. 7.

Excusing jurors

632. 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.

R.S., 1985, c. C-46, s. 632; 1992, c. 41, s. 2; 2001, c. 32, s. 39; 2002, c. 13, s. 53.

Peremptory challenges

634. (1) A juror may be challenged peremptorily whether or not the juror has been challenged for cause pursuant to section 638.

Maximum number

- (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).

If 13 or 14 jurors

(2.01) If the judge orders under subsection 631(2.2)

Dispenses

632. Le juge peut, avant le début du procès, dispenser un juré, que son nom ou son numéro ait ou non été tiré en application des paragraphes 631(3) ou (3.1) ou qu'une demande de récusation ait été ou non présentée à son égard, dans les cas suivants :

- a) intérêt personnel dans l'affaire à être jugée;
- b) liens avec le juge participant à la constitution du jury, le juge devant présider le procès, le poursuivant, l'accusé ou son avocat ou un témoin;
- c) toute raison valable qu'il considère acceptable, y compris un inconvénient personnel sérieux pour le juré.

L.R. (1985), ch. C-46, art. 632; 1992, ch. 41, art. 2; 2001, ch. 32, art. 39; 2002, ch. 13, art. 53.

Récusations péremptoires

634. (1) Un juré peut faire l'objet d'une récusation péremptoire qu'il ait ou non déjà fait l'objet d'une demande de récusation présentée en application de l'article 638.

Nombre maximal

- (2)** Sous réserve des paragraphes (2.1) à (4), le poursuivant et l'accusé ont le droit de récuser péremptoirement le nombre de jurés suivant :
- a) vingt, dans le cas où l'accusé est inculpé de haute trahison ou de meurtre au premier degré;
 - b) douze, dans les cas où l'accusé est inculpé d'une infraction autre que celles mentionnées à l'alinéa a) et punissable d'un emprisonnement de plus de cinq ans;
 - c) quatre, dans le cas où l'accusé est inculpé d'une infraction autre que celles mentionnées aux alinéas a) ou b).

Treize ou quatorze jurés

(2.01) Si le juge ordonne, en application du

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.

If alternate jurors

(2.1) 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.

Supplemental peremptory challenges

(2.2) 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.

Where there are multiple counts

(3) 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.

Where there are joint trials

(4) 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.

R.S., 1985, c. C-46, s. 634; 1992, c. 41, s. 2; 2002, c. 13, s. 54; 2008, c. 18, s. 25; 2011, c. 16, s. 8.

Challenge for cause

638. (1) 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

paragraphe 631(2.2), l'assermentation de treize ou quatorze jurés en conformité avec la présente partie, le nombre total de récusations péremptoires, d'une part pour la poursuite et d'autre part pour la défense, est augmenté de un ou deux, selon le cas.

Jurés suppléants

(2.1) Si le juge ordonne la sélection de jurés suppléants, le nombre total de récusations péremptoires, d'une part pour la poursuite et d'autre part pour la défense, est augmenté d'un nombre égal à celui des jurés suppléants.

Récusations péremptoires additionnelles

(2.2) Lorsqu'il faut pourvoir au remplacement d'un juré aux termes du paragraphe 644(1.1), il est accordé au poursuivant et à l'accusé une récusation péremptoire pour chaque juré à remplacer.

Pluralité de chefs d'accusation

(3) Les nombres de récusations péremptoires mentionnés au paragraphe (2) ne s'additionnent pas lorsqu'il y a plusieurs chefs dans un acte d'accusation; seul le plus grand est retenu.

Procès conjoint

(4) Lorsque plusieurs accusés subissent leur procès en même temps :

a) chacun a droit au nombre de récusations péremptoires auquel il aurait droit s'il subissait son procès seul;

b) le poursuivant a droit à un nombre de récusations péremptoires égal au total de celles dont peuvent se prévaloir tous les accusés.

L.R. (1985), ch. C-46, art. 634; 1992, ch. 41, art. 2; 2002, ch. 13, art. 54; 2008, ch. 18, art. 25; 2011, ch. 16, art. 8.

Récusation motive

638. (1) Un poursuivant ou un accusé a droit à n'importe quel nombre de récusations pour l'un ou l'autre des motifs suivants :

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. 1997, c. 18, s. 74; 1998, c. 9, s. 6.

No other ground

(2) No challenge for cause shall be allowed on a ground not mentioned in subsection (1).

...
R.S., 1985, c. C-46, s. 638; R.S., 1985, c. 27 (1st Supp.), s. 132, c. 31 (4th Supp.), s. 96; 1997, c. 18, s. 74; 1998, c. 9, s. 6.

Summoning other jurors when panel exhausted

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

a) le nom d'un juré ne figure pas sur la liste, mais aucune erreur de nom ou de désignation ne peut être un motif de récusation lorsque le tribunal est d'avis que la description portée sur la liste désigne suffisamment la personne en question;

b) un juré n'est pas impartial entre la Reine et l'accusé;

c) un juré a été déclaré coupable d'une infraction pour laquelle il a été condamné à mort ou à un emprisonnement de plus de douze mois;

d) un juré est un étranger;

e) un juré est, même avec l'aide technique, personnelle ou autre, ou avec les services d'interprétation qui pourraient lui être fournis en vertu de l'article 627, physiquement incapable de remplir d'une manière convenable les fonctions de juré;

f) un juré ne parle pas la langue officielle du Canada qui est celle de l'accusé ou la langue officielle du Canada qui permettra à l'accusé de témoigner le plus facilement ou les deux langues officielles du Canada, lorsque l'accusé doit, conformément à une ordonnance en vertu de l'article 530, subir son procès devant un juge et un jury qui parlent la langue officielle du Canada qui est celle de l'accusé ou la langue officielle du Canada qui permettra à l'accusé de témoigner le plus facilement ou qui parlent les deux langues officielles du Canada, selon le cas.

Nul autre motif

(2) Nulle récusation motivée n'est admise pour une raison non mentionnée au paragraphe (1).

...
L.R. (1985), ch. C-46, art. 638; L.R. (1985), ch. 27 (1er suppl.), art. 132, ch. 31 (4e suppl.), art. 96; 1997, ch. 18, art. 74; 1998, ch. 9, art. 6.

Autres jurés assignés en cas d'épuisement de la liste

642. (1) Lorsque, malgré l'observation des dispositions pertinentes de la présente partie, un jury complet ne peut pas être constitué et les postes de jurés suppléants, le cas échéant, ne peuvent être pourvus, le tribunal peut, à la demande du poursuivant, ordonner au shérif ou autre

persons, whether qualified jurors or not, as the court directs for the purpose of providing a full jury and alternate jurors.

Orally

(2) Jurors may be summoned under subsection (1) by word of mouth, if necessary.

Adding names to panel

(3) 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.

R.S., 1985, c. C-46, s. 642; 1992, c. 41, s. 4; 2002, c. 13, s. 56.

Substitution of alternate jurors

642.1 (1) 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).

Excusing of alternate jurors

(2) An alternate juror who is not required as a substitute shall be excused.

2002, c. 13, s. 57; 2011, c. 16, s. 11.

Discharge of juror

644. (1) 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.

Replacement of juror

(1.1) 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

fonctionnaire compétent d'assigner sans délai le nombre de personnes, habiles à agir comme jurés ou non, que le tribunal détermine afin de constituer un jury complet et de pourvoir les postes de jurés suppléants le cas échéant.

Oralement

(2) Les jurés peuvent être assignés d'après le paragraphe (1) de vive voix, si c'est nécessaire.

Noms ajoutés à la liste

(3) Les noms des personnes assignées en vertu du présent article sont ajoutés à la liste générale pour les fins du procès, et les mêmes procédures ont lieu, concernant l'appel, la dispense et la récusation de ces personnes et leur mise à l'écart, que celles que prévoit la présente partie à l'égard des personnes nommées dans la première liste.

L.R. (1985), ch. C-46, art. 642; 1992, ch. 41, art. 4; 2002, ch. 13, art. 56.

Jurés suppléants

642.1 (1) Les jurés suppléants sont tenus de se présenter le jour où débute la présentation de la preuve sur le fond et, si le jury n'est pas complet, ils prennent la place des jurés absents, selon l'ordre dans lequel leur carte a été tirée en application du paragraphe 631(3).

Dispense

(2) Est dispensé le juré suppléant qui ne prend pas alors la place d'un juré.

2002, ch. 13, art. 57; 2011, ch. 16, art. 11.

Libération d'un juré

644. (1) Lorsque, au cours d'un procès, le juge est convaincu qu'un juré ne devrait pas, par suite de maladie ou pour une autre cause raisonnable, continuer à siéger, il peut le libérer.

Remplacement d'un juré

(1.1) Il peut le remplacer si le jury n'a encore rien entendu de la preuve en lui substituant un autre juré qu'il choisit parmi les personnes dont le nom figure au tableau et qui sont présentes au tribunal ou qu'il

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.

Trial may continue

(2) 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.

R.S., 1985, c. C-46, s. 644; 1992, c. 41, s. 6; 1997, c. 18, s. 75.

Formal Defects in Jury Process

Judgment not to be stayed on certain grounds

670. 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.

R.S., c. C-34, s. 598.

Directions respecting jury or jurors directory

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 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.

R.S., c. C-34, s. 599.

assigne conformément à l'article 642.

Le procès peut continuer

(2) Lorsque, au cours d'un procès, un membre du juré décède ou est libéré au titre du paragraphe (1), le jury est considéré, à toutes les fins du procès, comme demeurant régulièrement constitué, à moins que le juge n'en ordonne autrement et à condition que le nombre des jurés ne soit pas réduit à moins de dix; le procès se continuera et un verdict pourra être rendu en conséquence.

L.R. (1985), ch. C-46, art. 644; 1992, ch. 41, art. 6; 1997, ch. 18, art. 75.

Vices de forme dans la convocation des jurés

Il n'est pas sursis au jugement pour certains motifs

670. Aucun jugement ne peut être suspendu ou infirmé après verdict rendu sur un acte d'accusation :

a) soit en raison d'une irrégularité dans l'assignation ou la constitution du jury;

b) soit parce qu'une personne qui a servi parmi le jury n'a pas été mise au nombre des jurés désignés par un shérif ou un autre fonctionnaire.

S.R., ch. C-34, art. 598.

Les prescriptions quant au jury ou jurés sont directrices

671. Aucune inobservation des prescriptions contenues dans une loi en ce qui regarde les qualités requises, le choix, le ballottage ou la répartition des jurés, la préparation du registre des jurés, le choix des listes des jurys ou l'appel du corps des jurés d'après ces listes, ne constitue un motif suffisant pour attaquer ou annuler un verdict rendu dans des procédures pénales.

S.R., ch. C-34, art. 599.

Kenora First Nation Reserves - Questionnaire Results for 2011 Jury Roll
Including what list was used for each reserve and the percentage of questionnaires returned to post office (RPO)

Court	First Nation Reserve	Total # of Questionnaires Mailed	Eligible	Ineligible	RPO	Deceased	No Response	Pop'n on list	As of 2010	Rate of RPO
Kenora	Attawapiskat	34	1	2	7		24	860	INAC	20.59%
Kenora	Bearskin Lake	24	1		5		18	592	2007	20.83%
Kenora	Cat Lake	16		2	3		11	407	2007	18.75%
Kenora	Deer Lake	18	1		1		16	455	INAC	5.56%
Kenora	Eabametoong (Fort Hope)	51	2	1	23		25	1,272	2006	45.10
Kenora	Eagle Lake/ Migisi Sahgaigan	6	1		5		0	152	INAC	83.33
Kenora	Fort Severn	9					9	233	INAC	0
Kenora	Grassy Narrows	16		2	7		7	398	INAC	45.75
Kenora	Iskatewizaagan-Shoal Lake #39 - Kejick	8	3				5	205	INAC	0
Kenora	Kasabonika Lake	26			5		21	636	2007	19.23
Kenora	Kashechewan	37	5	1			31	917	2009	0
Kenora	Keewaywin	19			8		11	456	2007	42.11
Kenora	Kingfisher	13	1	3	1		8	325	2008	7.69
Kenora	Kitchenuhmaykoosib Inninuwig - Big Trout Lake	38	2	1	8		27	956	2009	21.05
Kenora	Koocheching - East Sandy							No list		NA
Kenora	Lac Seul-Hudson (Kejick Bay-Frenchman's Head)	17	1	2	3		11	434	INAC	17.65
Kenora	McDowell Lake-Red Lake	1			1		0	5	INAC	100
Kenora	Miishkeegogamang-New Osnaburg-Pickle Lake	43			21		22	1071	2010	48.54
Kenora	Muskat Dam	10	1		5		4	244	2007	50.00
Kenora	Neskantaga - Lansdowne House							No list		NA
Kenora	Nibinamik/Summer Beaver	9			2		7	316	2010	22.22
Kenora	North Caribou-Weagamow-Round	17	3		1	3	10	435	INAC	5.88

Court	First Nation Reserve	Total # of Questionnaires Mailed	Eligible	Ineligible	RPO	Deceased	No Response	Pop'n on list	As of 2010	Rate of RPO
	Lake									
Kenora	North Spirit Lake	9	2				7	222	INAC	0
Kenora	NW Angle #33 – Naotkamegwanning – Pawitik – Whitefish Bay	29	1	2	12		14	409	INAC	41.38
Kenora	NW Angle #37 Sioux Narrows (Anishnaabeg of Naogashing)	3		1	2		0	73	INAC	66.67
Kenora	Obanshkaandagaang Bay/Washagamis Bay	3	1		2		0	86	INAC	66.67
Kenora	Ochiichagwe' Babigo' Ining/Dalles/Kenora	4	2				2	98	INAC	0
Kenora	Ogoki Post/Martens Falls							No list		NA
Kenora	Pikagikum	34	2	1	2	1	28	849	INAC	5.88
Kenora	Poplar Hill	7	2	1			4	176	INAC	0
Kenora	Sabaskong/Nestor Falls/Onegaming (Ojibways of Onegaming)	20	2		12		6	490	2010	60.00
Kenora	Sachigo Lake	10					10	244	INAC	0
Kenora	Sandy Lake	41	5	1		3	32	1014	INAC	0
Kenora	Saugeen etc.	3					3	63	INAC	0
Kenora	Shoal Lake #40	15		1			14	381	2008	0
Kenora	Slate Falls/New Slate Falls	6					6	149	2008	0
Kenora	Wabaseemoong/Whitedog/Islington	22	1				21	559	INAC	0
Kenora	Wabauskang-Ear Falls	2					2	46	INAC	0
Kenora	Wabigoniiw Saaga'iganiiw Anishnaabeg-Wabigoon Lk-Dinorwic	15	1	1	12		1	374	2006	80.00
Kenora	Wapekeka-Angling Lake	10	1				9	255	2007	0
Kenora	Wauzhusk Onigum-Rat Portage-Kenora	8					8	192	INAC	0
Kenora	Wawakapawin-Long Dog-Sioux	1					1	34	2008	0

Court	First Nation Reserve	Total # of Questionnaires Mailed	Eligible	Ineligible	RPO	Deceased	No Response	Pop'n on list	As of 2010	Rate of RPO
	Lookout – Wawapekewin									
Kenora	Webequie	18			3		15	457	2007	16.67
Kenora	Weenusk-Peawanuk	1					1	16	INAC	0
Kenora	Wunnumin Lake	11	1				10	284	INAC	0
TOTAL		684	43	22	151	7	461			

Results as of December 13, 2010 from report prepared by Provincial Jury Centre 14-Jul-11

Appendix B

"NO RESPONSE" RATE COMPARISONS¹

2007 Jury Roll	
Off-Reserve Province-Wide ²	On-Reserve Simcoe County*
28%	52%

2008 Jury Roll	
Off-Reserve Province-Wide ³	On-Reserve Kenora
21%	62%

* **Note:** This chart demonstrates that the disproportionately high "no-response" rate, for the on-reserve population, is not linked to the currency of the lists used. The lists used in Simcoe County in 2006 (for the 2007 roll) were current. They were provided by each of the two First Nations in 2006. In the case of the Mnjikaning First Nation, the list included on-reserve adults and specified addresses for each person. In the case of Beausoleil, the list included all adult band members.⁴ Although the Beausoleil list did not include specific addresses, the cover letter stated: "we do all have Post Office Box Numbers now, but our general address is still Cedar Point, P.O., Christian Island, Ontario L0K 1C0" which suggests that the questionnaires could be sent general delivery. There were zero "returned by post office" this year.

¹ The figures referenced are drawn from data compiled by the Provincial Jury Centre, attached to the Affidavit of Shaun Joy, sworn July 19, 2011 at Exhibit "C".

² In relation to the province-wide (off reserve) data summaries, the Provincial Jury Centre did not specifically calculate "no response" rates. The appellant has therefore calculated the percentage listed here by subtracting the other figures from the total number of questionnaires sent out to arrive at the number of "no responses".

³ The appellant has calculated the percentage listed here in the manner described in footnote 2.

⁴ Four off-reserve residents were selected and mailed questionnaires. See Cross-examination of Cheryl McCalmont, January 18, 2012, p. 122.

Province Wide Return Rates in 2007 and 2008¹

Year	Off Reserve Mailings	Number Returned	Returned by Post Office	Deceased	"No response" ²
2007	460,400	211,152 (eligible) + 92,804 (ineligible) = 303,956 66% return rate	27,409 6%	Not noted	 28% "no response"
2008	433,400	215,322 (eligible) + 96,382 (ineligible) = 311,704 71.9% return rate	24,259 5.6%	5114 1.2%	 21.3 % "no response"

Simcoe County Return Rates in 2007

Year	On Reserve Mailings	Number Returned	Returned by Post Office	Deceased	"No response"
2007	50	13 (eligible) + 11 (ineligible) = 24 48% return rate	0	Not noted	26 52% "no response"

Kenora District Return Rates in 2008

Year	On Reserve Mailings	Number Returned	Returned by Post Office	Deceased	"No response"
2008	600	34 (eligible) + 26 (ineligible) = 60 10% return rate	166 27%	Not noted	374 62% "no response"

¹ The figures in these tables are drawn from data compiled by the Provincial Jury Centre, attached to the Affidavit of Shaun Joy at Exhibit "C", Appellant's Record, Vol XXV, p 165..

² In relation to the province-wide (off reserve) data summaries, the Provincial Jury Centre did not make a specific column for "no response". The appellant has therefore calculated the percentages listed here by subtracting the other figures from the total number of questionnaires sent out to arrive at the number of "no responses".

Appendix C

RETURN RATE COMPARISON **1993-2007**

1993 Return Rate for Completed Questionnaires among Aboriginal People as Cited by Justice Stach¹	2001² Return Rates for Completed Questionnaires from Reserves in Kenora District	2007³ Return Rates for Completed Questionnaires from Reserves in Kenora District
33%	16%	10%

Note: At the Court of Appeal, the intervenor on behalf of the Bushie and Pierre families suggested that the drop in return rates between 1993 and 2007 is attributable to the fact that the lists used in later years (for the purpose of random selection) were not up-to-date. However, even assuming the 1993 figure quoted above accurately reflects the approximate return rate of completed questionnaires in Kenora District for that year, the suggested inference is not supported by the data. Indeed, as the above-noted numbers illustrate, the most substantial drop in return rates occurred between 1993 and 2001, when lists were still being provided by INAC. In 2001, the INAC lists used in Kenora District were only 1 year old. Justice LaForme references these numbers at paragraph 67 of the Court of Appeal judgment.

¹ *R. v. A.F.*, [1994] O.J. No. 1392, aff'd [1997] O.J. No. 2521 (C.A.), leave to appeal to SCC refused, [1997] S.C.C.A. No. 464. At paragraph 53 of the trial decision, Mr. Justice Stach states that: "In 1993, the return rate for completed questionnaires was 60-70% for the non-aboriginal community compared to a return rate of approximately 33% for aboriginal peoples." It is not clear where this statistic is from or whether the 33% statistic quoted reflects a province-wide return rate or a Kenora-specific rate. In addition, although it appears likely that this number reflects the rates of return among the Aboriginal persons living on-reserve, it is not clear on the face of the paragraph if that is the case. In an earlier paragraph, Mr. Justice Stach quoted census Canada statistics and in a related footnote (footnote 11) specified that the percentage quoted does not taken into account the number of Aboriginal persons living off-reserve, noting that no statistics are available regarding the number of people of Aboriginal descent living off reserve.

² This number reflects the number of completed questionnaires that were returned (either eligible or ineligible) in 2001 (for the 2002 roll). See tables included at Exhibit "C" to the Affidavit of Shaun Joy, Appellant's Record Vol XXV, p 165.

³ This number reflects the number of completed questionnaires that were returned (either eligible or ineligible) in 2007 (for the 2008 roll). See tables included at Exhibit "C" to the Affidavit of Shaun Joy, Appellant's Record Vol XXV, p 165.

Appendix D

Increase in "No Response" Rates

2008-2011

Roll Year	Number of "No Responses" Per Questionnaires Sent	"No Response" Percentage	Number of Updated Lists
2008	374/600	62%	10 (2006 & 2007)
2009	539/810	67%	13 (2006-2008)
2010	447/652	69%	16 (2006-2009)
2011	461/684	67%	19 (2006-2010)

***Note:** In 2010, jury forums were held in various communities throughout Kenora District.

Appendix E

TABLE OF PROVINCIAL AND TERRITORIAL LEGISLATION RELATING TO JURY SOURCE LISTS

Alberta	<i>Jury Act,</i> RSA 2000, c J-3	Information from municipalities 7 On the request of a sheriff, the proper officer of each municipality situated within or partly within the judicial district shall provide any information that may be of assistance to the sheriff respecting the selection of persons as jurors including (a) the list of electors, (b) the assessment rolls, and (c) any other public papers under the actual custody or control of the proper officer. Selection of jury panel 8(1) When a jury is required, the clerk shall immediately direct the sheriff to summon a sufficient number of persons from which the jury is to be selected. (2) The persons to be summoned shall be selected at random in accordance with the regulations. (3) The sheriff shall, within a reasonable time before the day on which the person is to attend, provide a summons in the prescribed form to each person selected (a) by sending it by ordinary mail, or (b) by giving it directly to the person or by leaving a copy at the person's residence or place of business with someone who is at least 16 years of age.
	<i>Jury Act Regulation,</i> Alta Reg 68/1983	2(1) When a jury is required the clerk shall deliver to the sheriff a certificate in Form A. (2) The selection of persons who are to be summoned for a jury panel for the purposes of section 8(2) of the <i>Act</i> may be made from any or all of the following: (a) lists of electors, assessment rolls or other public papers obtained from proper officers of municipalities situated within or partly within the judicial district, (b) telephone directories for municipalities situated within or partly within the judicial district, (c) Henderson's Directories for municipalities situated within or partly within the judicial district, or (d) any other source that the sheriff considers appropriate. (2.1) Notwithstanding subsection (2), the selection of a jury panel for a jury of French-speaking persons may be made from a list, compiled by the sheriff, of French-speaking persons who have been previously summoned for a jury panel.

British Columbia	<i>Jury Act</i> , RSBC 1996, c 242	Jury duty 2 A person has the right and duty to serve as a juror unless disqualified or exempted under this <i>Act</i>. Selection procedure 8 Having regard for the principle in section 2, the sheriff may determine the procedures the sheriff considers appropriate for the selection of jurors.
Manitoba	<i>Jury Act</i> , CCSM c J30	Access to appropriate lists 7(1) Any department or agency of the government that has control or custody of an appropriate list designated under the regulations shall make the appropriate list, or a copy thereof, available to the Chief Sheriff at all reasonable times for the purpose of the preparation of jurors' rolls. Use of computer data base 7(2) Where a department or agency has control or custody of an appropriate list designated under the regulations in the form of a computer data base, the department or agency shall permit the Chief Sheriff to have access to the list in a manner which would allow the Chief Sheriff to make a random selection of names and addresses from the list by the use of the computer data base and shall allow the Chief Sheriff, upon request, reasonable use of any computer equipment in the control or custody of the department or agency to permit the Chief Sheriff to make a random selection subject to the payment of reasonable charges for the use of the computer equipment. Chief Sheriff to prepare jurors' roll 5 The Chief Sheriff shall, in each numerical year before November 1 in that numerical year, prepare for each jury district for use in the ensuing 12 months a jurors' roll comprised of names of persons residing in that jury district. When old rolls may be used 15 Notwithstanding section 14, where a new jurors' roll for a jury district is not made in accordance with this <i>Act</i>, a judge of the court may order that the latest jurors' roll for the jury district in the hands of the sheriff responsible for the jury district shall be used to obtain therefrom the names of such a number of persons as, in the opinion of the judge, expressed in the order, appear sufficient to carry on the business of the court.
	<i>Jury Regulation</i> , Man Reg 320/87 R	6 The following lists are designated as appropriate lists for the purposes of the <i>Jury Act</i>: (a) the list maintained by the Minister of Health of residents registered with the Minister of Health under the <i>Health Services Insurance Act</i>; (b) the list of persons who are qualified as electors in the Francophone School Division under section 21.36 of the <i>Public Schools Act</i>.

New Brunswick	<i>Jury Act</i>, SNB 1980, C J- 3.1	Jury Panel 13(2) Subject to subsection (2.1), the persons to be summoned may be selected (a) at random in accordance with the regulations from the names of persons on a list provided for in the regulations who are apparently resident in the judicial district or the distinct part of it in which the proceeding is to be conducted, or (b) if a list provided for in the regulations indicates the linguistic preference of the persons named on the list, (i) in accordance with paragraph (a), (ii) at random in accordance with the regulations from the names of persons on the list who are apparently resident in the judicial district or the distinct part of it in which the proceeding is to be conducted and whose linguistic preference, according to the list, is the official language in which the proceeding is to be conducted, or (iii) partly in accordance with subparagraph (ii) and partly in accordance with paragraph (a). 13(2.1) The persons to be summoned may be selected under subsection (2) from the names of persons on the list who are apparently resident in a judicial district or a distinct part of it other than the judicial district or the distinct part in which the proceeding is to be conducted if (a) the sheriff considers it necessary in order to summon a sufficient number of persons from which to select a jury, and (b) the selection process complies with subsection (2) in all other respects.
	<i>General Regulation</i> , NB Reg 95-126	4 The lists referred to in subsection 13(2) of the <i>Act</i> are: (a) the list of beneficiaries and their dependents who are nineteen years of age or over under the <i>Medical Services Payment Act</i> that contains the surname, given names, mailing address, date of birth and linguistic preference of each of the beneficiaries and dependents and the location code and unique identifier number for each of the beneficiaries and dependents; (b) the most recent official list of electors under the <i>Elections Act</i>; (c) the most recent voters list for a municipality under the <i>Municipal Elections Act</i>; and (d) the record of registered owners of motor vehicles under the <i>Motor Vehicle Act</i>.

Newfound- land and Labrador	<i>Jury Act, 1991, SNL 1991, c 16</i>	Enumeration for jury list 11(1) The sheriff, or other person designated by the minister, shall, where directed to do so by the minister, compile a list of the names and addresses and other prescribed information of all persons eligible for jury duty living within 25 kilometres of each place where there may be a sitting. (2) The minister may, by order, vary the boundaries of an area for which a jury list may be prepared under subsection (1). (3) The sheriff, or other person designated by the minister under subsection (1), shall be the supervising enumerator and may designate a person to carry out his or her duties as supervising enumerator. (4) The jury list compiled under subsection (1) may be selected from (a) the most recent list of electors compiled by the Chief Electoral Officer under the <i>Elections Act</i>, 1991; (b) the records compiled by the Motor Registration Division of persons who have been issued drivers' licences, or motor vehicle licenses under the <i>Highway Traffic Act</i>; (c) the names, addresses and dates of birth of beneficiaries under the <i>Medical Care Insurance Act</i>, 1999, but no other information respecting beneficiaries shall be provided; and (d) those other sources that the Lieutenant-Governor in Council may prescribe. (5) Notwithstanding subsection (4), where a trial is held in the French language, the supervising enumerator may obtain the names and addresses of prospective jurors from alternative sources that may be prescribed for that purpose. (6) An enumeration carried out and a jury list compiled from it is considered to have been validly carried out and compiled notwithstanding a defect in the enumeration or compilation. Preparation of jury list 13(1) The jury list shall be prepared in the manner and shall state the information required by the regulations. (2) The supervising enumerator shall supervise the arrangement of the jury list in alphabetical order and where requested the issuing of separate cards for each person on the jury list. Special list 15 Where a jury list is not or may not be available at a place for a sitting, the minister may direct that a special jury list be taken by the supervising enumerator or another person designated by the minister, during a period fixed by the minister.
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	<i>Prospective Jurors Alternate Sources Regulations, NLR 88/99</i>	Alternative sources 2 For the purpose of the enumeration of prospective jurors' lists compiled under section 11 of the <i>Jury Act, 1991</i>, the sheriff may use one or more of the following alternative sources; (a) motor registration division – licensed drivers, management information system database; (b) a membership list of an association francophone; (c) the telephone directory; or (d) another source considered appropriate for the purpose by the sheriff.
North West Territories	<i>Jury Act, RSNWT 1988,c.J-2</i>	8(1) The Sheriff shall select persons who are apparently qualified to serve as jurors and compile a jury list in accordance with the regulations. (2) To enable compilation of the jury list, the Director of Medical Insurance appointed under the <i>Medical Care Act</i> shall, on the request of the Sheriff, provide the Sheriff with the names and addresses of those "insured persons", as defined in section 1 of the <i>Medical Care Act</i>, who have attained the age of 18 years.
	<i>Jury Regulations, NWT Reg 034-99</i>	4. (1) After receipt of the names and addresses provided under subsection 8(2) of the <i>Act</i>, the Sheriff, or a person designated by him or her, shall use them to compile a jury list. (2) The Sheriff may amend the jury list as he or she considers necessary.
Nova Scotia	<i>Juries Act, SNS 1998, c 16</i>	Preparation of jury list 7 (1) Before the end of August of each year, the jury co-ordinator for each district shall cause to be prepared a jury list of names drawn randomly from a data base that to the extent possible shall include the entire population, eighteen years or older, of the jury district. (2) The number of names on the jury list prepared pursuant to subsection (1) shall be determined by the jury co-ordinator in consultation with a judge. Availability of information for list 8(1) Notwithstanding any other enactment, a person, department or agency of Government or municipality that has control or custody of a list prescribed in the regulations shall make available to the jury co-ordinator at all reasonable times such information as the jury co-ordinator requires for the purpose of the preparation of a jury list. (2) Where a person or body described in subsection (1) has control or custody of a list prescribed pursuant to the regulations in the form of a computer data base, the person or body shall permit the jury co-ordinator to have access to the list and shall allow the jury co-ordinator, upon request, reasonable use of any computer equipment in the control or custody of the person or body.

	<i>Juries Regulations, NS Reg 126/2000</i>	Prescribed list 4 The Department of Health and Wellness's Health Insurance list is a prescribed list pursuant to Section 8 of the <i>Act</i> .
Nunavut	<i>Jury Act, RSNWT (Nu) 1988, c J-2</i>	Selection of jurors and jury list 8(1) The Sheriff shall select persons who are apparently qualified to serve as jurors and compile a jury list in accordance with the regulations. Access to lists and rolls (2) The Sheriff shall have access to the lists and rolls identified in the regulations to enable compilation of the jury list.
	<i>Jury Regulations, NWT Reg (Nu) 034-99</i>	3(1) For the purposes of selecting persons who are apparently qualified to serve as jurors and compiling the jury list under section 8 of the <i>Act</i> , the Sheriff or a person designated by the Sheriff may have access to (a) repealed, R-013-2011,s.2; (b) lists of voters compiled for elections of local authorities under the <i>Local Authorities Elections Act</i> ; (c) assessment rolls compiled under the <i>Property Assessment and Taxation Act</i> ; (c.1) lists, in the custody or control of the Registrar of Motor Vehicles, of holders of (i) certificates of registration, (ii) driver's licences, or (iii) Nunavut-issued identification; (c.2) lists of persons employed in the public service of Nunavut; (c.3) lists of tenants in the custody or control of the Nunavut Housing Corporation; (c.4) lists of residential customers in the custody or control of the Qulliq Energy Corporation; (d) publicly available lists of names of individuals and corresponding addresses or other contact information, such as municipal telephone directories; and (e) any other source of possible information, not otherwise protected by law, that the Sheriff considers appropriate.
Prince Edward Island	<i>Jury Act, RSPEI 1988, c J-5.1</i>	Sheriff to prepare jurors roll 8(1) The sheriff shall prepare a jurors roll by requisitioning from time to time from the person in charge of the register of the names of Prince Edward Island residents registered under the <i>Health Services Payment Act</i> R.S.P.E.I. 1988, Cap. H-2, the number of names and addresses which the sheriff anticipates will be required in the county pursuant to subsection (3) and no other information shall be transmitted.

Quebec	<i>Jurors Act,</i> CQLR, c J-2	Preparation of jury list 8 For the conduct of jury trials in his district, the sheriff shall prepare a jury list from the list of electors transmitted to him by the chief electoral officer. Special provision for the territories of Abitibi, Mistassini and Nouveau-Quebec in the Judicial District of Abitibi and for Indian reserves situated outside of those territories Act to apply to territories 41 This Act applies to the territories of Abitibi, Mistassini and Nouveau-Quebec in the judicial district of Abitibi, subject to the following sections. List from valuation roll, Band List or population register 42 To prepare the jury list and to form the panel, the sheriff may, with the authorization of the judge and in accordance with the terms and conditions prescribed by the judge, use the municipal valuation roll, the Band List drawn up in accordance with the <i>Indian Act</i> (Revised Statutes of Canada, 1985, chapter I-5) or the population register of the Ministère de la Santé et des Services sociaux. Reserve This section applies also to a reserve within the meaning of the <i>Indian Act</i> situated outside the territories comprised in the judicial district of Abitibi. Designation by sheriff 43 If the sheriff fails to find a sufficient number of jurors to form a panel, he may with the authorization of the judge designate a Canadian citizen of full age residing in the district. Summoning jurors 44 The sheriff may summon the jurors in the manner he deems most appropriate. Indian or Inuk 45 An Indian or an Inuk, even though he does not speak French or English fluently, may serve as a juror if the accused is an Indian or an Inuk.
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Saskatchewan	<i>The Jury Act, 1981, SS 1980-81, c J-4.1</i>	Preparation of jury list 6(1) The Inspector of Legal Offices of the Department of Justice shall requisition from time to time from the person in charge of the register maintained pursuant to subsection 13(1) of <i>The Saskatchewan Hospitalization Act</i>, the number of names and addresses which he anticipates will be required by sheriffs in the province pursuant to subsection (3) and no other information shall be transmitted. (2) Notwithstanding any other <i>Act</i>, upon receipt of a requisition from the Inspector of Legal Offices pursuant to subsection (1), the person in charge of the register described in subsection (1) shall randomly select the requisitioned number of names and addresses, and no other information from the register, except the requisitioned names and addresses, is to be forwarded to the Inspector of Legal Offices. (3) Eight weeks before the opening of a jury sitting, each sheriff shall inform the Inspector of Legal Offices of the number of persons who are required as prospective jurors for the next sitting of the court from the geographical area of the sheriff, as that area is determined by the Inspector of Legal Offices, and the Inspector of Legal Offices shall: (a) randomly select that number of names and addresses from the names and addresses provided to him pursuant to subsection (2); and (b) forward to the sheriff the number of names and addresses that the sheriff requires. (4) Immediately upon receipt of the names and addresses pursuant to subsection (3), the sheriff shall serve each person at the indicated address with: (a) a Juror Information Return and Summons; and (b) an Application for Relief from Jury Service; in duplicate, together with an envelope addressed to the sheriff with postage pre-paid.
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Yukon	<i>Jury Act,</i> RSY 2002, c 129	Jury list 9(1) The sheriff shall, before November 1 in each year or as nearly as possible thereafter, compile a list in the prescribed form of persons who are qualified to serve as jurors and who are not, to the sheriff's knowledge, exempt from service, for each place set for the sittings of the Supreme Court in the following year. (2) The list shall contain, if possible, not less than 48 names, and shall give the addresses and occupations of the persons whose names are listed. Information to assist compilation of list 10(1) For the purpose of compiling the list referred to in section 9, the sheriff shall be given access to (a) the voters lists and other public documents under the control of any officer of a municipality; and (b) records in the custody or under the control of a department or public officer of the Government of the Yukon, for information about the name and address and eligibility for service as jurors.
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Appendix F

Juries Act

R.S.O. 1990, CHAPTER J.3

Consolidation Period: From June 30, 2010 to the e-Laws currency date.

Last amendment: 2009, c. 33, Sched. 2, s. 38.

Definitions

1. In this Act,

“county” includes a district; (“comté”)

“Director of Assessment” means the employee of the Municipal Property Assessment Corporation who is appointed by the Corporation to be the Director of Assessment under this Act; (“directeur de l’évaluation”)

“regulations” means the regulations made under this Act. (“règlements”) R.S.O. 1990, c. J.3, s. 1; 1997, c. 43, Sched. G, s. 22; 2001, c. 8, s. 206.

Eligibility

Eligible jurors

2. Subject to sections 3 and 4, every person who,

(a) resides in Ontario;

(b) is a Canadian citizen; and

(c) in the year preceding the year for which the jury is selected had attained the age of eighteen years or more,

is eligible and liable to serve as a juror on juries in the Superior Court of Justice in the county in which he or she resides. R.S.O. 1990, c. J.3, s. 2; 2006, c. 19, Sched. C, s. 1 (1).

Ineligibility to serve as juror

Ineligible occupations

3. (1) The following persons are ineligible to serve as jurors:

1. Every member of the Privy Council of Canada or the Executive Council of Ontario.

2. Every member of the Senate, the House of Commons of Canada or the Assembly.

3. Every judge and every justice of the peace.
4. Every barrister and solicitor and every student-at-law.
5. Every legally qualified medical practitioner and veterinary surgeon who is actively engaged in practice and every coroner.
6. Every person engaged in the enforcement of law including, without restricting the generality of the foregoing, sheriffs, wardens of any penitentiary, superintendents, jailers or keepers of prisons, correctional institutions or lockups, sheriff's officers, police officers, firefighters who are regularly employed by a fire department for the purposes of subsection 41 (1) of the *Fire Protection and Prevention Act, 1997*, and officers of a court of justice. R.S.O. 1990, c. J.3, s. 3 (1); 1994, c. 27, s. 48 (1); 1997, c. 4, s. 82.

(2) Repealed: 1994, c. 27, s. 48 (2).

Connection with court action at same sittings

(3) Every person who has been summoned as a witness or is likely to be called as a witness in a civil or criminal proceeding or has an interest in an action is ineligible to serve as a juror at any sittings at which the proceeding or action might be tried. R.S.O. 1990, c. J.3, s. 3 (3).

Previous service

(4) Every person who, at any time within three years preceding the year for which the jury roll is prepared, has attended court for jury service in response to a summons after selection from the roll prepared under this Act or any predecessor thereof is ineligible to serve as a juror in that year. R.S.O. 1990, c. J.3, s. 3 (4); 1994, c. 27, s. 48 (3).

Ineligibility for personal reasons

4. A person is ineligible to serve as a juror who,

(a) has a physical or mental disability that would seriously impair his or her ability to discharge the duties of a juror; or

(b) has been convicted of an offence that may be prosecuted by indictment, unless the person has subsequently been granted a pardon. R.S.O. 1990, c. J.3, s. 4; 2009, c. 33, Sched. 2, s. 38 (1).

Preparation of Jury Rolls

Duty of sheriff

Number of jurors on roll

5. (1) The sheriff for a county shall on or before the 15th day of September in each year determine for the ensuing year for the county,

- (a) the number of jurors that will be required for each sittings of the Superior Court of Justice;
- (b) the number of persons that will be required for selection from the jury roll for the purposes of any other Act; and
- (c) the aggregate number of persons that will be so required. R.S.O. 1990, c. J.3, s. 5 (1); 2006, c. 19, Sched. C, s. 1 (1).

Number of jurors in districts

(2) In a territorial district, after determining the number of persons that will be required for service during the ensuing year, the sheriff shall fix the total number of persons that shall be selected from municipalities, and the total number that shall be selected from territory without municipal organization. R.S.O. 1990, c. J.3, s. 5 (2).

Transmission of resolutions

(3) The sheriff shall forthwith upon making the determination under subsection (1) certify and transmit,

- (a) to the Director of Assessment,
- (i) a copy of the determination declaring the aggregate number of persons required for the jury roll in the county in the ensuing year, and
- (ii) a statement of the numbers of jury service notices to be mailed to persons in the county; and
- (b) to the local registrar of the Superior Court of Justice, a copy of the determination for the number of jurors under clause (1) (a). R.S.O. 1990, c. J.3, s. 5 (3); 2006, c. 19, Sched. C, s. 1 (1).

Jury service notices

6. (1) The Director of Assessment shall in each year on or before the 31st day of October cause a jury service notice, together with a return to the jury service notice in the form prescribed by the regulations and a prepaid return envelope addressed to the sheriff for the county, to be mailed by first class mail to the number of persons in each county specified in the sheriff's statement, and selected in the manner provided for in this section. R.S.O. 1990, c. J.3, s. 6 (1).

Selection of persons notified

(2) The persons to whom jury service notices are mailed under this section shall be selected by the Director of Assessment at random from persons who, from information obtained at the most recent enumeration of the inhabitants of the county under section 15 of the *Assessment Act*,

- (a) at the time of the enumeration, resided in the county and were Canadian citizens; and
- (b) in the year preceding the year for which the jury is selected, are of or will attain the age of eighteen years or more,

and the number of persons selected from each municipality in the county shall bear approximately the same proportion to the total number selected for the county as the total number of persons eligible for selection in the municipality bears to the total number eligible for selection in the county, as determined by the enumeration. R.S.O. 1990, c. J.3, s. 6 (2).

Application of subs. (2) to municipalities in districts

(3) In a territorial district for the purposes of subsection (2), all the municipalities in the district shall together be treated in the same manner as a county from which the number of jurors required is the number fixed under subsection 5(2) to be selected from municipalities. R.S.O. 1990, c. J.3, s. 6 (3).

Address for mailing

(4) The jury service notice to a person under this section shall be mailed to the person at the address shown in the most recent enumeration of the inhabitants of the county under section 15 of the *Assessment Act*. R.S.O. 1990, c. J.3, s. 6 (4).

Return to jury service notice

(5) Every person to whom a jury service notice is mailed in accordance with this section shall accurately and truthfully complete the return and shall mail it to the sheriff for the county within five days after receipt thereof. R.S.O. 1990, c. J.3, s. 6 (5).

When service deemed made

(6) For the purposes of subsection (5), the notice shall be deemed to have been received on the third day after the day of mailing unless the person to whom the notice is mailed establishes that he or she, acting in good faith, through absence, accident, illness or other cause beyond his or her control did not receive the notice or order, or did not receive the notice or order until a later date. R.S.O. 1990, c. J.3, s. 6 (6).

List of notices given

(7) The Director of Assessment shall furnish to the sheriff for the county a list of persons in the county arranged alphabetically to whom jury service notices were mailed under this section forthwith after such mailing and the list received by the sheriff purporting to be certified by the Director of Assessment is, without proof of the office or signature of the Director of Assessment, receivable in evidence in any proceeding as proof, in the absence of evidence to the contrary, of the mailing of jury service notices to the persons shown on the list. R.S.O. 1990, c. J.3, s. 6 (7).

Indian reserves

(8) In the selecting of persons for entry in the jury roll in a county or district in which an Indian reserve is situate, the sheriff shall select names of eligible persons inhabiting the reserve in the same manner as if the reserve were a municipality and, for the purpose, the sheriff may obtain the names of inhabitants of the reserve from any record available. R.S.O. 1990, c. J.3, s. 6 (8).

Sheriff to prepare jury roll

7. The sheriff shall in each year prepare a roll called the jury roll in the form prescribed by the regulations. R.S.O. 1990, c. J.3, s. 7.

Entry of names in jury roll

8. (1) The sheriff shall open the returns to jury service notices received by the sheriff and shall cause the name, address and occupation of each person making such a return, who is shown by the return to be eligible for jury service, to be entered in the jury roll alphabetically arranged and numbered consecutively. R.S.O. 1990, c. J.3, s. 8 (1); 1994, c. 27, s. 48 (4).

English, French and bilingual jurors

(2) The jury roll prepared under subsection (1) shall be divided into three parts, as follows:

1. A part listing the persons who appear, by the returns to jury service notices, to speak, read and understand English.
2. A part listing the persons who appear, by the returns to jury service notices, to speak, read and understand French.
3. A part listing the persons who appear, by the returns to jury service notices, to speak, read and understand both English and French. 1994, c. 27, s. 48 (5).

Omission of names

(3) The sheriff may, with the written approval of a judge of the Superior Court of Justice, omit the name from the roll where it appears such person will be unable to attend for jury duty. R.S.O. 1990, c. J.3, s. 8 (3); 2006, c. 19, Sched. C, s. 1 (1).

Supplementary names

(4) The sheriff may request the Director of Assessment to mail such number of additional jury service notices and forms of returns to jury service notice as in the opinion of the sheriff are required. R.S.O. 1990, c. J.3, s. 8 (4).

Supplying of supplementary names

(5) Upon receipt of a request from the sheriff under subsection (4), the Director of Assessment shall forthwith carry out such request and for such purpose section 6 applies with necessary modifications with respect to the additional jury service notices requested by the sheriff to be mailed. R.S.O. 1990, c. J.3, s. 8 (5).

Selection from unorganized territory

(6) In a territorial district, the sheriff shall select names of eligible persons who reside in the district outside territory with municipal organization in the numbers fixed under subsection 5(2) and for the purpose may have recourse to the latest polling list prepared and certified for such territory, and to any assessment or collector's roll prepared for school purposes and may obtain names from any other record available. R.S.O. 1990, c. J.3, s. 8 (6).

Certification of roll

9. As soon as the jury roll has been completed but not later than the 31st day of December in each year, the sheriff shall certify the roll to be the proper roll prepared as the law directs and shall deliver notice of the certification to a judge of the Superior Court of Justice, but a judge of the court may extend the time for certification for such reasons as he or she considers sufficient. R.S.O. 1990, c. J.3, s. 9; 2006, c. 19, Sched. C, s. 1 (1).

Extension of times

10. The Chief Justice of the Superior Court of Justice may, upon the request of the sheriff for a county, extend any times prescribed by this Act in connection with the preparation of the jury roll for the county to such date as the Chief Justice considers appropriate and may authorize the continued use of the latest jury roll until the dates so fixed. R.S.O. 1990, c. J.3, s. 10; 2006, c. 19, Sched. C, s. 2 (1).

Additions to roll by sheriff

11. (1) Where there are no persons or not a sufficient number of persons on the proper jury roll, or where there is no jury roll for the year in existence, the sheriff may supply names of eligible jurors from the jury rolls for the three nearest preceding years for which there is a jury roll or certified copy thereof in existence. R.S.O. 1990, c. J.3, s. 11 (1).

Certification of additions by sheriff

(2) The names supplied to the jury roll under this section shall be entered thereon and certified by the sheriff. R.S.O. 1990, c. J.3, s. 11 (2).

Jury Panels

Issuance of precepts

12. A judge of the Superior Court of Justice may issue precepts in the form prescribed by the regulations to the sheriff for the return of such number of jurors as the sheriff has determined as the number to be drafted and returned or such greater or lesser number as in his or her opinion is required. R.S.O. 1990, c. J.3, s. 12; 2006, c. 19, Sched. C, s. 1 (1).

Two or more sets of jurors

13. (1) Where a judge of the Superior Court of Justice considers it necessary that the jurors to form the panel for a sittings of the Superior Court of Justice be summoned in more than one set, the judge may direct the sheriff to return such number of jurors in such number of sets on such day for each set as he or she thinks fit. R.S.O. 1990, c. J.3, s. 13 (1); 2006, c. 19, Sched. C, s. 1 (1).

Sheriff to divide jurors into sets

(2) The sheriff shall divide such jurors into as many sets as are directed, and shall in the summons to every juror specify at what time his or her attendance will be required. R.S.O. 1990, c. J.3, s. 13 (2).

Each set a separate panel

(3) Each set shall for all purposes be deemed a separate panel. R.S.O. 1990, c. J.3, s. 13 (3).

Additional jurors

14. (1) A judge of the Superior Court of Justice, after the issue of the precept, at any time before or during the sittings of the court, by order under his or her hand and seal, may direct the sheriff to return an additional number of jurors. R.S.O. 1990, c. J.3, s. 14 (1); 2006, c. 19, Sched. C, s. 1 (1).

Duty of sheriff as to drafting additional number of jurors

(2) The sheriff, upon the receipt of an order under subsection (1), shall forthwith draft such additional number of jurors in the manner provided by this Act, and shall add their names to the panel list, and shall forthwith thereafter summon them, and where there are not a sufficient number of jurors on the jury roll for the purpose of the additions, section 11 applies. R.S.O. 1990, c. J.3, s. 14 (2).

How sheriffs to draft panels of jurors

15. Every sheriff to whom a precept for the return of jurors is directed shall, to such precept, return a panel list of the names of the jurors contained in the jury roll, whose names shall be drafted from such roll in the manner hereinafter mentioned. R.S.O. 1990, c. J.3, s. 15.

Sheriff to draft panel

16. Upon receipt of the precept, the sheriff shall post up in his or her office written notice of the day, hour and place at which the panel of jurors will be drafted, and the sheriff shall draft the panel by ballot from the jury roll in the presence of a justice of the peace who shall attend upon reasonable notice from the sheriff. R.S.O. 1990, c. J.3, s. 16.

How sheriff to prepare a panel

17. (1) Before proceeding to draft a panel of jurors from a jury roll, the sheriff shall prepare a proper title or heading for the list of jurors to be returned, to which he or she shall fix an appropriate number according as such panel is the first, second, third or subsequent panel drafted from such jury roll, and the title or heading shall set forth the number of jurors to be returned. R.S.O. 1990, c. J.3, s. 17 (1).

Ballots for drafting panel

(2) The sheriff shall then append to such title or heading a list of numbers from "1" forward to the number required, and shall prepare a set of ballots of uniform and convenient size containing the same number of ballots as there are numbers on the jury roll, allowing one number to each ballot, which number shall be printed or written on it, and the sheriff shall then proceed to draft the panel of jurors. R.S.O. 1990, c. J.3, s. 17 (2).

Drafting of panel

18. (1) The sheriff shall draft the panel by drawing at random the ballots from a container in the presence of the justice of the peace. R.S.O. 1990, c. J.3, s. 18 (1).

Panel list

(2) The names of the persons so drafted, arranged alphabetically, with their places of residence and occupations shall then be transcribed by the sheriff, with a reference to the number of each name on the jury roll, and each name shall be thereupon marked by the sheriff or the sheriff's deputy upon the jury roll. R.S.O. 1990, c. J.3, s. 18 (2).

(3) Repealed: 1994, c. 27, s. 48 (6).

Idem

(4) The panel list so alphabetically arranged and numbered, with a short statement of the precept in obedience to which it has been drafted, the date and place of such drafting, and the names of the sheriff, or the sheriff's deputy and the justice of the peace, present at such drafting, shall then be recorded and attested by the signatures of the sheriff, or the sheriff's deputy and the justice of the peace, and such panel list shall be retained in the custody of the sheriff. R.S.O. 1990, c. J.3, s. 18 (4).

Automated procedure for drafting panel

18.1 (1) Instead of following the procedure described in sections 15 to 18 to draft a panel of jurors, the sheriff may use any electronic or other automated procedure to accomplish the same result. 1994, c. 27, s. 48 (7).

Non-application of certain requirements

(2) When a jury panel is being drafted under subsection (1),

(a) notice need not be posted as set out in section 16;

(b) the participation of a justice of the peace, as referred to in section 16 and subsections 18 (1) and (4), is not required. 1994, c. 27, s. 48 (7).

Criminal record check

18.2 (1) For the purposes of confirming whether clause 4 (b) applies in respect of a person selected under section 18 or 18.1 for inclusion on a jury panel, the sheriff may, in accordance with this section and the regulations, request that a criminal record check, prepared from national data on the Canadian Police Information Centre database, be conducted concerning the person. 2009, c. 33, Sched. 2, s. 38 (2).

Timing

(2) A criminal record check concerning a person that is requested under subsection (1) shall be obtained by the sheriff before he or she finalizes the jury panel on which the person is to be included. 2009, c. 33, Sched. 2, s. 38 (2).

Collection, use and disclosure of personal information by sheriff

(3) Subject to any restrictions or conditions set out in the regulations, the sheriff shall collect, directly or indirectly, use and disclose such personal information respecting a person who is the subject of a criminal record check under subsection (1) as is required for the purposes of this section. 2009, c. 33, Sched. 2, s. 38 (2).

Agreement with police force

(4) The sheriff may enter into an agreement with a police force that is prescribed by the regulations respecting,

(a) the preparation of a criminal record check by the police force for the purposes of this section; and

(b) the collection, use and disclosure of personal information by the police force for the purposes of the criminal record check. 2009, c. 33, Sched. 2, s. 38 (2).

Removal and replacement

(5) If, on review of a person's criminal record check, the sheriff determines that clause 4 (b) applies in respect of the person, the sheriff shall,

- (a) remove the person from the jury panel on which the person was to have been included;
- (b) remove the person's name and other information from the jury roll for the applicable year; and
- (c) draft, in accordance with section 18 or 18.1, as the case may be, another person for the jury panel to replace the person who was removed. 2009, c. 33, Sched. 2, s. 38 (2).

Notice

Summoning jurors 21 days before attendance required

19. (1) The sheriff shall summon every person drafted to serve on juries by sending to the person by ordinary mail a notice in writing in the form prescribed by the regulations under the hand of the sheriff at least twenty-one days before the day upon which the person is to attend, but when the sheriff is directed to draft and summon additional jurors under this Act, such twenty-one days service is not necessary. R.S.O. 1990, c. J.3, s. 19 (1).

Excusing of jurors

(2) The sheriff may excuse any person summoned for a jury sittings on the ground,

- (a) of illness; or
- (b) that serving as a juror may cause serious hardships or loss to the person or others,

but unless a judge of the Superior Court of Justice directs otherwise and despite any other provision of this Act, such person shall be included in a panel to be returned for a sittings later in the year or, where there are not further sittings in that year, in a panel to be returned for a sittings in the year next following. R.S.O. 1990, c. J.3, s. 19 (2); 2006, c. 19, Sched. C, s. 1 (1).

Secrecy of jury roll and panel

20. The jury roll and every list containing the names of the jury drafted for any panel shall be kept under lock and key by the sheriff, and except in so far as may be necessary in order to prepare the panel lists, and serve the jury summons, shall not be disclosed by the sheriff, the sheriff's deputy, officer, clerk, or by the justice of the peace mentioned in section 16, or by any other person, until ten days before the sittings of the court for which the panel has been drafted, and during such period of ten days, the sheriff, or the sheriff's deputy, shall permit the inspection at all reasonable hours of the jury roll and of the panel list or copy thereof in his or her custody by litigants or accused persons or their solicitors and shall furnish the litigants or accused

persons or their solicitors, upon request and payment of a fee of \$2, with a copy of any such panel list. R.S.O. 1990, c. J.3, s. 20.

Attendance of jurors postponed or not required

Countermand where no jury cases

21. (1) Where there is no business requiring the attendance of a jury at a sittings in respect of which a precept has been issued,

(a) the local registrar, where the sittings is for the trial of actions; or

(b) the Crown Attorney, where the sittings is for the trial of criminal prosecutions,

shall, at least five clear days before the day upon which the sittings is to commence, give notice in writing to the sheriff in the form prescribed by the regulations that the attendance of the jurors is not required. R.S.O. 1990, c. J.3, s. 21 (1).

Postponement of date for attendance of jurors

(2) Where the business of the court does not require the attendance of the jurors until a day after the day upon which the sittings is to commence, the appropriate officer determined under subsection (1) shall, at least five clear days before the day upon which the sittings is to commence, give notice in writing to the sheriff in the form prescribed by the regulations that the attendance of the jurors is not required until such later day as is specified in the notice. R.S.O. 1990, c. J.3, s. 21 (2).

Notice to jurors

(3) Subject to subsection (4), where, upon receipt of such notice it appears to the sheriff that the attendance of jurors is not required or not required until a later date, the sheriff shall forthwith by registered mail or otherwise, as he or she considers expedient, notify in the form prescribed by the regulations each person summoned to serve as a juror that attendance at the sittings is not required or is not required until the day specified in the notice. R.S.O. 1990, c. J.3, s. 21 (3).

Sheriff must ascertain that there are no prisoners in custody

(4) In the case of a sittings for the hearing of criminal proceedings, the sheriff shall not give the notice mentioned in subsection (3) unless he or she is satisfied that there is no prisoner in custody awaiting trial at the sittings. R.S.O. 1990, c. J.3, s. 21 (4).

Division of panel

22. A judge of the Superior Court of Justice who considers it necessary may direct that the jurors summoned for a sittings of the Court be divided into two or more sets as he or she may

direct, and each set shall for all purposes be deemed a separate panel. R.S.O. 1990, c. J.3, s. 22; 2006, c. 19, Sched. C, s. 1 (1).

Merger

22.1 A judge of the Superior Court of Justice who considers it necessary may direct that two or more panels of jurors, including panels established by division under section 22, be merged into a single panel. 1994, c. 27, s. 48 (8); 2006, c. 19, Sched. C, s. 2 (2).

Excusing of juror

Religious reasons

23. (1) A person summoned for jury duty may be excused by a judge from service as a juror on the ground that service as a juror is incompatible with the beliefs or practices of a religion or religious order to which the person belongs. R.S.O. 1990, c. J.3, s. 23 (1).

Illness or hardship

(2) A person summoned for jury duty may be excused by a judge from attending the sittings on the ground,

(a) of illness; or

(b) that serving as a juror may cause serious hardships or loss to the person or others,

and the judge may excuse the person from all service as a juror, or the judge may direct that the service of a person excused be postponed and that despite any provision of this Act, the person be included in a panel to be returned for a sittings later in that year or in a panel to be returned for a sittings in the year next following. R.S.O. 1990, c. J.3, s. 23 (2).

Application for excusing

(3) A person summoned for jury service may be excused under subsection (1) or (2),

(a) before the day for attendance, by any judge of the Superior Court of Justice;

(b) on or after the day for attendance, by the judge presiding at the sittings,

and the application to be excused may be made to the sheriff. R.S.O. 1990, c. J.3, s. 23 (3); 2006, c. 19, Sched. C, s. 1 (1).

Release and transfer of jurors

Release before sittings

24. (1) Where jurors are summoned for a jury sittings, a judge of the Superior Court of Justice may, at any time before the sittings, release from or postpone service of any number of jurors summoned for the sittings. R.S.O. 1990, c. J.3, s. 24 (1); 2006, c. 19, Sched. C, s. 1 (1).

Release during sittings

(2) The judge presiding at the sittings may release from or postpone service of any number of jurors summoned for the sittings. R.S.O. 1990, c. J.3, s. 24 (2).

Transfer to another panel

(3) Jurors released from service at a sittings under this section may be resummoned by the sheriff for service at any other sittings, held concurrently with or immediately following the sittings from which they were released. R.S.O. 1990, c. J.3, s. 24 (3).

Constitution of panel

(4) Where jurors have been released from service or their service has been postponed under this section, the remaining jurors constitute the panel, and jurors recalled or resummoned under this section form part of the panel to which they are added. R.S.O. 1990, c. J.3, s. 24 (4).

Superior Court of Justice may issue precepts as heretofore

25. Subject to this Act, the Superior Court of Justice and the judges thereof have the same power and authority as heretofore in issuing any precept, or in making any award or order, orally or otherwise, for the return of a jury for the trial of any issue before the court, or for amending or enlarging the panel of jurors returned for the trial of any such issue, and the return to any precept, award or order shall be made in the manner heretofore used and accustomed, and the jurors shall, as heretofore, be returned from the body of the county, and shall be eligible according to this Act. R.S.O. 1990, c. J.3, s. 25; 2006, c. 19, Sched. C, s. 1 (1).

Actions Tried by Jury

When actions to be entered for trial

26. Subject to any order of a judge of the Superior Court of Justice, actions to be tried by a jury shall be entered for trial not later than six clear days before the first day of the sittings. R.S.O. 1990, c. J.3, s. 26; 2006, c. 19, Sched. C, s. 1 (1).

Drawing Jury at Trial

Empanelling jury at the trial

27. (1) The name of every person summoned to attend as a juror, with the person's place of residence, occupation, and number on the panel list, shall be written distinctly by the sheriff on a card or paper, as nearly as may be of the form and size following:

15. DAVID BOOTH

OF LOT NO. 11, IN THE 7TH CON. OF
ALBION

MERCHANT

and the names so written shall, under the direction of the sheriff, be put together in a container to be provided by the sheriff for that purpose, and he or she shall deliver it to the clerk of the court. R.S.O. 1990, c. J.3, s. 27 (1).

How the clerk is to proceed to draw names

(2) Where an issue is brought on to be tried, or damages are to be assessed by a jury, the clerk shall, in open court, cause the container to be shaken so as sufficiently to mix the names, and shall then draw out six of the cards or papers, one after another, causing the container to be shaken after the drawing of each name, and if any juror whose name is so drawn does not appear or is challenged and set aside, then such further number until six jurors are drawn, who do appear, and who, after all just causes of challenge allowed, remain as fair and indifferent, and the first six jurors so drawn, appearing and approved as indifferent, their names being noted in the minute book of the clerk of the court, shall be sworn, and shall be the jury to try the issue or to assess the damages. R.S.O. 1990, c. J.3, s. 27 (2).

Names drawn to be kept apart, etc.

(3) The cards or papers containing the names of persons so drawn and sworn shall be kept apart until the jury has given in its verdict, and it has been recorded, or until the jury has been by consent of the parties, or by leave of the court, discharged, and shall then be returned to the container there to be kept with the other cards or papers remaining therein. R.S.O. 1990, c. J.3, s. 27 (3).

Automated procedure for empanelling jury in civil cases

27.1 Where a trial is in respect of a civil proceeding, instead of following the procedure described in section 27 to select a jury, any electronic or other automated procedure may be used to accomplish the same result. 2009, c. 33, Sched. 2, s. 38 (3).

Selection of juries in advance

28. A jury may be selected in accordance with section 27 or 27.1 at any time before the trial of an issue or assessment of damages directed by the judge presiding at the sittings and shall attend for service upon the summons of the sheriff. R.S.O. 1990, c. J.3, s. 28; 2009, c. 33, Sched. 2, s. 38 (4).

Several causes may be tried in succession with the same jury

29. (1) Despite sections 27, 27.1 and 28, unless a party objects, the court may try any issue or assess damages with a jury previously selected to try any other issue or to assess damages. 2009, c. 33, Sched. 2, s. 38 (5).

Same

(2) Despite subsection (1), unless a party objects, the court may order any juror from the previously selected jury whom both parties consent to withdraw or who may be justly challenged or excused by the court, to retire and may cause another juror to be selected in accordance with section 27 or 27.1, as the case may be, in his or her place, in which case the issue shall be tried or the damages assessed with the remaining members of the previously selected jury and the new juror or jurors, as the case may be, who appear and are approved as indifferent. 2009, c. 33, Sched. 2, s. 38 (5).

If a full jury does not appear supplementary jurors may be appointed

30. (1) Where a full jury does not appear at a sittings for civil matters, or where, after the appearance of a full jury, by challenge of any of the parties, the jury is likely to remain untaken for default of jurors, the court may command the sheriff to name and appoint, as supplementary jurors, so many of such other able persons of the county then present, or who can be found, as will make up a full jury, and the sheriff shall return such persons to serve on the jury. R.S.O. 1990, c. J.3, s. 30 (1).

Adding names of supplementary jurors

(2) Where a full jury does not appear, the names of the persons so returned shall be added to the panel returned upon the precept. R.S.O. 1990, c. J.3, s. 30 (2).

The sheriff to note on rolls names of jurors who do not serve

31. Immediately after the sittings of the court, the sheriff shall note on the jury roll from which the panel of jurors returned to the sittings was drafted opposite the names of the jurors, the non-attendance or default of every juror who has not attended until discharged by the court. R.S.O. 1990, c. J.3, s. 31.

Challenges

Lack of eligibility

32. If a person not eligible is drawn as a juror for the trial of an issue in any proceeding, the want of eligibility is a good cause for challenge. R.S.O. 1990, c. J.3, s. 32.

Peremptory challenges in civil cases

33. In any civil proceeding, the plaintiff or plaintiffs, on one side, and the defendant or defendants, on the other, may challenge peremptorily any four of the jurors drawn to serve on the trial, and such right of challenge extends to the Crown when a party. R.S.O. 1990, c. J.3, s. 33.

Ratepayers, officers, etc., of municipality may be challenged

34. In a proceeding to which a municipal corporation, other than a county, is a party, every ratepayer, and every officer or servant of the corporation is, for that reason, liable to challenge as a juror. R.S.O. 1990, c. J.3, s. 34.

General

Payments under *Administration of Justice Act*

Fees payable to jurors and justices of the peace

35. (1) Such fees and allowances as are prescribed under the *Administration of Justice Act* shall be paid to,

(a) every juror attending a sittings of the Superior Court of Justice; and

(b) the justice of the peace in attendance for each panel drafted under section 16. R.S.O. 1990, c. J.3, s. 35 (1); 2006, c. 19, Sched. C, s. 1 (1).

Sums to be paid with record when entered for trial in jury cases

(2) With every record entered for trial of issues or assessment of damages by a jury in the Superior Court of Justice there shall be paid to the local registrar of the Superior Court of Justice such sum as is prescribed under the *Administration of Justice Act*, and the record shall not be entered unless such sum is first paid. R.S.O. 1990, c. J.3, s. 35 (2); 2006, c. 19, Sched. C, s. 1 (1).

Attendance and fees

List of jurors to be called

36. (1) The clerk of the court or the sheriff or sheriff's officer shall, at the opening of the court and before any other business is proceeded with, call the names of the jurors, and the sheriff or sheriff's officer shall record those who are present or absent. R.S.O. 1990, c. J.3, s. 36 (1).

Record of fees paid

(2) The sheriff shall keep a record of the payment of fees to jurors for attending sittings of a court. R.S.O. 1990, c. J.3, s. 36 (2).

When fees payable

(3) A juror is not entitled to fees or expenses in respect of days that he or she does not or is not required to attend. R.S.O. 1990, c. J.3, s. 36 (3).

Jury areas

36.1 (1) A jury area established under clause 37 (c) shall be treated as a separate county for the purposes of this Act. 1994, c. 27, s. 48 (9).

Court facilities

(2) If there are no court facilities in a jury area, a regional senior judge of the Superior Court of Justice may order residents of the jury area who are summoned for jury duty to attend at a court outside the jury area. 1994, c. 27, s. 48 (9); 2006, c. 19, Sched. C, s. 1 (1).

Regulations

37. The Attorney General may make regulations,

- (a) prescribing any form required or permitted by this Act to be prescribed by the regulations;
- (b) prescribing the manner of keeping jury rolls and lists of jury panels and records thereof and requiring and prescribing the form of the certification or authentication of entries therein;
- (b.1) setting out restrictions or conditions that apply to the collection, use or disclosure of personal information by the sheriff, for the purposes of subsection 18.2 (3);
- (b.2) prescribing a police force for the purposes of subsection 18.2 (4);
- (c) establishing jury areas, consisting of parts of existing counties, for the purposes of section 36.1. R.S.O. 1990, c. J.3, s. 37; 1994, c. 27, s. 48 (10); 2009, c. 33, Sched. 2, s. 38 (6, 7).

Offences

38. (1) Every person who,

- (a) wilfully makes or causes to be made any alteration in any roll or panel or in any certified copy thereof except in accordance with this Act;
- (b) falsely certifies any roll or panel; or
- (c) influences or attempts to influence the selection of persons for inclusion in or omission from any jury roll or panel, except in a proper procedure under this Act,

is guilty of an offence and on conviction is liable to a fine of not more than \$10,000 or to imprisonment for a term of not more than two years, or to both. R.S.O. 1990, c. J.3, s. 38 (1).

Idem

(2) Every sheriff, or clerk or registrar of a court, who refuses to perform any duty imposed on him or her by this Act, is guilty of an offence and on conviction is liable to a fine of not more than \$5,000. R.S.O. 1990, c. J.3, s. 38 (2).

Idem

(3) Every person who is required to complete a return to a jury service notice and who,

(a) without reasonable excuse fails to complete the return or mail it to the sheriff as required by subsection 6(5); or

(b) knowingly gives false or misleading information in the return,

is guilty of an offence and on conviction is liable to a fine of not more than \$5,000 or to imprisonment for a term of not more than six months, or to both. R.S.O. 1990, c. J.3, s. 38 (3).

Evidence of not mailing

(4) For the purposes of subsection (3), where the sheriff fails to receive a return to a jury service notice within five days from the date on which it was required by this Act to be mailed, such failure is proof, in the absence of evidence to the contrary, that the person required to mail it to the sheriff failed to do so in the time required. R.S.O. 1990, c. J.3, s. 38 (4).

Certificate as evidence

(5) A statement as to the receipt or non-receipt of a return to a jury service notice purporting to be certified by the sheriff is, without proof of the appointment or signature of the sheriff, receivable in evidence as proof, in the absence of evidence to the contrary, of the facts stated therein in any prosecution under subsection (3). R.S.O. 1990, c. J.3, s. 38 (5).

Contempt of court

39. Every person is in contempt of court who, without reasonable excuse,

(a) having been duly summoned to attend on a jury, does not attend in pursuance of the summons, or being there called does not answer to his or her name; or

(b) being a juror or supplementary juror, after having been called, is present but does not appear, or after appearing wilfully withdraws from the presence of the court; or

(c) being a sheriff, wilfully empanels and returns to serve on a jury a person whose name has not been duly drawn upon the panel in the manner prescribed in this Act; or

(d) being a registrar or other officer wilfully records the appearance of a person so summoned and returned who has not actually appeared. R.S.O. 1990, c. J.3, s. 39.

Idem, tampering with jurors

40. (1) Every person is in contempt of court who, being interested in an action that is or is to be entered for trial or may be tried in the court, or being the solicitor, counsel, agent or emissary of such person, before or during the sittings or at any time after a juror on the jury panel for such court has been summoned knowingly, directly or indirectly, speaks to or consults with the juror respecting such action or any matter or thing relating thereto. R.S.O. 1990, c. J.3, s. 40 (1).

Revocation or suspension of licence, etc.

(2) A solicitor, barrister or student-at-law who is guilty of such offence may, in addition to any other penalty, have his or her licence under the *Law Society Act* to practise law or provide legal services revoked or suspended, or his or her name may be erased from the register of the Law Society or removed from the register for a limited time, by the Superior Court of Justice upon motion at the instance and in the name of the Attorney General. 2006, c. 21, Sched. C, s. 114.

Exception where juror is a party or witness

(3) This section does not apply where a juror is also a party to or a known witness or interested in the action or is otherwise ineligible as a juror in the action, nor to anything that may properly take place in the course of the trial or conduct of the action. R.S.O. 1990, c. J.3, s. 40 (3).

Leave of absence from employment

41. (1) Every employer shall grant to an employee who is summoned for jury service a leave of absence, with or without pay, sufficient for the purpose of the discharge of the employee's duties, and, upon the employee's return, the employer shall reinstate the employee to his or her position, or provide the employee with alternative work of a comparable nature at not less than his or her wages at the time the leave of absence began and without loss of seniority or benefits accrued to the commencement of the leave of absence. R.S.O. 1990, c. J.3, s. 41 (1).

Liability of employer for breach

(2) An employer who fails to comply with subsection (1) is liable to the employee for any loss occasioned by the breach of the obligation. R.S.O. 1990, c. J.3, s. 41 (2).

Penalty for reprisals

(3) Every employer who, directly or indirectly,

(a) threatens to cause or causes an employee loss of position, or employment; or

(b) threatens to impose or imposes on an employee any pecuniary or other penalty,