Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process

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The prevalence of white juries in criminal trials is characteristic of the Canadian criminal justice system. While criminal defendants have attempted, with minimal success, to challenge various aspects of the jury selection process, the systemic exclusion of minorities persists. Through an analysis of Canadian case law, the author canvasses the ability of parties to the action to challenge the racial composition of the jury, both under challenge and change of venue procedures in the *Criminal Code*, and by the assertion of constitutional rights under the *Canadian Charter of Rights and Freedoms*. In both areas, the author argues, the courts have failed to develop the section 15 analysis as articulated in *Andrews* v. *Law Society of British Columbia*.

The evolution of pre-*Charter* equality jurisprudence is analyzed to explain the continued insistence by the courts that proof of purposeful discrimination is required in order to establish a violation of equality rights. However, as the author notes, the *Charter* has added a new dimension to jury selection challenges. Although allegations of violations under section 11(f) have met with relative failure, the author scrutinizes the jurisprudence and argues that the issue of representativeness on jury trials is essentially a question of equality and should be addressed as such. This argument is extended to include the equality rights of victims of crimes and of prospective jurors. Under a section 15 analysis, it is argued that all people should have equal access to jury duty in recognition of their equal worth as members of the community, and as a means to combat institutionalized racism.

The author concludes that a reformation of the challenge for cause procedure is required in order to achieve representativeness in the Canadian jury selection process. In order for such reform to be effective, all peremptory challenges should be eliminated and the challenge for cause procedure should be liberalized both to prevent racially motivated exclusion of jurors and to allow for the exclusion of jurors with racist views.

Dans les procès criminels au Canada, il arrive souvent que tous les membres du jury soient de race blanche. Malgré les tentatives de bon nombre d'accusés de contester la façon dont les jurés sont choisis, l'exclusion systémique des minorités continue de sévir. À partir d'une analyse de la jurisprudence canadienne, l'auteure examine les différentes avenues possibles pour attaquer la composition raciale du jury, tant en vertu des dispositions du *Code criminel* qu'avec la *Charte canadienne des droits et libertés*. L'auteure prétend que dans les deux cas, les tribunaux n'ont pas su s'inspirer de l'analyse de l'article 15 énoncée par la Cour suprême dans l'arrêt *Andrews* c. *Law Society of British Columbia*.

Dans une étude de la jurisprudence antérieure à la *Charte*, l'auteure explique pourquoi les tribunaux exigent encore que, pour qu'une situation discriminatoire soit illicite, il faut que la discrimination ait été voulue. Elle s'empresse de dire toutefois que l'avènement de la *Charte* n'est pas sans conséquences pour la sélection des jurys. Malgré le peu de succès qu'ont connu les arguments basés sur l'article 11(f), l'auteure examine la jurisprudence et insiste sur le fait que la question de la représentativité des jurys est une question d'égalité et devrait être analysée comme telle. Cet argument s'étend jusqu'aux victimes d'actes criminels et aux jurés éventuels. S'appuyant sur l'article 15, l'auteure dit que tous ont droit à la possibilité d'être juré tant en vertu de l'égalité des membres de la communauté qu'à cause de la nécessité de combattre le racisme du système actuel.

L'auteure conclut que, pour arriver à un système de sélection qui soit vraiment représentatif, les procédures actuelles en matière de récusation motivée doivent faire l'objet d'une réforme. Pour ce faire, elle préconise l'abolition des récusations péremptoires et la libéralisation du régime des récusations motivées pour empêcher que des jurés soient exclus en raison de leur race et pour permettre l'exclusion de jurés ayant des attitudes racistes.

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Many Canadians were shocked by the verdicts in the trial of the four white Los Angeles police officers who brutally beat a Black motorist, Rodney King, on the night of March 3, 1991. Three of the officers, Theodore Briseno, Stacey Koon and Timothy Wind, were acquitted of all charges on April 29, 1992. The jury failed to reach a verdict with respect to an assault charge against the fourth officer, Laurence Powell, for whom a mistrial was declared.[1] The astonishment of concerned Canadians did not reflect self-righteousness nor an indictment of the American criminal justice system, as though similar events could never have transpired in our country. Racist police violence is not unknown in Canada[2] and it is not unusual for white police officers to be acquitted of crimes committed against Black men.[3] On the contrary, the virtually routine exoneration of racist police violence has contributed to increasing cynicism toward the Canadian criminal justice system. Yet many Canadians, including those who belong to communities affected by police violence, expected convictions in the trial of the police officers who beat Rodney King. Despite a general lack of faith in the legal system, many were stunned by the verdicts. Their amazement stemmed from the fact that the beating was captured on videotape by an amateur photographer. Eighty-one seconds of tape recorded the four white officers kicking and delivering 56 baton blows to the defenceless Black man.[4] Segments of the tape were aired on television and millions of viewers thereby witnessed the brutal assault. Many viewers (including those who supported the police) believed that, with the tape as evidence, the prosecution would secure convictions. The public outrage expressed in the aftermath of the trial was exacerbated by the fact that for some, there was hope that the justice system would not fail this particular Black victim.

For others, hope was lost on November 26, 1991, five months before the verdicts were delivered. It was on that date that Superior Court Judge Stanley Weisberg selected East Ventura County as the site for the trial.[5] An appellate

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[1]Laurence Powell will be retried. See "Judge Orders Retrial for Police Officer" *The Ottawa Citizen* (16 May 1992) A12.

[2]"Since the early '70s, 16 unarmed blacks have been shot by police in Canada" (J. Miller, "A Question of Color" *The Ottawa Citizen* (23 May 1992) F1). Many shootings have occurred in Toronto, but other smaller cities have also witnessed this violence. For example, J.J. Harper, an Aboriginal leader, was fatally shot by Winnipeg police in 1989. Vincent Gardner, a 49-year-old unarmed Black man, was shot by a Nepean police officer in 1991. In Montreal, three Black men and three Hispanic men have been fatally shot by police since 1987 (A. Picard, "Rampage Seen as Warning of 'Hot Summer' in Montreal" *The [Toronto] Globe and Mail* (6 May 1992) A8). Incidents of racist police violence have also been reported in Vancouver. Most recently, two Chinese Canadians, Feng Hua Zhang and Wai Shuen Wong, "were roughed up and dragged from their ... home" by police who mistakenly believed that they were drug dealers. Zhang, who does not speak English, was struck and kicked by police officers for failing to put his hands behind his back (M.L. Young, "We're Victims Again, Pair Says of Ruling" *The Vancouver Sun* (28 May 1992) A1).

[3]In the past 18 months, in the Toronto area alone, five white police officers have been acquitted of charges stemming from their involvement in the shootings of Black victims (T. Appleby, "Embattled Police Seek Solutions" *The [Toronto] Globe and Mail* (9 May 1992) A1 at A9).

[4]Appleby, *ibid.* at A9.

[5]"Four Officers' Trial is Moved" *The New York Times* (27 November 1991) B7. See also L. Cannon & L. Smith, "The Tale of the Tape: Video Wasn't Enough to Convince Jury in King Beating" *The Ottawa Citizen* (2 May 1992) B1.

court ordered the change of venue because the political climate in Los Angeles was too volatile.[6] The prosecution argued that the trial should be held in a racially diverse metropolitan centre,[7] but Judge Weisberg selected the courthouse in Simi Valley, "an isolated suburban community West of Los Angeles with a black population of only 1.5 per cent."[8] It is well known as a community in which many police officers live.[9] The demographics of the County virtually guaranteed that there would be no Black jurors for the trial. Indeed, there were none. One Filipino, one Hispanic and ten white jurors comprised the six men and six women who decided the case.[10] One can only speculate whether or not the verdicts would have been different if the jury had contained Black members.

It is not uncommon for defendants to be tried by disproportionately, or exclusively, white juries. However, the prevalence of predominantly white juries is not unique to the American legal process;[11] it is also a characteristic of the Canadian criminal justice system.[12] It is one of the multiple factors which inform the widespread perception that the system serves the exclusive interests of white victims and white defendants.

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[6]The defence requested the change of venue. Judge Bernard Kamins initially denied the request. On July 24, 1991, an appellate court reversed his decision and ordered the change, citing the "high level of political turmoil and controversy" which the case had generated in Los Angeles (S. Mydans, "Los Angeles Trial Ordered to Move" *The New York Times* (24 July 1991) A17). Judge Kamins was later removed from the case because he sent a note to the prosecution which was deemed to be improper contact (R. Perez-Pena, "Judge in Police Beating Trial Sets Aside Confusion" *The New York Times* (6 March 1992) B8).

On May 22, 1992, Judge Weisberg rejected a defence motion for a change of venue and ruled that the retrial of Laurence Powell would be held in Los Angeles County ("Retrial Stays in LA" *The [Toronto] Globe and Mail* (23 May 1992) A9).

[7]The prosecution favoured Alameda County, which includes the cities of Oakland and Berkeley. Alameda is located 350 miles north of Los Angeles and "has a liberal political bent and a large black population." Judge Weisberg rejected the suggestion due to cost and inconvenience (Perez-Pena, *ibid.* at B8).

[8]Cannon & Smith, *supra* note 5 at B1. Simi Valley was described by one journalist as "not just a white suburb, but an outer-outer suburb full of people who have fled even the mainly white outer suburbs of LA" (J. Lichfield, "Riots in America" *The [London] Independent* (3 May 1992) 15).

[9]One in five officers from the Los Angeles Police Department live in or around Simi Valley. There are also many retired police officers living in the area (Lichfield, *ibid.* at 15). The region is commonly known as "Cop County" (J. Hiscock, "Bandage That Only Opened a Race Wound" *The [London] Sunday Telegraph* (3 May 1992) 15).

[10]"Trial Jury is Selected in Videotaped Beating" *The New York Times* (3 March 1992) A14. See also Hiscock, *ibid.* at 15.

[11]For evidence of the problem in England, see H. Mills, "Juries 'Should Reflect Racial Balance'" *The [London] Independent* (1 May 1992) 3; *R.* v. *Thomas, Lee, Aidoo-Ababio and Hudson* (1989), 88 Cr. App. R. 370 (Central Crim. Ct.); *R.* v. *Ford*, [1989] 3 All E.R. 445 (C.A.); D.P. Herbert, "Multi-Racial Juries: The Way Forward" (20 May 1990) [unpublished].

[12]In a speech delivered at a conference on the administration of criminal justice, Halifax lawyer Davies Bagambirre is reported to have said: "In Nova Scotia, you rarely find a black man or a black woman on a jury. It's unheard of, it's unthinkable" (K. Cox, "System Excludes Minorities, Lawyer Says" *The [Toronto] Globe and Mail* (30 June 1989) A8). The under-representation of Aboriginal people on juries in Manitoba is documented in the report of the Aboriginal Justice Inquiry of Manitoba, *The Justice System and Aboriginal People*, vol. 1 (Winnipeg: Province of Manitoba, 1991) (Commissioners: A.C. Hamilton & C.M. Sinclair) at 377-87 [hereinafter *The Justice System*]. See also K. Roach, "Juries Have Outlived Their Usefulness" *The [Toronto] Globe and Mail* (2 May 1992) D3.

The jury selection procedure in criminal trials is deeply flawed. Historically, Canadian laws explicitly prohibited the participation of women on juries and effectively precluded the participation of ethnic, religious and racial minorities.[13] Due to legal reform, women are now permitted to serve as jurors[14] and, with few exceptions, juries are sexually integrated. Statutory and regulatory amendments have also been made in an effort to improve the racial diversity of juries, but the systemic exclusion of Aboriginal, Arab, Asian, Black and Hispanic persons persists.[15] This exclusion results from the combination of numerous factors which arise at different stages in the jury selection process.

Criminal defendants have attempted, with minimal success, to challenge various aspects of the jury selection procedure. In this paper, I canvass those efforts and analyse the reasons for their failure. I also develop an argument, based upon the developing equality jurisprudence under the *Charter*,[16] which I believe demonstrates the constitutional invalidity of the laws that regulate the criminal jury selection process in Canada.

Jury selection in criminal proceedings is governed by both federal and provincial legislation. Subsection 91(27) of the *Constitution Act, 1867*[17] confers upon the Canadian Parliament jurisdiction over "[t]he Criminal Law ... including the Procedure in Criminal Matters." Subsection 92(14) of the same *Act* grants jurisdiction over "[t]he Administration of Justice" to the provincial legislatures. Consequently, the in-court process for selecting jurors for criminal trials is established by the provisions of the *Criminal Code*, but the eligibility criteria for potential jurors are established by provincial and territorial statutes. Jurisdictional conflict is avoided by subsection 626(1) of the *Criminal Code*, which recognizes that persons are qualified to serve as jurors in a criminal proceeding if they meet the requirements established by the law of the province where the trial is to be conducted.

Jury eligibility varies regionally but there are some legislative provisions which are common to most of the territorial and provincial statutes. For example, individuals convicted of criminal offences are generally excluded from jury duty. Also, persons in specified occupations such as lawyers, judges, justices of the peace, Members of Parliament and medical practitioners (among others) are usually ineligible to serve as jurors, as are their spouses.[18]

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[13]See *e.g.* text accompanying notes 19-22.

[14]"[N]o person may be disqualified, exempted or excused from serving as a juror in criminal proceedings on the grounds of his or her sex" (*Criminal Code*, R.S.C. 1985, c. C-46, s. 626(2) [hereinafter *Criminal Code*]). This section was introduced by the *Criminal Law Amendment Act, 1972*, S.C. 1972, c. 13, s. 46.

[15]This is not an exhaustive list of persons excluded by the jury selection process.

[16]*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[17]*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

[18]See *e.g. The Jury Act, 1981*, S.S. 1990, c. J-4.1, s. 4; *Juries Act*, R.S.N.S. 1989, c. 242, s. 5; *Jury Act*, S.N.B. 1980, c. J-3.1, s. 3; *Jury Act*, R.S.N.W.T. 1974, c. J-2, ss. 6-7. For a constitutional challenge to some of the eligibility criteria in the *Juries Act*, R.S.O. 1990, c. J-3, see *R.* v. *Church of Scientology of Toronto (No. 1)* (1992), 74 C.C.C. (3d) 327 (Ont. Ct. (Gen. Div.)). Subsection 2(b) of the Ontario *Juries Act* specifies that only Canadian citizens are eligible for jury duty. Judge

In addition to establishing eligibility criteria, provincial and territorial laws govern the initial stages of the jury selection process. These statutes authorize the annual preparation of a jury roll by an official (usually the sheriff) in each judicial district. The roll is a list of potential jurors for all the trials to be held during the ensuing year. The names which appear on the roll are generated in a random fashion from other pre-existing lists. The selection of these pre-existing lists frequently constitutes the first phase in the elimination of prospective Aboriginal, Arab, Asian, Black and Hispanic jurors.

Historically, provincial voters' lists were the favoured sources for the compilation of jury rolls. This meant that Aboriginal people and members of other disenfranchised races were precluded from serving on juries. British Columbia passed legislation in 1875 declaring that "no Chinaman or Indian" could vote.[19] By 1922, every province except Nova Scotia and Newfoundland had enacted similar laws disqualifying "Indians" from the franchise.[20] Each of these laws was eventually repealed but Aboriginal people did not acquire universal adult suffrage in all provincial elections until 1969.[21] It is therefore not surprising that January 1972 is "reported to be the first time Indians served on a Canadian jury."[22]

In most provinces, sheriffs are authorized to exercise their discretion in selecting the lists from which the jury rolls are compiled. In some areas, provincial and municipal electoral lists continue to be used in the preparation of jury rolls, notwithstanding that their enumeration processes often result in the under-representation of certain segments of the population. Municipal assessment rolls are also used and they similarly under-represent particular populations. They include only the names of property owners and thereby exclude lower income groups. This exclusion has a disproportionate impact on people of colour who are over-represented among the poor and working class and are therefore under-represented in municipal assessment rolls.[23]

Southey ruled that this provision infringed the right of the accused to a representative jury, but that it was a justifiable limit under s. 1 of the *Charter*. The accused also challenged the constitutional validity of certain occupational disqualifications contained in s. 3 of the Ontario *Juries Act*. Judge Southey held that if the exclusion of lawyers, law students, law enforcement officers and their spouses constituted a limit on the accused's right to a representative jury, then it was justifiable under s. 1 of the *Charter*. With respect to medical doctors, coroners and veterinarians, Southey J. ruled that "[t]he exclusion from juries of persons engaged in those occupations does not ... materially reduce the representativeness of jury panels" (*ibid.* at 339).

[19]*An Act to Make Better Provision for the Qualification and Registration of Voters*, S.B.C. 1875, c. 2.

[20]W. Moss, *Aboriginal People: History of Discriminatory Laws* (Ottawa: Library of Parliament, 1987) at 5-7.

[21]Quebec was the last province to extend its provincial franchise: *An Act to Amend the Elections Act*, S.Q. 1969, c. 13, s. 1.

[22]Moss, *supra* note 20 at 10, citing (1972) 14:10 *The Indian News*.

[23]White people constitute the majority of Canada's poor population, but people of colour are disproportionately poor. See "Selected Employment Income Indicators by Ethnicity and Sex," table in D.K. Stasiulus, "Rainbow Feminism: Perspectives on Minority Women in Canada" (1987) 16:1 *Resources for Feminist Research* 5 at 8. See also the report of the National Council of Welfare, *Women and Poverty Revisited* (Ottawa: Minister of Supply and Services, 1990) at 112-24.

Some sheriffs have experimented with alternate lists in a deliberate effort to correct the problem of misrepresentation.[24] In Manitoba, sheriffs have adopted the practice of using registration lists from the provincial health insurance plan.[25] In *The Jury Act* of Saskatchewan, this practice is specifically mandated by law.[26] In Alberta, it is prohibited by law.[27] Clearly, there is no uniform approach to the problem. The Ontario *Juries Act*[28] is the only provincial statute which specifically requires the use of lists from Indian reserves.[29] None of the provincial or territorial statutes require that the lists selected to compile a jury roll be adequately representative of the racial composition of the district's population. Thus the first step in the jury selection process often initiates the systemic over-representation of white people on juries.

The creation of a panel constitutes the second step in the jury selection process. A panel is a pool of potential jurors for a particular court sitting. Its size varies depending on the number of accused and the number of jury trials to be conducted during the court sitting. In order to draft a panel, names are drawn at random from the jury roll and summonses are delivered by registered mail to those persons whose names are drawn. Recipients of the summonses are usually requested to contact the sheriff by telephone. Respondents who are not exempted by the sheriff are requested to appear in court on a particular date. Those who eventually appear in court, and are not then exempted by the judge, comprise the panel from which individual juries are drawn.

Inevitably, some people fail to receive their summonses, some fail to respond to their summonses, some are exempted by the sheriff, some fail to appear in court as requested and some are exempted by the judge. Therefore, as a matter of expediency, more people than necessary are summoned by the sheriff.[30] Once a predetermined number of prospective jurors have been confirmed,

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[24]In a recent Alberta case, the deputy sheriff responsible for compiling the jury roll testified that traditional municipal sources (*i.e.* electoral lists and municipal assessment rolls) were "too narrow." He therefore obtained permission to use a utility company customer list. The company provided utility services to the local Indian reserves as well as to several municipalities. The list included the names of renters as well as property owners. The deputy sheriff used the list in a calculated effort to overcome problems of misrepresentation. Unfortunately, the list did not generate a representative jury roll; it excluded people under the age of 23 and significantly under-represented women. See *R.* v. *Nepoose (no. 1)* (1991), 85 Alta. L.R. (2d) 8 (Alta. Q.B.) [hereinafter *Nepoose (no. 1)*]; *R.* v. *Nepoose (no. 2)* (1991), 85 Alta. L.R. (2d) 18 (Alta. Q.B.) [hereinafter *Nepoose (no. 2)*].

[25]*The Justice System*, *supra* note 12 at 380.

[26]*Supra* note 18 at s. 6(1).

[27]"The *Alberta Health Care Insurance Act*, R.S.A. 1980, c. A-24, prohibits the release of any information obtained for the purposes of that program" (*Nepoose (no. 2)*, *supra* note 24 at 23-24).

[28]*Supra* note 18.

[29] 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 that purpose, the sheriff may obtain the names of inhabitants of the reserve from any record available (*ibid.* at s. 6(8)).

[30]As many as twice the required number of jurors may be summoned (*Nepoose (no. 1)*, *supra* note 24 at 15). Note that the reference to "exception writ" (*ibid.*) should read "exemption rate." This is an obvious transcription error.

the sheriff ceases pressuring those who have not yet responded and may even reject subsequent respondents by informing them that they are no longer needed.[31]

This summoning procedure has been identified as the primary reason Aboriginal people are under-represented on jury panels. The report of the Aboriginal Justice Inquiry of Manitoba explains that Aboriginal people often live in communities which have poorer mail service and telephone service than non-Aboriginal communities.[32] This causes delay in the delivery of their summonses as well as in their responses. Without these delays, non-Aboriginal people are more likely to respond quickly to their summonses and are therefore more likely to be represented on the panel.[33]

The summoning procedure also favours property owners, even if the jury roll includes the names of renters (which is not always the case). People who rent apartments are likely to change addresses more often than property owners. They are therefore less likely to receive their summonses by mail. Their failure to respond may be ignored by the sheriff who has summoned considerably more people than required to fill the panel. This contributes to the systemic over-representation of the property-owning middle class on juries, and consequently to the over-representation of white people who are already over-represented within that economic class.[34]

The exemption procedure also has a differential impact upon certain communities. When prospective jurors respond to a summons by telephone, they may be exempted from jury duty by the sheriff, sometimes at their own request. For example, many provincial and territorial laws provide for the exemption of individuals for whom jury duty would create a serious hardship.[35] Some laws also permit exemption based on religious objection.[36] There is evidence that the rate of exemption for Aboriginal persons is higher than the rate for non-Aboriginal persons, at least in Alberta[37] and British Columbia.[38] There is no

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[31]*The Justice System*, *supra* note 12 at 383.

[32]*Ibid.* at 383.

[33]*Ibid.* at 382.

[34]See *supra* note 23.

[35]See *Jury Act* of Saskatchewan, *supra* note 18 at s. 5(2)(a); *Juries Act* of Ontario, *supra* note 18 at s. 23(2)(b); *Juries Act* of New Brunswick, *supra* note 18 at s. 5(1); *Jury Act*, R.S.N. 1990, c. J-5 at s. 6(1); *The Jury Act*, R.S.M. 1987, c. J30, s. 25(1)(b); *Jury Act*, R.S.B.C. 1979, c. 210, s. 5(1)(b); *Jury Act*, R.S.P.E.I. 1988, c. J-5, s. 6.

[36]See *Jury Act* of Saskatchewan, *ibid.* at s. 5(2)(c); *Juries Act* of Ontario, *ibid.* at s. 23(1); *Jury Act* of Newfoundland, *ibid.* at s. 7; *The Jury Act* of Manitoba, *ibid.* at s. 25(1)(a); *Jury Act* of British Columbia, *ibid.* at s. 5(1)(a).

[37]*Nepoose (no. 1)*, *supra* note 24 at 15.

[38]In a recent case before the British Columbia Supreme Court, the accused objected to the racial composition of the jury panel because it contained no Aboriginal persons. One of his arguments related to "deletions on the jury list." Judge Harvey rejected the argument, stating that "such deletions are the result of prospective jurors applying in the usual manner to the office of the Sheriff for exemption." Although the information provided in this case is rather obscure, it may reasonably be inferred that the accused was objecting to the high exemption rate of Aboriginal jurors (*R.* v. *Chipesia* (1991), 3 C.R. (4th) 169 at 171 (B.C.S.C.) [hereinafter *Chipesia*]).

requirement in any province or territory that an exempted Aboriginal person be replaced by another Aboriginal person.

While there is little documentation on the respective exemption rates of various segments of the population, it is not difficult to imagine how the exemption procedure could further eliminate prospective Aboriginal, Arab, Asian, Black and Hispanic jurors. For example, individuals who do not meet eligibility criteria are automatically exempted from jury duty. Thus the failure to meet statutory language requirements results in exemption. In Quebec, the *Jurors Act* disqualifies "all persons who do not speak French or English fluently"[39] subject to the exception that "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."[40] In the Northwest Territories, the law requires that jurors be "able to speak and understand either the French language or the English language"[41] but provides the following exception for Aboriginal persons:

> An aboriginal person who does not speak and understand either the French language or the English language, but who speaks and understands an aboriginal language, as defined in the *Official Languages Act* and is otherwise qualified under this Act, may serve as a juror in any action or proceeding that may be tried by a jury in the Territories.[42]

In the Yukon, all individuals must be "able to speak and understand the English language" in order to qualify to serve as jurors.[43] Five provincial statutes contemplate the disqualification of any juror who does not comprehend the language in which a trial is to be conducted.[44] Four provincial statutes contain no explicit language requirements.[45]

Language requirements present an obstacle for many Aboriginal people and immigrants whose first language is not one of the two official languages of Canada and whose fluency in English or French is inadequate. Moreover, if the sheriff *believes* that potential jurors are not sufficiently fluent, then they may be exempted, despite a good command of the English or French language. Due to accent discrimination, people of colour are more likely to be exempted from juries on these grounds.

Mari Matsuda has argued persuasively that accent discrimination is part of an embedded culture of domination.[46] There exists in Canada, as in other parts of the world, an unspoken norm of "non-accent" which is an artificial social

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[39]*Jurors Act*, R.S.Q. c. J-2, s. 4(i).

[40]*Ibid.* at s. 45.

[41]The *Jury Act* of the Northwest Territories, *supra* note 18 at s. 5(c).

[42]*An Act to Amend the Jury Act*, S.N.W.T. 1986, c. 7, s. 1.

[43]*Jury Act*, R.S.Y. 1986, c. 97, s. 4(c).

[44]*The Jury Act* of Saskatchewan, *supra* note 18; *Jury Act* of British Columbia, *supra* note 35 at s. 4; *Jury Act*, S.A. 1990, c. J-2.1, s. 5(1)(f); *The Jury Act* of Manitoba, *supra* note 35 at s. 4; *Jury Act* of Prince Edward Island, *supra* note 35 at s. 5.

[45]The Ontario *Juries Act*, *supra* note 18; the New Brunswick *Jury Act*, *supra* note 18; the Nova Scotia *Juries Act*, *supra* note 18; *Judicature Act*, R.S.N. 1970, c. 187.

[46]See M.J. Matsuda, "Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction" (1991) 100 Yale L.J. 1329.

construction.[47] Although everyone has an accent, only some people are perceived to be accented. Only those who deviate from the norm are perceived to "have an accent." In evaluating a prospective juror's fluency in English or French, a sheriff is liable to be influenced by his or her accent. Some accents are not likely to impede acceptance as a juror. For example, certain European accents such as French, Irish, British and Scottish accents, give the impression that the speaker's first language is French or English and therefore do not raise doubts about the speaker's fluency in French or English. In contrast, accents such as Chinese, Japanese and Mexican accents are viewed, often fallaciously, as indicia of poor fluency,[48] perhaps because they give the impression that the speaker's first language is neither English nor French.[49] It is trite to note that the former accents are current among predominantly white populations, while the latter are current among populations of colour. The link between accent discrimination and racial discrimination becomes even more apparent when one considers that many Black people are often perceived by white people to be illiterate and/or inarticulate in English or French despite the fact that their accents may not be indicative of another mother tongue (*e.g.* Jamaican and Haitian accents).[50] They too are more likely to be exempted from jury duty based on a sheriff's subjective evaluation and implementation of statutory language requirements.

The people who survive the initial stages of the selection process, who appear in court as requested,[51] and are not then exempted by the judge,[52] form the panel for a court sitting. Juries for multiple criminal trials may be selected from one panel.

Prior to the selection of a jury for any criminal trial, the parties may object to the composition of the jury panel. If successful, such an objection results in the summoning of a new panel. This process is commonly referred to as "challenging the array." In Canada, such challenges are restricted by subsection 629(1) of the *Criminal Code* which states:

> 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.

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[47]*Ibid.* at 1330, 1361.

[48]Mari Matsuda provides several useful examples (*ibid.*).

[49]I am perhaps being generous to the prejudiced listener. Mari Matsuda explains how race and class boundaries are maintained by accent discrimination (*ibid.* at 1397).

[50]A number of experiences have confirmed my view that race discrimination and accent discrimination are intrinsically linked. I have discussed this phenomenon with a Jamaican woman who is the mother of two children. Her children have experienced difficulty in the Ontario English school system because of accent discrimination. Also, in reviewing the files of applicants to law school (in my capacity as a member of the admissions committee), I encountered two files from Jamaican students who discussed the impact of racism on their lives and on their early education. Both applicants mentioned accent discrimination within the English school system in Canada. I have had a similar discussion with a Haitian man who complained about the French school system in Quebec.

[51]Travel costs associated with jury service are not pre-paid but rather are reimbursed after the fact. For Aboriginal people who live in remote areas, this expense operates as a disincentive to appear in court (*The Justice System*, *supra* note 12 at 383).

[52]The judge may exempt prospective jurors who appear in court. For example, a person who is related to the accused, to the victim, or to one of the lawyers, may be exempted.

As a result of the limitations imposed by this subsection, successful motions to challenge an array have been extremely rare.

One of the few reported cases in which a panel was successfully challenged is *R.* v. *Catizone*,[53] a 1972 Ontario County Court decision. The accused woman challenged the array because the panel of 70 potential jurors included only three women, none of whom were available for her trial.[54] The panel was dismissed and the case was traversed to the next court sitting. Judge Stortini suggested that the new panel should include, if possible, equal numbers of men and women. He expressed concern about the then widespread practice of returning all male jury panels, acceding to defence counsel's request that he "take a stand on this matter" and set an example for other counties.[55] There was no finding of partiality, fraud or wilful misconduct on the part of the sheriff or sheriff's deputies. Therefore, Stortini J. did not actually have the authority to dismiss the panel. This case is not only anomalous, but also technically incorrect according to the law.

In other reported cases, challenges have almost invariably been unsuccessful. The decision in *Rose* v. *R.*[56] provides a useful example. The array in *Rose* was constituted under the Quebec *Jury Act* which, in 1972, declared women to be ineligible as jurors.[57] Counsel for the accused argued that the *Jury Act* was discriminatory and therefore contrary to the *Canadian Bill of Rights*.[58] Judge Marquis emphasized that the case did not involve "a decision concerning the vindication of the rights of women"[59] but rather a question of the equality of the (male) accused before the law. He ruled that the accused suffered no discrimination because he was subject "to the same rules and the same system as all other accused" and was therefore treated equally before the law.[60] Ultimately, the challenge was dismissed because the requirements of section 558 (now section 629) of the *Criminal Code* had not been satisfied: "In the instant case, there

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[53](1972), 23 C.R.N.S. 44 (Ont. Co. Ct.) [hereinafter *Catizone*].

[54]Two had claimed exemption and the third was serving on a grand jury.

[55]*Catizone*, *supra* note 53 at 46-47.

[56](1972), 19 C.R.N.S. 66 (Que. Q.B.) [hereinafter *Rose*].

[57]*Jury Act*, R.S.Q. 1964, c. 26, as am. by S.Q. 1971, c. 15.

[58]S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III, s. 1(a), (b) [hereinafter *Bill of Rights*].

[59]*Rose*, *supra* note 56 at 78. In *obiter dicta*, Marquis J. stated:

> [T]here is no discrimination where a man is called upon to perform a certain function and a woman is required to fill some other role of equal importance but of a different nature. If the various roles played by men and women in society were to be considered discriminatory, we would be forced to the logical conclusion that all the professions would have to contain an equal number of persons of both sexes, and this would apply to judges, teachers, government officials, etc. Can it really be said that this parity should extend to the area of manual labour, involving the heavy work done by street labourers, miners, workers in heavy industry or, in one word, workers involved in all those activities requiring physical strength not available to a woman whose charms and energy, nevertheless, are adaptable to other tasks which are often much more important and more useful? (*ibid.* at 74)

Later, he revealed the nature of the tasks which he believed to be best suited for women: "the magnificent role of wife and mother" (*ibid.* at 76).

[60]*Ibid.* at 77.

was no evidence of *partiality, fraud or wilful misconduct on the part of the sheriff or his deputies.*"[61]

The first Canadian jury case involving an allegation of racial discrimination was decided in 1973. In *R.* v. *Bradley and Martin (no. 1)*,[62] the co-accused were two Black men who challenged the array because it contained no Black jurors. The trial was to be conducted in Essex county which, at that time, had a Black population of approximately 6,000 persons and a total population of 250,000 to 300,000 persons.[63] Counsel for the defence indicated that they had never seen a Black person as a member of a jury panel in Essex county. Judge Galligan accepted that as being their "personal experience" but also accepted the assurance of the Crown Attorney that he had seen panels which included Black members.[64] Defence counsel did not suggest that the sheriff was personally motivated by racism but rather that the jury selection procedure in the county resulted in systemic racial discrimination and was therefore partial "in the legal sense."[65] Galligan J. rejected their interpretation of the meaning of "partiality" within section 558 (now section 629) of the *Criminal Code*. He ruled that the undisputed fact that there were no Black people on the jury panel before them was not "the slightest proof of any partiality" on the part of the sheriff or his deputies.[66]

Counsel for the co-accused also argued that the exclusion of Black people from the jury panel constituted a violation of their clients' equality rights as protected by the *Bill of Rights*. Galligan J., in a separate oral judgment, expressed his opinion as follows:

> In my view the requirement in the Bill of Rights of a fair hearing in accordance with the principles of fundamental justice means that all accused persons shall be entitled to the same hearing that is provided for by law. I do not think that the Bill of Rights goes so far that it requires that there be persons of a particular race, national origin, colour, religion or sex summoned to try accused persons who happen to be of that particular race, national origin, colour, religion or sex.[67]

This reasoning is typical of the equality jurisprudence developed under the *Bill of Rights*. According to the courts, the *Bill* declared only formal equality.[68]

It is therefore not surprising that reliance on the *Bill of Rights* proved to be unsuccessful in subsequent cases. In *R.* v. *Diabo*[69] the defendant was accused of committing armed robbery on the Kahnawake reserve. He was a member of the

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[61]*Ibid.* at 78.

[62](1973), 23 C.R.N.S. 33 (Ont. S.C.) [hereinafter *Bradley and Martin (no. 1)*].

[63]*Ibid.* at 35.

[64]*Ibid.* at 39.

[65]*Ibid.* at 35.

[66]*Ibid.* at 39.

[67]*R.* v. *Bradley and Martin (no. 2)* (1973), 23 C.R.N.S. 39 at 40 (Ont. S.C.) [hereinafter *Bradley and Martin (no. 2)*].

[68]For another example, see Tysoe J.A.'s interpretation of the meaning of "equality before the law" as protected by the *Bill of Rights*: "They shall be entitled to have the law as it exists applied equally and without fear or favour to all persons to whom it relates or extends" (*R.* v. *Gonzales* (1962), 32 D.L.R. (2d) 290 at 296, 37 C.R. 56 (B.C.C.A.)).

[69](1974), 27 C.C.C. (2d) 411, 30 C.R.N.S. 75 (Que. C.A.) [hereinafter *Diabo* cited to C.C.C.].

Mohawk Nation and a resident of the reserve. At the time of the trial, the Quebec *Jury Act* specified that no person could serve as a juror unless "domiciled in a municipality and entered on the valuation roll of that municipality."[70] Kahnawake, like all other Indian reserves, is not a municipality. Since the residents do not pay taxes, Kahnawake does not have a valuation roll. The provincial law in 1974 effectively deprived all Kahnawake residents, indeed, all residents of any Indian reserve, of the right to serve on juries in Quebec. Thus, no Kahnawake residents appeared as potential jurors for the accused's trial. Based on these facts, the accused put forward three arguments in his challenge to the array. First, he asserted that the *Jury Act* was discriminatory and was therefore contrary to the *Bill of Rights*.[71] Second, he alleged that the sheriff or the sheriff's deputies were guilty of partiality, fraud or wilful misconduct. Finally, he claimed that the Quebec law denied him the right to be tried by a jury of his peers. Each of these arguments was dismissed at trial. Diabo appealed the decision.

Justice Owen, writing for a unanimous Court of Appeal, ruled that the case did not involve racism and berated the accused for making such an allegation:

> He comes marching into Court waving the flag of racial discrimination and rattling the saber of "Drybones". He is flying false colours because this is clearly not a case of racial discrimination.[72]

Owen J.A. reasoned as follows:

> It is true that no registered Indian living on the Reservation at Caughnawaga [Kahnawake] could sit as a juror at the trial of Diabo. The reason for this is not the fact that he belongs to the Indian race but rather the fact that he does not reside in a municipality that has a valuation roll. The basis of the exclusion from the jury list under the terms of the Quebec *Jury Act* of a registered Indian living on the Caughnawaga [Kahnawake] Reserve is geographical not racial.[73]

The artificial distinction between geography and race, and the attempt to rationalize racism by calling it geographical discrimination, is transparent. Indeed, this judicial reasoning is so transparent that it would be uninteresting were it not also oppressive and discriminatory.

With respect to Diabo's second argument, the Court of Appeal held that the allegations of partiality, fraud and wilful misconduct were unfounded and were therefore properly dismissed by the trial judge. Finally, the court upheld the trial judge's ruling that "the accused had the right to be judged by a jury constituted in accordance with the law but no right to be judged by a jury of his peers."[74] Thus the appellate judges acknowledged, perhaps inadvertently, that non-Aboriginal people did not constitute the "peers" of the accused, at least not for

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[70]*Jury Act*, R.S.Q. 1964, c. 26, s. 1, as am. by S.Q. 1971, c. 15, ss. 1, 2.

[71]The *Bill of Rights* applies only to federal legislation. Counsel for the accused successfully argued that the provisions of the Quebec *Jury Act* were incorporated in the *Criminal Code* by virtue of s. 554(1) (now s. 626(1)). It is odd that this issue was not addressed in earlier cases.

[72]*Diabo*, *supra* note 69 at 416.

[73]*Ibid.* at 415.

[74]*Ibid.*

jury purposes. This finding was subsequently contradicted by Justice Guy's judgment in *R.* v. *LaForte*,[75] a 1975 decision of the Manitoba Court of Appeal.

In the latter case, one of three co-accused, Elsie Noella Gaskin, challenged the array because it contained few women and no Band Indians. She noted the existence of a Manitoba provincial policy, adopted in 1971, which obliged Band Councils to submit names drawn from their electoral lists for the purpose of jury selections. The trial judge held that the provincial *Jury Act* did not require proportionate or minimum representation of Band Indians or of women on any jury, whatever the race or sex of the accused.[76] She was unable to demonstrate partiality or wilful misconduct on the part of the sheriff and her motion was consequently dismissed. The co-accused were tried jointly and all three were convicted. One of them, Wilfred David LaForte, appealed his conviction, arguing that it was delivered by an improperly constituted jury.

Laforte did not allege partiality on the part of the sheriff. Instead, his factum read as follows:

> [I]t is submitted that under the Jury Act of Manitoba, and/or under the Bill of Rights, the jury panel should have included Band Indians. And the matter is left with the time-honoured declaration in Magna Carta that an accused is entitled to be tried by his peers.[77]

Justice Guy responded to these arguments as follows:

> [T]he argument that the *Canadian Bill of Rights* was passed to prevent discrimination is completely inconsistent with the argument that Indians cannot be tried by non-Indians.
> The very definition of the word "peer" is: "An equal in standing or rank; one's equal before the law." That is exactly what the *Bill of Rights* was designed to accomplish — to make everyone equal before the law. Counsel for the appellant is equating the word "peers" with the word "Indians." That is not the purpose of the *Bill of Rights*.[78]

In a separate but concurring judgment, Justice Matas conceded that the absence of Band Indians and the presence of only 16 women on a panel of 96 persons "indicate[d] there had been discrimination."[79] He nevertheless ruled that there was no violation of the *Bill of Rights* because there was no evidence of impropriety and "[i]n the absence of any such evidence, it must be assumed that those charged with the responsibility of selecting the jury panel did so properly."[80] In support of this ruling, Matas J. cited the decisions in *Bradley and Martin (no. 1)* and *Bradley and Martin (no. 2)*.

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[75](1975), 62 D.L.R. (3d) 86, 25 C.C.C. (2d) 75 (Man. C.A.) [hereinafter *Laforte* cited to D.L.R.].

[76]The Court of Appeal unanimously approved this ruling. Justice Matas stated:

> [The] appellant has confused eligibility of band Indians to sit on juries with a requirement that a jury panel *must* have band Indians represented on it. There is nothing in the *Jury Act*, R.S.M. 1970, c. J30, requiring any proportionate or minimum representation of band Indians on any jury, whatever the racial origin of an accused may be (*ibid.* at 90).

[77]*Ibid.* at 87.

[78]*Ibid.* at 88.

[79]*Ibid.* at 90.

[80]*Ibid.* at 91.

It was not until 1984 that three justices of the Saskatchewan Court of Appeal delivered a judgment which suggested a deviation from the traditional position that an array could only be challenged if the sheriff or his deputies were guilty of partiality, fraud or wilful misconduct. In *R.* v. *Bird*,[81] the appellant was a treaty Indian who appealed his conviction on the basis that the jurors who tried him were chosen from a panel that was returned through a process which systematically excluded Aboriginal people. Writing for a unanimous court, Chief Justice Bayda stated:

> A process which systematically excludes, either by design or unwittingly, an identifiable group from serving on a jury may be a sufficient ground for vacating a conviction made by a jury selected by that process.[82]

Bayda C.J. nevertheless dismissed the appeal, ruling that it was not necessary to decide the issue because the appellant's evidence did not establish that the process used in his case resulted in systemic exclusion of an identifiable group. Unfortunately, the *obiter dicta* in this judgment had no impact upon the development of equality jurisprudence under the *Bill of Rights*. In fact, it was selectively ignored by judges in subsequent jury cases.

In *R.* v. *Butler*,[83] the co-accused were brothers belonging to an American Indian Band. They made an unsuccessful motion to challenge the array at the outset of their joint trial. They indicated that they intended to establish that the sheriff had used the provincial voters' list as the source of names for the jury roll and that the enumeration process for the list did not reach certain classes of people, including Band Indians. The trial judge refused to hear the evidence and ruled that their motion could not proceed because the matters about which they complained, even if proved, would not establish partiality on the part of the sheriff.

The trial judge's decision was upheld by the British Columbia Court of Appeal. Justice Esson stressed that the appellants' argument was based solely on the inadequacy of the provincial voters' list. The cases of *Bradley and Martin (no. 1)*, *Diabo* and *LaForte* were cited as "settled law" requiring proof of deliberate exclusion to establish a violation of the *Bill of Rights*.[84] Interestingly, Esson J.A. did not mention that the *obiter dicta* in *Bird* contemplated a successful challenge based on inadvertent systemic discrimination. He ignored the fact that the *Bird* decision contradicted the so-called "settled law." His selective use of precedent was particularly striking since he quoted at length from the *Bird* judgment in order to support a separate aspect of his ruling.[85]

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[81][1984] 1 C.N.L.R. 122 (Sask. C.A.) [hereinafter *Bird*].

[82]*Ibid.* at 122.

[83][1985] 2 C.N.L.R. 107 (B.C.C.A.) [hereinafter *Butler*].

[84]*Ibid.* at 120-21.

[85]Although the appellate court in *Butler* upheld the dismissal of the pre-trial motion to challenge the array, it ordered a new trial on other grounds. On the third day of the trial, new evidence surfaced which demonstrated that the deputy sheriff was not impartial. Counsel for one of the two accused filed an affidavit claiming that the deputy sheriff admitted the existence of a deliberate policy of excluding Aboriginal jurors. Racist remarks were attributed to him. The deputy sheriff subsequently filed his own affidavit, claiming that his comments had been taken out of context. The presiding judge refused to address the matter because the trial was already in progress. On appeal,

The *Bird* decision did not alter the course of the evolution of Canadian equality jurisprudence. The judiciary continued to insist upon proof of purposeful discrimination in order to establish a violation of the *Bill of Rights*. Thus the *Bill of Rights* offered no greater protection against all white (or predominantly white) juries than subsection 629(1) of the *Criminal Code*. While Canadian law did not expressly sanction the systemic exclusion of Aboriginal, Arab, Asian, Black and Hispanic jurors, it precluded effective challenges to such *de facto* practices.

The advent of the *Charter* introduced a new dimension to jury panel challenges, but did not immediately facilitate their success. *R.* v. *Smoke*[86] was the first reported jury case involving a *Charter* argument. The accused challenged the array because it did not include any residents from two local Indian reserves. The evidence revealed that the two reserves contained approximately 1,200 eligible jurors. The evidence also indicated that Aboriginal persons living in municipalities outside of the reserves had been summoned to the jury panel. The trial judge denied the accused's motion, finding no partiality or wilful misconduct on the part of the sheriff. The accused then brought an application for prohibition with *certiorari* in aid to quash the trial judge's decision. Alternatively, he argued that the court should grant prerogative relief pursuant to subsection 24(1) of the *Charter* because the trial judge's ruling was contrary to subsection 11(d).[87] Judge Hollingworth acknowledged that empanelling Aboriginal persons from other municipalities was not equivalent to empanelling those who resided on the reserves. However, the fact that Aboriginal persons had been called as potential jurors was considered proof that there was no prejudice to the accused.[88] According to Hollingworth J., the accused's constitutional right to a fair trial by an impartial tribunal had not been violated.

The accused in *Smoke* did not allege a violation of his right to a trial by jury, as guaranteed by subsection 11(f) of the *Charter*. A recent Supreme Court of Canada judgment suggests that this might have been a useful legal strategy. In the case of *R.* v. *Sherratt*,[89] Madam Justice L'Heureux-Dubé remarked:

> The perceived importance of the jury and the *Charter* right to jury trial is meaningless without some guarantee that it will ... represent, as far as is possible and appropriate in the circumstances, the larger community.[90]

She then asserted:

> Provincial legislation guarantees representativeness, at least in the initial array. The random selection process, coupled with the sources from which this selection

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Esson J.A. ruled that the trial judge should have investigated the matter to determine whether or not the evidence proved partiality on the part of the deputy sheriff. The investigation not having been conducted, a new trial was granted. The *Bird* decision was considered because it involved a motion to vacate a conviction rather than a pre-trial motion to challenge an array.

[86][1984] 2 C.N.L.R. 178 (Ont. S.C.) [hereinafter *Smoke*].

[87]Subsection 11(d) states that any person charged with an offence has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

[88]*Smoke, supra* note 86 at 182.

[89][1991] 1 S.C.R. 509, 3 C.R. (4th) 129, 63 C.C.C. (3d) 193 [hereinafter *Sherratt* cited to S.C.R.].

[90]*Ibid.* at 525.

> is made, ensures the representativeness of Canadian criminal juries. (See the provincial Jury Acts.) Thus, little if any objection can be made regarding this crucial characteristic of juries.[91]

In support of the latter assertions, Madam Justice L'Heureux-Dubé quoted from a 1979 study conducted for the Law Reform Commission of Canada.[92] She did not mention the jurisprudence or literature[93] which contradicted the study's findings. Her comments were unrelated to the issue before the Court as the case at bar did not involve a challenge to the array. Presumably, in a case on point, the parties would draw the relevant material to the Court's attention. If, in the future, the Court were presented with proof that provincial statutes consistently fail to furnish representative jury panels, then a violation of subsection 11(f) of the *Charter* might be found.

A similar interpretation was recently adopted by a judge of the Alberta Queen's Bench in *R.* v. *Nepoose (no. 1)*.[94] The accused alleged that the underrepresentation of women on the panel from which her jury was to be selected violated subsection 11(f) of the *Charter*. In compiling the panel, the deputy sheriff confirmed 175 potential jurors, but only 98 people appeared in court as requested. After exemptions, there were 87 prospective jurors available for trial, 62 of whom were men and only 25 of whom were women.[95] The gender imbalance was attributed to the fact that the deputy sheriff inadvertently used a list with a ratio of 2.5 men for each woman.[96] Judge McFadyen ruled that the panel before her was "not reasonably representative of the community."[97] Based on the *obiter dicta* from Madam Justice L'Heureux-Dubé's judgment in *Sherratt*, she found a breach of the accused's right to a trial by jury. As a remedy, she ordered that a supplementary panel be called to correct the gender imbalance and to ensure the proportionate representation of Aboriginal women.[98]

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[91]*Ibid.*

[92]P. Schulman & E.R. Myers, "Jury Selection" in T. Elton & N. Brooks, eds., *Studies on the Jury* (Ottawa: Law Reform Commission of Canada, 1979) 395 at 408.

[93]See L. Smith, "Charter Equality Rights: Some General Issues and Specific Applications in British Columbia to Elections, Juries and Illegitimacy" (1984) 18 U.B.C. L. Rev. 371 at 397, note 192.

[94]*Supra* note 24.

[95]*Ibid.* at 11.

[96]*Ibid.* See also *supra* note 24.

[97]*Ibid.* at 12.

[98]McFadyen J. ordered that the supplementary panel be drafted by randomly selecting names from the jury roll and by rejecting all the men's names. This procedure would be followed until an additional 50 women's names were drawn. Only 37 women were required but McFadyen J. estimated that 50 names should be drawn in order to generate 37 prospective women jurors.

McFadyen J. further ruled that if this procedure did not generate the names of at least five Aboriginal women, then the names of the first selected women were to be struck and additional women's names drawn until at least five Aboriginal women's names were added to the panel. Aboriginal women would be identified by their addresses (*i.e.* women who lived on reserves were assumed to be Aboriginal). The Crown Attorney suggested that Aboriginal people represented four to five per cent of the local population but McFadyen J. contradicted him and stated that the proportion was in excess of ten percent. Proportionate representation would therefore require a minimum of six Aboriginal women out of a total of 124 potential jurors. McFadyen J. assumed that the process would generate the name of at least one Aboriginal woman who did not live on the reserves, which is why she ordered a minimum of only five names from the reserves (*ibid.* at 15-17).

The decision in *Nepoose (no. 1)* established an important Canadian precedent. By relying on subsection 11(f) of the *Charter*, the accused was not required to demonstrate deliberate exclusion in order to challenge the composition of the jury panel. She thereby avoided the principal obstacle which had impeded the success of earlier challenges. McFadyen J. appropriately focused on the problem of representativeness rather than being concerned with defending the process or exonerating the sheriff from blame. However, the importance of representativeness was inadequately explored. This inadequacy was due to the way in which the argument was framed.

By alleging a violation of section 11 of the *Charter*, the case was removed from equality discourse. It was therefore impossible to discuss meaningfully the significance of representativeness. The accused's objection to the gender imbalance in her jury panel was made within the context of a patriarchal society and a male-dominated legal system. However, her case was neither argued nor decided in light of those considerations. Thus the significance of achieving gender parity was obscured.[99]

Thus *Nepoose (no. 1)* established a dangerous precedent in Canadian law. While reliance on section 11 of the *Charter* may assist some defendants, it will ultimately undermine efforts to expose the inherent biases of the criminal justice system. By diverting attention away from the issues of power and inequality, it will preclude recognition of the jury selection process as an oppressive institution which perpetuates discrimination against traditionally disempowered people.

Section 11 of the *Charter* would be of no assistance to a man like Rodney King. It fails to address equality considerations; rather, it is intended merely to protect the legal rights of individuals who come into conflict with the law. The language of the section explicitly limits the scope of its protection to "[a]ny person charged with an offence." Thus a Black victim of racist violence committed by white assailants could not argue that subsection 11(f) guarantees the proportional representation of Black people on the jury panel.

Linking the issue of representativeness to the right to a trial by jury not only ignores the important concerns of victims, but also restricts the issue to a limited class of criminal jury trials. The *Charter* right to a trial by jury is explicitly limited to individuals charged with civilian offences punishable by at least

[99]One week after McFadyen J. ordered the supplementary panel to correct the gender imbalance in the original array, counsel for the accused submitted that the entire panel ought to be discharged because the jury selection procedure excluded young people and people living outside of a particular geographic region. People living more than 60 km from the courthouse were not included in the jury roll and no one under 23 years of age was summoned for the jury panel. Based on these exclusions, the accused argued that the selection procedure violated her right to a representative jury, as guaranteed by subsection 11(f) of the *Charter*. McFadyen J. rejected the argument, noting that misrepresentation of a particular group is not unconstitutional unless that group "has some relevance to the accused" whereby its exclusion might "cause ... some prejudice" to the accused. She referred to the gender imbalance in the initial array as an example of a factor that "had relevance and had to be corrected." She did not elaborate further upon the meaning of "relevance." This was a rather futile attempt to contextualize the issue of representativeness without the benefit of an equality analysis. See *Nepoose (no. 2)*, *supra* note 24 at 22-23.

five years imprisonment. These arbitrary restrictions demonstrate the absence of an equality basis for arguments developed under subsection 11(f).

The inability of subsection 11(f) to address equality considerations is apparent in many instances. For example, imagine that an Aboriginal man is accused of a highly publicized crime and as a result of the publicity, requests a change of venue for his trial. The judge grants his request but selects a venue whose demographics are significantly different from those of the community in which the crime was allegedly committed. In particular, the population of the newly selected judicial district is overwhelmingly white. Can the accused object to the judge's decision? Can he challenge the array if, as anticipated, it contains few Aboriginal members? If the jury panel accurately reflects the racial composition of the judicial district for the trial, then the arguments developed in *Sherratt* and *Nepoose (no. 1)* will prove to be of no assistance to the accused. Arguments for jury representativeness which are founded on subsection 11(f) of the *Charter* are so decontextualized that they cannot respond to many of the inequities of the criminal justice system. To be appreciated, the accused's concerns must be evaluated within the context of a racist society and a white-dominated legal system. In other words, his argument must be located within equality jurisprudence. Alleging a violation of subsection 15(1) of the *Charter* would therefore be the appropriate legal strategy under the circumstances.

Subsection 15(1) would also be available to victims of crime who are precluded from using section 11 to challenge the racial composition of jury panels. The equality rights of victims, as well as defendants, are violated when members of their race are excluded from the jury panel. The overwhelming majority of people involved in the criminal justice system are white (*e.g.* the police officers, the courtroom officers, the lawyers and the judges). Defendants and victims from racial minorities are likely to experience a sense of alienation in this all-white environment. The presence of people of colour on the jury may not eliminate, but may alleviate, their alienation. The absence of jurors of their own race increases the likelihood that there will be barriers to their ability to convey their version of the facts. In particular, it increases the likelihood that racial stereotyping will influence the jury's evaluation of the evidence.

White jurors are most likely to be influenced by racial stereotypes because they tend to have the least awareness about the dynamics of racism and they tend to have the least contact with communities of colour. However, all people are susceptible to racial stereotyping. Although it is possible to internalize the beliefs of the dominant culture, people of colour are least likely to adopt stereotypical beliefs about the members of their own race because they are likely to have contact with a community which exposes the falsity of those stereotypes. Jurors of the defendant's and victim's race may therefore correct an imbalance of attitudes which might otherwise govern the outcome of the trial.[100]

[100]Simulated jury studies have found that the race of the defendant affects determinations of guilt. White subjects in these studies were more likely to find a person of colour guilty than they were to find an identically situated white person guilty. These studies are summarized in S.L. Johnson, "Black Innocence and the White Jury" (1985) 83 Mich. L. Rev. 1611 at 1625-34. Johnson also summarized the results of similar studies which investigated the impact of the victim's race on

When members of the victim's race are excluded from the jury, there is an increased risk that racist attitudes will operate in the defendant's favour. The system's failure to address this risk demonstrates a disregard for the victim's needs; it trivializes and condones their victimization. The current jury selection process implies that crimes committed against white victims are more egregious and are therefore more deserving of efficacious prosecution. The process thereby violates the equality rights of victims of colour.[101]

In evaluating jury selection procedures, it is critical to move beyond an examination of the rights of the accused and of the victim to a consideration of the rights of prospective jurors. Since one of the primary functions of the jury is "to act as the conscience of the communities,"[102] all people should have equal access to jury duty in recognition of their equal worth as valued members of their community. Jurors are entrusted with an important task. The disproportionate over-representation of white people on jury panels implies that their values are more important, that their judgment is more respected, and that their perspectives are more legitimate than the values, judgment and perspectives of those who are under-represented. Jurors are invested with the power to make vital decisions which not only affect the outcome of individual trials but also contribute to the formation of community standards. The concentration of that power in the hands of white people constitutes institutionalized racism.

The jury also "provides a means whereby the public can learn about, and critically examine, the functioning of the criminal justice system."[103] Jurors are exposed to the mechanics of the courtroom process; the legal system is thereby demystified. Due to their under-representation on jury panels, people of colour are deprived of the equal benefit of this educational experience. White people are privileged by their participation in the jury system. This, too, constitutes institutionalized racism.

The equality rights of Aboriginal, Arab, Asian, Black and Hispanic people are violated by the laws, regulations and practices which result in their systemic exclusion from criminal jury panels. They are entitled to serve as jurors in all criminal trials, regardless of the race of the victim or of the accused.

The issue of representativeness on jury panels is quintessentially a question of equality and should be addressed as such. The early *Bill of Rights* cases were argued on that basis, albeit unsuccessfully. The rather dismal jurisprudence

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determinations of guilt. White subjects in these studies perceived defendants to be more culpable when their victims were white, less culpable when their victims were Black (*ibid.* at 1634-35). For further development of the argument that jurors of colour might correct this imbalance, see Herbert, *supra* note 11 at 23-24, 28-30. See also R. Jameson, "Ethnic Background May Influence Jurors' Decisions" (1980) 16:3 *Trial* 11.

[101]In order to demonstrate a violation of s. 15 equality rights, a victim of colour need not prove that the defendant would be convicted if the victim were white. The fact that the jury system reinforces the alienation and anxiety of victims of colour by failing to address the increased risk of racist decision-making in the defendant's favour, is sufficient to establish that victims of colour suffer a differential impact which disadvantages them.

[102]Law Reform Commission of Canada, *The Jury* (Report no. 16) by F.C. Muldoon, R.F. Paul & L.D. Lemelin (Ottawa: Minister of Supply and Services Canada, 1982) at 5.

[103]*Ibid.*

developed through those cases may have contributed to the reluctance to pursue the equality rights strategy. Counsel for defendants began to search for alternative approaches. The advent of the *Charter* presented an exciting opportunity for creative new arguments, but section 15 did not immediately come into effect.[104] Thus the temptation to use section 11 was strong. Moreover, the early section 15 cases mirrored the *Bill of Rights* jurisprudence and thereby quelled any optimism that may have existed in that regard.

R. v. *Kent, Sinclair and Gode*[105] was the first jury case involving an alleged violation of subsection 15(1) of the *Charter*. One of the co-accused, Sinclair, was a Treaty Indian whose mother tongue was Cree. At the outset of the trial, he challenged the array pursuant to section 558 (now section 629) of the *Criminal Code*. Unable to prove partiality on the part of the sheriff, his motion failed and he was ultimately convicted. On appeal, he argued that his equality rights had been violated because he was tried by an improperly constituted jury. Of the 114 people summoned for the original jury panel, only one was Aboriginal. The panel was exhausted before a full jury had been selected, so an additional 36 people were summoned from the jury roll. The supplementary panel included only one Aboriginal person (who eventually served on the jury). As proof of racial discrimination, the accused relied exclusively upon the fact that there were only two Aboriginal persons in a total panel of 148 potential jurors. His counsel submitted: "[w]e do not need more evidence than that."[106] The justices of the Manitoba Court of Appeal rejected this submission, ruling that it was insufficient simply to point to the under-representation of members of a particular race on the array. Justice Matas cited the requirement, articulated in the *Butler* case, that a violation of the equality provision of the *Bill of Rights* be proven by evidence of deliberate racial exclusion. He then declared that "this principle would be equally applicable to a challenge to a jury array based on the *Charter*."[107]

This initial decision was rather discouraging, but subsequent cases significantly altered the evolution of constitutional equality jurisprudence. In particular, the Supreme Court of Canada ruling in *Andrews* v. *Law Society of British Columbia*[108] marked a momentous departure from earlier *Bill of Rights* cases.

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[104]The *Charter* came into force on April 17, 1982. Due to a three-year moratorium set out in s. 32(2), s. 15 did not come into effect until April 17, 1985.

[105](1986), 40 Man. R. (2d) 160, 27 C.C.C. (3d) 405 (Man. C.A.) [hereinafter *Kent, Sinclair and Gode* cited to Man. R.].

[106]*Ibid.* at 174.

[107]*Ibid.* In the United States, the accused may establish a *prima facie* case of unconstitutional discrimination by demonstrating a wide disparity between the proportion of his or her race in the population of the county and the percentage represented on the jury panel. Once a *prima facie* case has been established, "the burden shifts to the State to rebut the presumption of unconstitutional action by showing ... permissible racially neutral selection criteria and procedures" (*Alexander* v. *Louisiana*, 405 U.S. 625 at 632 (1972)). American courts have declared that a *prima facie* case of discrimination cannot be rebutted merely by an official's testimony that the jury selection was conducted without bias. Specific and substantial evidence must be tendered to counter the evidence of systemic exclusion. See *e.g. Whitus* v. *Georgia*, 385 U.S. 545 (1967); *South Dakota* v. *Plenty Horse*, 184 N.W.2d 654 (So. Dak. Sup. Ct. 1971).

[108][1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 [hereinafter *Andrews* cited to S.C.R.].

Among other important developments, it adopted the principle developed under human rights legislation, that intent is not required as an element of discrimination.[109] It is now well established that subsection 15(1) of the *Charter* prohibits inadvertent as well as deliberate discrimination.[110] Thus provincial jury selection procedures may be unconstitutional notwithstanding the good intentions of those who administer them. Subsection 629(1) of the *Criminal Code* may also be unconstitutional because it precludes the success of jury panel challenges in the absence of deliberate misconduct on the part of the sheriff.

Surprisingly, recent cases have not manifested the kind of legal argument or judicial reasoning that might reasonably be anticipated in the post-*Andrews* era of *Charter* equality litigation. In *Chipesia*,[111] no *Charter* arguments were made. The accused and the victim were both Aboriginal persons and the offence allegedly occurred on an Indian reserve in British Columbia. The panel summoned for the trial did not include any Aboriginal jurors. The accused furnished evidence of two court circulars which outlined new provincial policies designed to increase the participation of Aboriginal persons on juries.[112] The circulars instructed sheriffs to consult Band membership lists in conjunction with provincial voters' lists because the latter systematically under-represent Indians living on reserves. Pursuant to the new policy, sheriffs would be provided with "an estimate of the number of Indians living on reserves in relation to the total population from which jurors are selected."[113] In preparing a jury roll, names of Aboriginal persons living on reserves were to be selected using these percentage figures as a target amount.

The accused submitted that the total exclusion of Aboriginal persons from the jury panel must have resulted from a conscious decision to ignore the new policy directives. He offered this argument as evidence of partiality on the part of the sheriff. Judge Harvey rejected the argument, noting that the sheriff prepared the jury list at a time when he had no knowledge of the accused's or victim's race or of the contents of the court circulars, which he testified he had never received. Harvey also noted that the provincial voters' list used by the sheriff to compile the jury roll may well have included the names of Aboriginal persons. Adhering strictly to the terms of subsection 629(1) of the *Criminal*

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[109]*Ibid.* at 173-75. In 1984, Professor Smith predicted that the success of *Charter* challenges to jury selection procedures would depend on the courts' position "on systematic or non-intentional discrimination arising from facially neutral provisions which have a disproportionate impact on a particular group" (Smith, *supra* note 93 at 390).

[110]"[A]s *Andrews* v. *Law Society of British Columbia* made clear ..., not only does the *Charter* protect from direct or intentional discrimination, it also protects from adverse impact discrimination ..." (*McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229 at 279, 2 C.R.R. (2d) 1).

In the United States, proof of purposeful discrimination is required in order to demonstrate a violation of the Equal Protection clause. Proof of a statute's disparate impact is insufficient. Disproportionate impact is not, however, completely irrelevant. The United States Supreme Court has ruled that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact ... that the law bears more heavily on one race than another" (*Washington* v. *Davis*, 426 U.S. 229 at 242 (1976)).

[111]*Supra* note 38 at 170.

[112]The circulars were issued by the Assistant Deputy Minister of Court Services in British Columbia. One was a draft dated June 1989 and the other was dated July 1989, with the effective date of the policy improvements indicated as September 1, 1989.

[113]*Chipesia*, *supra* note 38 at 170.

Code, he concluded that "there is no evidence which proves the sheriff or his deputy consciously, deliberately planned to exclude Native Indians from this jury list."[114]

The accused did not allege an infringement of subsection 15(1) of the *Charter* but Judge Harvey nevertheless chose to address the issue. He indicated in *obiter dicta* that the decision in *Kent, Sinclair and Gode* would be "determinative" of a subsection 15(1) challenge.[115] Although an equality rights violation was not pleaded, with the consequence that Harvey J. did not have the benefit of counsel's submissions on this point, it is nonetheless astonishing that he deferred to a judgment which not only pre-dated critical developments in *Charter* equality jurisprudence, but which was explicitly based on *Bill of Rights* jurisprudence.

The most recent reported decision involving a challenge to a jury panel was *Nepoose (no. 2)*.[116] The defendant was an Aboriginal woman accused of a crime that was committed in the Aboriginal community in which she resided. That community is located within a judicial district with a radius of approximately 60 km. The jury panel was drawn from the population of the larger judicial district, of which Aboriginal people constitute only a small percentage. The accused argued that her constitutional right to a trial by jury included the right to be tried by a jury selected from the community in which the offence was committed. She further argued that the community in which the offence was committed ought to be defined in a limited fashion, particularly in cases involving crimes committed on an Indian reserve in which both the victim and defendant are Aboriginal persons. Judge McFadyen held that "nothing ... in the criminal law or the *Charter* ... requires such a limited interpretation of the right to the benefit of a jury trial."[117]

McFadyen J. explained her decision as follows:

> While participation from minority groups must continue to be encouraged and facilitated, no accused is entitled to trial by a jury selected on the basis of racial considerations which would result in the elimination of the general population from the jury panel.[118]

McFadyen J. failed to recognize that the jury panel before her had in fact been selected (albeit unintentionally) "on the basis of racial considerations" which resulted in the elimination of Aboriginal persons who, moreover, constitute part of "the general population." The practice of summoning jurors from a large (predominantly white) geographic region drastically reduced the number of Aboriginal persons on the panel. The requested geographic restriction would facilitate the participation of Aboriginal persons, an objective which McFadyen J. endorsed. The proposed restriction would simultaneously decrease the participation of non-Aboriginal persons, but it would not thereby violate their equality

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[114]*Ibid.* at 171.
[115]*Ibid.* at 170.
[116]*Supra* note 24.
[117]*Ibid.* at 25.
[118]*Ibid.*

rights, as Judge McFadyen suggested.[119] Subsection 15(2) of the *Charter* recognizes the constitutional legitimacy of measures undertaken to ameliorate the material conditions of inequality suffered by disempowered groups.[120]

The recent decisions in *Chipesia* and *Nepoose (no. 2)* suggest that the Supreme Court's interpretation of subsection 15(1) has not yet been fully embraced by the lower courts. While it is disconcerting that cases are likely to require appellate review in order to receive a proper contextualized equality analysis, it is comforting that, in the end, existing provincial jury selection procedures are unlikely to withstand *Charter* scrutiny. The constitutional equality provisions minimally guarantee protection against the systemic exclusion of potential jurors based on their race.

The prospect of successful court challenges may induce legislative reform.[121] However, the over-representation of white people on juries will not be eliminated simply by amending the provincial statutes and regulations. The in-court process for empanelling juries for criminal trials also contributes to the exclusion of Aboriginal, Arab, Asian, Black and Hispanic jurors.[122] This process is governed by the provisions of the *Criminal Code*.[123] The relevant provisions are currently undergoing reform.[124]

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[119]"[T]o exclude eligible members of society because they were not of a particular race would be as discriminatory as to exclude them because they were of a particular race" (*ibid.* at 26). In support of this statement, McFadyen J. quoted from a *Bill of Rights* case: *Bradley and Martin (no. 2)*, *supra* note 67. In that case, it was said that:

> It is my opinion that the Bill of Rights does not attempt to, and indeed does not have the power of forcing upon the Province of Ontario the obligation to use discrimination in the selection of jurors. In my view it would be as much discrimination to insist that a particular number of persons be of a particular race or colour as it would be to say that such persons cannot participate as jurors in the trial process (*Bradley and Martin (no. 2)*, *ibid.* at 40-41).

She also quoted from a pre-*Andrews Charter* case.

> The equality provisions of s. 15 do not require a jury composed entirely or proportionately of persons belonging to the same race as the accused. An accused has no right to demand that members of his race be included in the jury. To so interpret the Charter would run counter to Canada's multicultural and multiracial heritage and the right of every person to serve as a juror ... It would mean the imposition of inequality (*Nepoose (no. 2)*, *ibid.* at 26, quoting *Kent, Sinclair and Gode*, *supra* note 105 at 174-75).

[120]"By its terms s. 15(2) informs us that measures aimed at ameliorating the conditions of those who are disadvantaged because of such personal characteristics as race ... (those in other words who have been the victims of discrimination) are constitutionally permissible" (*Harrison* v. *U.B.C.*, [1990] 3 S.C.R. 451 at 474-75, 77 D.L.R. (4th) 55, Wilson J. (dissenting on another point)).

[121]The Attorney General of Ontario is conducting a review of that province's jury selection process. See *House of Commons Debates* (11 June 1992) at 11796. See also T. Tyler, "Provincial Task Force to Probe How Jurors Selected for Duty" *The Toronto Star* (9 May 1991) A7. Other provinces may also be undertaking similar reviews. The Aboriginal Justice Inquiry of Manitoba made several useful recommendations which should be implemented in all of the provinces and territories (*The Justice System*, *supra* note 12 at 383, 387).

[122]For example, on January 30, 1989 at the Thompson assizes in Winnipeg, Aboriginal people represented 36% of the initial jury panel but the three juries constituted from the panel contained only two Aboriginal members each. Thus Aboriginal people represented only 17% of each jury (*The Justice System*, *ibid.* at 379).

[123]*Criminal Code*, s. 631.

[124]This paper was written in June 1992.

Under the existing selection procedure, the names of jury panel members are called at random and the individuals come forward in the courtroom. Both the aceused and the Crown are permitted to challenge each potential juror either peremptorily[125] or for cause.[126] Both are entitled to an unlimited number of challenges for cause.[127] The accused is entitled to twenty, twelve or four peremptory challenges, depending on the seriousness of the offence charged.[128] The Crown is entitled to only four peremptory challenges, but may direct as many as forty-eight jurors to stand by until the jury panel has been exhausted.[129] Jurors stood aside are only recalled if a full jury is not selected from the remaining panel.[130] The accused is required to declare whether or not each juror will be challenged before the Crown is required to make a similar declaration.[131] Any person whose name is called and who is not rejected or stood aside is sworn as a jury member. The process continues until suffieient jurors are sworn. In the provinces, a jury consists of twelve members; in the Yukon Territory and the Northwest Territories, it consists of only six members.[132]

In the post-*Charter* era, numerous courts examined the constitutional validity of this process. The limit on the number of jurors in the Territories was consistently declared invalid, albeit never by the Supreme Court of Canada.[133] Numerous defendants objected to the Crown's ability to stand aside jurors and to the requirement that the accused declare first whether or not a prospective juror would be challenged. These objections were made with varying degrees of success.[134] The cases culminated in a recent Supreme Court of Canada decision which, in turn, prompted the current process of legislative reform.

In *R.* v. *Bain*,[135] the Supreme Court held that the Crown's exclusive right to stand aside jurors violates the defendant's constitutional right to an independent and impartial jury. The numerical discrepancy between the Crown's and the defendant's ability to dismiss prospective jurors permits the Crown a greater role in fashioning the jury. This impairs the appearance of impartiality which is

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[125]A peremptory challenge is made by objecting to a prospective juror without offering any justification or explanation for the objection.

[126]A challenge for cause requires the articulation of a justification for excluding a prospective juror. There are a limited number of acceptable grounds to justify a challenge for cause. See text accompanying notes 170-73.

[127]*Criminal Code*, s. 638(1).

[128]*Ibid.* at s. 633.

[129]*Ibid.* at s. 634(1), (2).

[130]*Ibid.* at s. 641.

[131]*Ibid.* at s. 634(3).

[132]*Ibid.* at s. 632. In those Territories, the accused is entitled to half the number of peremptory challenges and the prosecutor may not direct more than 24 jurors to stand by.

[133]*R.* v. *Bailey* (1985), 17 C.R.R. 1 (Y.S.C.); *R.* v. *Punch*, [1985] N.W.T.R. 373, 48 C.R. (3d) 374 (S.C.) [hereinafter *Punch* cited to N.W.T.R.]; *R.* v. *Emile*, [1988] N.W.T.R. 196, 42 C.C.C. (3d) 408 (C.A.).

[134]See *e.g. R.* v. *Olson* (1987), 47 Man. R. (2d) 115, 34 C.C.C. (3d) 564 (Q.B.); *R.* v. *Byers* (1987), 66 Nfld. & P.E.I.R. 212, 36 C.C.C. (3d) 86 (P.E.I.S.C.); *R.* v. *Stoddart* (1987), 37 C.C.C. (3d) 351, 20 O.A.C. 365 (C.A.); *R.* v. *Favel* (1987), 60 Sask. R. 176, 39 C.C.C. (3d) 378 (C.A.); *R.* v. *L.(P.T.)* (1990), 9 W.C.B. (2d) 660 (P.E.I.S.C.).

[135][1992] 1 S.C.R. 91, 87 D.L.R. (4th) 449, rev'g (1989), 68 C.R. (3d) 50, 47 C.C.C. (3d) 250 (Ont. C.A.) [hereinafter *Bain* cited to S.C.R.].

an essential element of the right guaranteed by subsection 11(d) of the *Charter*.[136] Thus the Court declared the invalidity of subsections 634(1) and (2) of the *Criminal Code* which "provide the Crown with a combination of peremptory challenges and stand-bys that is more than four times in excess of the number of peremptory challenges permitted to an accused."[137] The declaration of invalidity was suspended for six months.

The federal government responded to this decision by introducing Bill C-70, *An Act to Amend the Criminal Code (Jury)*.[138] Passage of the Bill was expedited so that the amendments could come into force upon the expiry of the six-month suspension of the declaration in *Bain*.[139] Bill C-70 proposes three fundamental changes to the in-court jury selection process.[140] It repeals the section of the *Criminal Code* which limits the number of jurors to six in the Yukon and Northwest Territories.[141] It stipulates that, in every trial, the accused and the Crown will be entitled to equal numbers of peremptory challenges: twenty, twelve or four each, depending on the gravity of the offence charged.[142] Finally, it requires the presiding judge to call alternately on the accused and the prosecutor to declare first whether or not a juror shall be challenged.[143]

The primary objective of Bill C-70 is to equalize the positions of the accused and the Crown in selecting jurors for criminal trials. The Supreme Court ruling in *Bain* will eliminate the tactical advantage previously enjoyed by the Crown. However, under certain circumstances, it would leave the Crown with fewer peremptory challenges than the accused.[144] The provisions of Bill C-70 preclude that eventuality.[145]

In its haste to respond to the *Bain* decision before the six-month suspension of the declaration expires, the federal government has refused to pause to address the issue of racism within the criminal jury selection process. The Honourable Ian Waddell, representative of the New Democratic Party, has crit-

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[136]*Ibid.* at 104, 148-49.

[137]*Ibid.* at 104.

[138]Bill C-70, *An Act to Amend the Criminal Code (Jury)*, 3d Sess., 34th Parl., 1992 (came into force 23 July 1992, S.C. 1992, c. 41) [hereinafter Bill C-70].

[139]*House of Commons Debates* (5 May 1992) at 10100; *House of Commons Debates* (11 June 1992) at 11795-97.

[140]It also proposes other minor changes which will not be canvassed in this paper.

[141]Bill C-70, s. 2. This amendment has the potential to improve the racial diversity of juries in the Yukon and Northwest Territories. See Law Reform Commission of Canada, *The Jury in Criminal Trials* (Working Paper No. 27) (Ottawa: Minister of Supply and Services, 1980) at 36. See also *Punch*, *supra* note 133 at 392.

[142]Bill C-70, s. 2, introducing a new s. 634(2).

[143]The judge shall call upon the accused first with respect to the first juror (Bill C-70, s. 2, introducing a new s. 635(1)).

[144]In some cases, the accused will have 20 or 12 peremptory challenges whereas the Crown is always limited to four. See text accompanying notes 128-29.

[145]"The Supreme Court of Canada has suspended the effect of its decision for six months in order to permit Parliament to amend the Criminal Code. ... Failure to enact new jury provisions before July 23 would have the potential to leave the Crown at a distinct disadvantage in the jury selection process once the suspension of the judgment is lifted on that date" (Mr. Rob Nicholson, *House of Commons Debates* (5 May 1992) at I0099).

icized the government for "[going] through the process of drafting and debating amendments to the Criminal Code without making full use of this opportunity to really effect meaningful and innovative change ..."[146] His criticism has been met with the response that the Department of Justice is currently studying the problem.[147]

In fact, the new in-court jury selection procedure is likely to increase the participation of Aboriginal, Arab, Asian, Black and Hispanic jurors, at least marginally. However, this improvement will not be to the federal government's credit. Rather, it will be a serendipitous result of the abolition of stand-asides in the *Bain* decision.

The judicial reasoning in *Bain* was not informed by an anti-racist critique of the jury selection process. The Supreme Court Justices mentioned only one concrete example of an abusive use of stand-bys. They cited *R.* v. *Pizzacalla*,[148] a case in which the Crown Attorney admitted using 20 out of 23 stand-asides to exclude prospective male jurors. The result was that an all-female jury tried and convicted the male defendant on three counts of sexual assault. The defendant successfully appealed his conviction, arguing "that the manner in which the Crown exercised its right to stand aside jurors gave 'the appearance that the prosecution had secured a favourable jury, rather than simply an impartial one.'"[149] The implication was that subsection 11(d) of the *Charter* was thereby violated.[150]

The Ontario Court of Appeal decision in *Pizzacalla* is the only reported case involving allegations of improper use of stand-asides. There is, however, reason to suspect that it is common practice for some Crown Attorneys to reject jurors on the basis of their race. The perception of criminal defence lawyers surveyed by the Aboriginal Justice Inquiry of Manitoba supports such a suspicion. Asked whether Crown attorneys challenged or stood aside Aboriginal persons more often than non-Aboriginal persons, 83% of Legal Aid staff lawyers and 77% of private counsel responded affirmatively.[151] Based on my limited exposure to jury selections, I have come to share that perception.[152]

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[146]*House of Commons Debates* (11 June 1992) at 11793.

[147]*Ibid.* at 11796.

[148](1991), 7 C.R. (4th) 294 (Ont. C.A.) [hereinafter *Pizzacalla*].

[149]*Ibid.* at 296.

[150]This may be inferred from the cases which were cited by the Court.

[151]Only 17% of Crown attorneys agreed (*The Justice System, supra* note 12 at 384).

[152]As a law student in the spring of 1987, I obtained a summer position with the Attorney General's office in Kingston, Ontario. My first day on the job was also the day for jury selections for the summer court sitting. I watched attentively as the juries for four trials were empanelled. There was only one person of colour in the array, a Chinese woman who appeared to be in her thirties. Twice her name was called and both times she was stood aside. Later, I asked the Crown Attorney why he had rejected her. He responded that although his actions "might appear to be racist," he actually had a legitimate reason for excluding her: "She probably cannot understand English well enough to follow the testimony during the trial." The woman had complied with all of the (English) directions given during the selection process. She had not spoken a word. There was no reason to believe that English was not her first language or that she could not understand and speak it with ease.

On one other occasion, I had the opportunity to observe a criminal jury selection process. I went

Although widespread racist use of stand-asides has not been empirically documented, there is sufficient evidence of misuse to discourage the preservation of this Crown right.[153] Moreover, as Justice Cory stated in *Bain*,

> [I]t would seem that whenever the Crown is granted statutory power that can be used abusively then, on occasion, it will indeed be used abusively. The protection of basic rights should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to monitor or control.[154]

Cory J. did not specifically contemplate the influence of racism on the jury selection process, but his comments are nevertheless appropriate in that context.

While the abolition of stand-asides is desirable, it will not completely eliminate the potential for racism in jury selections. Through the use of peremptory challenges, both the Crown and the defence have at their disposal the means to exclude jurors summarily. Bill C-70 explicitly preserves the use of peremptory challenges. In fact, it increases the number of challenges available to the Crown in certain circumstances.[155] With no reasons provided and none demanded, a minimum of eight and as many as forty prospective jurors may be challenged peremptorily.[156] Both parties have considerable opportunities to make juror selections based on racist or otherwise discriminatory grounds.[157] The in-court process for empanelling juries consequently remains open to manipulation and abuse.

Past incidents of abuse have been documented. The Aboriginal Justice Inquiry of Manitoba recorded the following statistics, which include the use of stand-asides as well as peremptory challenges:

> On one day of the Thompson assizes in January 1989, thirty-five of the forty-one Aboriginal people who were called to serve on three juries were rejected. In one case, the Crown rejected sixteen Aboriginal jurors; in another, the defence rejected two and the Crown rejected ten; in the third and final case, the defence accepted all the proposed Aboriginal jurors while the Crown rejected nine. Two jurors were rejected twice.[158]

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to the Kingston courthouse with a group of law students as part of a class assignment in 1988. Afterward, a student commented that there were few people of colour on the jury panel (only three) and that those whose names were called (one Hispanic woman and one Asian man) were stood aside by the Crown Attorney; the Hispanic woman was stood aside twice.

[153]See text accompanying note 158.

[154]*Bain*, *supra* note 135 at 103-04. Justices Lamer and LaForest concurred.

[155]See text accompanying notes 144, 145.

[156]In cases in which the prosecution and the defence are entitled to 20 peremptory challenges, as many as 40 prospective jurors may be excluded.

[157]The Crown and the accused are provided with a list of the names, occupations and addresses of the prospective jurors. Certain details can be gleaned from this panel list. For example, some names suggest that the juror is probably Jewish, some addresses suggest that the juror is probably poor or working-class, and some occupations suggest that the juror is probably middle-class or wealthy. If the juror's name is called, other details immediately become apparent. Personal characteristics such as gender, race and age are usually identifiable. Certain types of disabilities are visible. Finally, a juror's mode of dress may be informative. For example, the observer may notice an expensive suit, a yarmulka or a turban. Thus, in addition to racism, other forms of discrimination such as ableism, anti-Semitism, and classism may influence the selection process.

[158]*The Justice System*, *supra* note 12 at 384.

The highly publicized Helen Betty Osborne case provides another useful example. In that case, an Aboriginal woman was murdered in a community in which Aboriginal people constitute more than 50% of the population. The defence counsel peremptorily challenged the six Aboriginal jurors who were called. A jury with no Aboriginal members was empanelled for the trial.[159]

Canadian courts have yet to be confronted by constitutional challenges to such discriminatory practices. Based on *obiter dicta* from various Supreme Court decisions, the judicial response to some potential arguments may be predicted. In his dissenting opinion in *Bain*, Mr. Justice Gonthier suggested that the *Charter* offered protection against prosecutorial abuse of peremptory challenges based on race.[160] However, in *Sherratt*, Madam Justice L'Heureux-Dubé commented that peremptory challenges were justified notwithstanding that they can "be used by the parties to alter somewhat the degree to which the jury represents the community."[161] Thus it appears that a prosecutor's racially motivated use of peremptory challenges does not violate the defendant's right to a trial by a (representative) jury, as guaranteed by subsection 11(f) of the *Charter*. The defendant's right to an impartial tribunal, as guaranteed by subsection 11(d), may offer no greater protection under the circumstances. In *Bain*, Justice Stevenson remarked that the peremptory challenge "may be used under partisan considerations, and so long as the right of exercise is proportionate neither the crown nor the accused can be said to have an unconstitutional advantage."[162]

The judicial response to a subsection 15(1) argument is particularly difficult to predict. In the past, Supreme Court justices have been rather emphatic about the unfettered nature of peremptory challenges, but no pronouncements have been made in a context in which the issue of racism was before the Court. In the 1979 case of *Cloutier* v. *R.*,[163] the Court ruled that an accused person who unsuccessfully challenges a prospective juror for cause is not thereby precluded from exercising a peremptory challenge with respect to the same juror.[164] Mr. Justice Pratte reasoned as follows:

> The very basis of the right to peremptory challenges, therefore, is not objective but purely subjective. ... The very nature of the right to peremptory challenges and the

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[159]*Ibid.* See also *House of Commons Debates* (11 June 1992) at 11794; *House of Commons Debates* (12 June 1992) at 11896.

[160]*Bain*, *supra* note 135 at 133. Madam Justiee McLachlin and Mr. Justice Iacobucci concurred.

[161]*Sherratt*, *supra* note 89 at 532. This was reiterated in Gonthier J.'s dissenting judgment in *Bain*, *ibid.* at 126.

[162]*Bain*, *ibid.* at 159. Contrary to Stevenson J.'s assertion, a party who wishes to secure an exclusively white jury will almost inevitably have a tactical advantage, notwithstanding that both parties have equal numbers of peremptory challenges. Since virtually all jury panels are predominantly white, peremptory challenges can be used to deplete the pool of jurors of colour. If it is not depleted, then it will suffer disproportionate losses. Consider, for example, a panel of 100 jurors, 75 of whom are white. If one party exercises 20 peremptory challenges to exclude white jurors and the other exercises 20 peremptory challenges to exclude jurors of colour, then the remaining panel will include 55 white jurors and 5 jurors of colour. The initial panel which was 75% white is now almost 92% white.

Stevenson J.'s remark also ignores the equality rights of the jurors who are entitled not to be excluded on the basis of their race.

[163][1979] 2 S.C.R. 709, 48 C.C.C. (2d) 1 [hereinafter *Cloutier* cited to S.C.R.].

[164]This has been incorporated into Bill C-70, s. 2, introducing a new s. 634(1).

> objectives underlying it require that its exercise be entirely discretionary and not subject to any condition.[165]

The "purely subjective" nature of peremptory challenges was recently reiterated by Justice Stevenson in *Bain*.[166] Thus the Supreme Court appears reluctant to impose limits on the exercise of peremptory challenges. It may, however, be compelled to do so if confronted with circumstances which amount to a blatant violation of subsection 15(1) of the *Charter*.

In the United States, the Supreme Court has ruled that a prosecutor's racially motivated use of peremptory challenges violates the Equal Protection Clause of the *Fourteenth Amendment*.[167] It has recently extended that ruling to defence counsel's exercise of peremptory challenges.[168] Canadian courts may some day reach similar conclusions. However, rather than relying on the judiciary to respond to complaints of misuse, it would be preferable to eliminate peremptory challenges.[169] The logic and fairness of preserving peremptory challenges in Bill C-70 is questionable, given that they have been used in the past to exclude jurors based on their race.

As the Aboriginal Justice Inquiry of Manitoba recommended, it would be best to preserve only challenges for cause as a means for rejecting prospective jurors.[170] Challenges for cause are not readily susceptible to abuse. The grounds for such challenges are exhaustively enumerated in subsection 638(1) of the *Criminal Code*. The most common ground is that the juror is not "indifferent between the Queen and the accused." When a challenge for cause is asserted, the opposing party may admit it, in which case the juror will not be sworn.[171] The opposing party may alternatively submit that the ground for the challenge is not recognized in law, in which case the judge will rule on the propriety of the challenge.[172] Finally, the opposing party may contest the challenge, in which case the issue will be tried by the two jurors who were last sworn.[173] Given the stringency of the challenge procedure, it would be very difficult to effect a race-motivated exclusion under the pretext of one of the permitted grounds. The

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[165]*Cloutier*, *supra* note 163 at 720-21.

[166]*Bain*, *supra* note 135 at 153.

[167]*Batson* v. *Kentucky*, 476 U.S. 79 (1986). For more information on the American case law, see C. Petersen, "The United States Criminal Jury Selection Process" in T. Pickard & P. Goldman, eds., *Dimensions of Criminal Law* (Toronto: Emond Montgomery, 1992) 1115.

[168]*Georgia* v. *McCollum*, 120 L. Ed. 2d 33 (1992).

[169]The elimination of peremptory challenges must occur as part of a comprehensive overhaul of the criminal jury selection process. Jury panels must become representative and the challenge for cause procedure must be improved (see below). In the absence of these changes, the elimination of peremptory challenges may reinforce the over-representation of white people on juries. This has happened in England. See Herbert, *supra* note 11 at 3-4.

[170]See *The Justice System*, *supra* note 12 at 385.

[171]See *R.* v. *Hubbert* (1976), 11 O.R. (2d) 464 at 479, 29 C.C.C. (2d) 279 (C.A.), aff'd [1977] 2 S.C.R. 267, 15 O.R. (2d) 324 [hereinafter *Hubbert* cited to O.R.].

[172]The Ontario Court of Appeal suggested in *Hubbert* the following example of an improper challenge: "that a prospective juror and a prospective witness are of the same racial origin" (*ibid.* at 479).

[173]*Criminal Code*, s. 640(2). If no jurors have yet been sworn, then two prospective jurors are appointed by the Court to try the issue.

challenger must satisfy the presiding judge that there is some foundation for the challenge. In order to do so, counsel must communicate a reason outside of the mere words of the *Criminal Code*.[174] Although challenges for cause are not restricted to extreme cases or exceptional circumstances,[175] they are confined to cases in which there is a realistic potential for the existence of partiality on a sufficiently articulated ground.[176] In Canada, counsel are rarely permitted to challenge a juror for cause. If permitted to proceed, a challenger may call the prospective juror as a witness. The opposing party may also question the juror. The judge exercises control over the process and may rule as to the relevance of the questioning, but the ultimate determination of the success of the challenge is left to the two triers of the issue. If the triers decide that the challenge has been substantiated, then the juror will not be sworn. The triers may, however, find against the challenger, in which case the juror will be sworn (provided that the juror is not then peremptorily challenged).

Clearly, it is difficult to misuse the challenge for cause procedure to strike prospective jurors on account of their race. Unfortunately, it is equally difficult to use the procedure to exclude jurors who adhere to biased views which may jeopardize the impartiality of a trial. Based on the grounds enumerated in subsection 638(1) of the *Criminal Code*, a defendant or a prosecutor should be permitted to reject a juror whose racist views render him or her "not indifferent between the Queen and the accused." However, difficulty may arise in obtaining permission to question jurors in such a way as to elicit possible racial prejudice. In the past, the judiciary has been reluctant to accept mere apprehension of racism as a foundation for a challenge for cause.[177]

Two Ontario cases furnish evidence of this reluctance. In *R.* v. *Racco (no. 2)*,[178] Judge Graburn refused to permit defence counsel to question prospective jurors about their possible prejudice against Italians. He stated:

> I know of no prejudice against any ethnic group in this city, and no evidence to that effect has been tendered before me ... and I am most anxious at the outset of the trial that challenges for cause do not furnish the background of racial, national or religious overtones in the trial ... It may be that in other places a hint of bias or prejudice has been detected and that a challenge for cause has been necessary in order to ensure the accused a fair trial, but in my opinion, such is not evident in this city.[179]

In *R.* v. *Crosby*,[180] the accused was a Black man who sought to question prospective jurors about their possible racism. Judge Osler noted that the major-

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[174]The Ontario Court of Appeal has held that the reason must be "in more than general words" (*Hubbert, supra* note 171 at 479). The Supreme Court of Canada has ruled that the trial judge "must be given an adequate explanation for the challenge outside of the mere words of the section" (*Sherratt, supra* note 89 at 527-28).

[175]See text accompanying note 184.

[176]See text accompanying note 186.

[177]The United States Supreme Court has similarly developed a restrictive test for determining when race-directed questions may be put to prospective jurors. For information on the American process, see Petersen, *supra* note 167 at 1118-20.

[178](1975), 29 C.R.N.S. 307, 23 C.C.C. (2d) 205 (Ont. Co. Ct.) [hereinafter *Racco (no. 2)* cited to C.R.N.S.].

[179]*Ibid.* at 310.

[180](1979), 49 C.C.C. (2d) 255 (Ont. H.C.).

ity of Crown witnesses were white and that the majority of defence witnesses were Black. He also noted that "few, if any," of the prospective jurors were Black. He nevertheless refused to permit the questioning based on the following reasons:

> I think it is a matter of common knowledge that throughout society there are many people who hold particular prejudiced views about other segments of society. ... Certain long persisting prejudices are generally acknowledged, relating frequently to religious differences and frequently to differences of colour. Sometimes they relate to differences of national origin. From time to time something in the nature of a cause celebre arises in a given community which indicates that passions are running high and that hate and prejudice regarding one or more segments of the community is rampant in that community. Fortunately, in our land we have been spared most of the major manifestations of this phenomenon. ... It seems to me that, in the absence of any notorious episode in a community of the type I have mentioned, to permit challenges of this kind to go forward simply on the ground that man [*sic*] is prejudiced and that black and white may frequently be prejudiced against each other is to admit to a weakness in our nation and in our community which I do not propose to acknowledge.[181]

Osler J.'s requirement that there be a "notorious episode" before the potential for racism can be addressed was consistent with other early cases on the use of the challenge for cause procedure. In *Hubbert*, five justices of the Ontario Court of Appeal unanimously ruled that only in "extreme cases" would publicity concerning a particular crime give rise to the degree of partiality that would lead to the right to challenge for cause.[182] The justices stressed that trials "should not be unnecessarily prolonged" by "speculative" challenges.[183]

In the post-*Charter* era, a defendant's right to a trial by an independent and impartial tribunal may override these considerations. In *Sherratt*, Madam Justice L'Heureux-Dubé criticized the trial judge for using the word "extraordinary" to describe the challenge for cause procedure. "The process," she wrote, "is neither 'extraordinary' nor 'exceptional.'"[184] She elaborated:

> If the challenge process is used in a principled fashion, according to its underlying rationales, possible inconvenience to potential jurors or the possibility of slightly lengthening trials is not too great a price for society to pay in ensuring that accused persons in this country have, and appear to have, a fair trial before an impartial tribunal, in this case, the jury.[185]

The threshold test, as established by the Supreme Court of Canada, is whether or not there exists a realistic potential for partiality on the part of a prospective juror.[186] It remains to be seen whether the judiciary will be willing, in future cases, to admit the realistic potential for racist partiality on the part of virtually any juror.

To refuse to do so would demonstrate a regrettable lack of even rudimentary race awareness. People of colour experience racism in all aspects of their

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[181] *Ibid.* at 255-56.
[182] *Hubbert*, *supra* note 171 at 477.
[183] *Ibid.* at 476.
[184] *Sherratt*, *supra* note 89 at 536.
[185] *Ibid.* at 533.
[186] *Ibid.* at 536.

lives (*e.g.* employment, housing, public transit and education). It is unrealistic to assume that racism will not also be present in the jury room. The apprehension of bias that may be experienced by a defendant of colour, or by the prosecutor in a case involving a victim of colour, should not be trivialized or ignored. Counsel should be permitted to question prospective jurors in such a way as to attempt to identify those whose racial prejudices would likely interfere with their ability to be fair.

Such a liberalization of the challenge procedure should also extend to cases in which there is a reasonable apprehension of other forms of discrimination. For example, in cases involving lesbian or gay victims or defendants, counsel should be permitted to inquire about prospective jurors' potential homophobia.[187] Similar inquiries might be necessary, in appropriate circumstances, with respect to anti-Semitism, ableism, classism or sexism.

In the *Pizzacalla* case, the Crown Attorney might not have been inclined to stand aside male jurors if he could have been assured that they were not biased against the victims. The case involved allegations of sexual assault made by female employees of the male accused. The Crown explained his actions as follows:

> In my experience, I was of the view that I might encounter a man or more than one man who felt that, somehow, a person in the workplace has the right to fondle, touch, make passes at, or otherwise touch people in the workplace.[188]

Given the prevalence of sexual harassment in the workplace,[189] the Crown's concern could hardly be characterized as unreasonable. He should have been permitted to question the jurors about their attitudes regarding sexual harassment.

Liberalization of the challenge for cause procedure is a crucial element of the required reform of the Canadian criminal jury selection process. A commit-

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[187]Ruthann Robson recounts the story of Annette Green, a battered woman who was convicted of murder for killing her abusive lesbian lover. Green's defence attorney advised Professor Robson that "[o]ne jury member related an incident to the judge in which two venire members spoke in the women's restroom about their desire to be selected as jurors in order to 'hang that lesbian bitch'" (R. Robson, "Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory" (1990) 20 Golden Gate University L. Rev. 567 at 575, note 35). See also Harvard Law Review Editors, *Sexual Orientation and the Law* (Cambridge: Harvard University Press, 1990) at 42-43; A. Young, "Out of the Closets, Into the Street" in K. Jay & A. Young, eds., *Out of the Closets: Voices of Gay Liberation* (New York: Douglas/Links, 1972) 6 at 15.

In a recent New York case involving the trial of two men for the murder of a gay man in a "gay bashing" incident, defence counsel requested that prospective jurors be asked whether or not they were lesbian or gay in order to exclude all lesbians and gay men from the jury. State Supreme Court Justice Ralph Sherman refused to put the question to all the prospective jurors, but did ask one juror whether she was a lesbian because she indicated that she "knew gays." See "Judge Asks Female Juror If She Is a Lesbian" *Bay Windows* (7 November 1991) 12.

[188]*Pizzacalla*, *supra* note 148 at 295.

[189]See Canadian Human Rights Commission, *Unwanted Sexual Attention and Sexual Harassment: Results of a Survey of Canadians* (Ottawa: Ministry of Supply and Services, 1983); B. Robichaud, *A Guide to Fighting Workplace Sexual Harassment/Assault* (Ottawa: Cheriton Graphics, 1988); C. Backhouse & L. Cohen, *The Secret Oppression: Sexual Harassment of Working Women* (Toronto: MacMillan, 1978).

ment to facilitate the participation of jurors of colour must be accompanied by a commitment to facilitate the exclusion of jurors with racist views. While racist views will not necessarily be discovered by questioning prospective jurors, they cannot be discovered without questioning.

Multi-racial juries are likely to possess the diversity of experiences and multiplicity of perspectives that are required for an enlightened deliberative process. Increased jury representativeness is therefore an important goal. However, not all perspectives ought necessarily to be represented on juries. In his dissenting opinion in *Bain*, Justice Gonthier made the following remarks:

> Of course, I do not consider that jurors come to their task with a completely blank slate, devoid of any preconceptions and prejudices. Each juror has his or her own particular mind-set, and it forms part of his or her representative quality.[190]

Although racist jurors represent a segment of the Canadian population, that fact alone does not justify their participation on juries. Criminal juries should embody the collective good sense of the community, not the collective racism of society.

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[190]*Bain*, *supra* note 135 at 126.