A Jury of Whose Peers?

On February 9th, 2018, Gerald Stanley was acquitted of second degree murder and manslaughter in the shooting death of Colten Boushie, an Indigenous man. Following the not guilty verdict by a jury, Boushie's family, as well as Indigenous leaders, pointed to the underrepresentation of Indigenous people on the jury as an instance of systemic racism against Indigenous people in the justice system[1]. Boushie's family and others have stated that they have lost confidence in the criminal justice system. They have called for reform to the way juries are selected.[2]

Chief of the Six Nations of the Grand River, Ava Hill, says that where an Indigenous person is involved in a case, she believes there should be Indigenous people on the jury.[3] Her comments were in reference to the case of Peter Khill, a white man accused of killing Jon Styres, an Indigenous man from Ohsweken (a village on Six Nations of the Grand River reserve land). At jury selection, potential jurors were asked a question related to their bias and three potential jurors were excused.[4]

If the justice system does not appear to be fair, it is difficult for Indigenous people to have faith in it.[5] Beyond being underrepresented on juries,[6] Indigenous people are also over-represented in incarcerated populations. As of March 2015, according to the annual report from the Office of the Correctional Investigator, Indigenous people comprise 4.3% of the Canadian population although they account for 24.4% of those incarcerated.[7] Those who call for reform to jury selection to increase representation of Indigenous people on juries argue that representative juries are able to be more impartial, and to decide verdicts that are more fair. They make a direct link between representativeness and fairness.

The Supreme Court recognized the relationship between representativeness and fairness on juries in the *Kokopenace* case.[8] However, the Court noted that representativeness was not necessary for a fair verdict. Justice Moldaver, writing for the majority of justices, cited the following statement from Justice McLachlin, as she then was, in *R. v. Biddle****[9]***:

> To say that a jury must be representative is to confuse the means with the end. I agree that representativeness may provide extra assurance of impartiality and competence. I would even go so far as to say that it is generally a good thing. But I cannot accept that it is essential in every case, nor that its absence automatically entitles an accused person to a new trial.[10]

The Court remarked that there is a notable lack of evidence that jurors of the same race as the accused [or complainant/deceased] are necessary to have the jury act fairly and impartially.[11]

Improving representation of Indigenous people on juries may be achieved through two potential legal avenues: the courts, and the Parliament. The *Charter of Rights and Freedoms* in the Canadian Constitution protects the right of an accused to be tried by a jury; but does it offer any assistance to those making calls for more representative juries? The Prime

Minister has said that underrepresentation of Indigenous people is a problem; will his recently introduced criminal justice system reform bill improve representation of Indigenous people on juries?

A Backgrounder - The Jury Selection Process

The process of selecting a jury varies by province. Each province prepares a jury roll according to its own legislation. This is a list of all eligible jurors which can be selected, for example, by using health care card records or driver's license records. When there is a need for a jury, a number of the people on the jury roll, selected at random, are sent notices to attend jury selection. At jury selection, jurors are selected by defence counsel and the crown prosecutor from those who attend. A person who attends jury selection may be selected or refused in a number of ways:

1. **For cause challenge**: If a lawyer for the accused or for the Crown can convince the trial judge that there is widespread bias in the community and that some jurors may be unable to set aside this bias to act impartially, then the judge may ask, or allow the lawyer to ask, each potential juror a set list of questions.[12] Two jurors (or potential jurors, if no jurors have been selected yet) are tasked with deciding whether or not to reject the juror based on their answers to the questions.[13] A "for cause" challenge may include questions related to racial bias.[14]
2. **Peremptory challenge:** A peremptory challenge allows a lawyer to exclude a potential jury member without giving a reason. When an individual is selected from the jury roll, the crown prosecutor, or the defence may challenge the appointment of that juror. Depending on the severity of the crime, the Crown and the defence will have between 4 and 20 peremptory challenges available each, as determined by the Criminal Code.[15] If a peremptory challenge is used, a prospective juror is dismissed from serving on the jury. This simply means that a lawyer can look at a potential juror, and without asking that juror anything, dismiss them. Many criminal justice commentators claim that peremptory challenges can be misused to exclude members of the jury based on characteristics such as race, or gender.[16]

The jury in the Stanley case was comprised of all white-appearing jurors. In the selection of this jury all Indigenous-appearing potential jurors were excluded using peremptory challenges.[17] There was no race-based "challenge for cause" to identify potential racial bias.[18]

The Charter of Rights on Juries and Representation

The right to be tried by a jury is guaranteed in s. 11(f) of the *Charter of Rights and Freedoms*:

Any person charged with an offence has the right

> (*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment. [19]

The Supreme Court was asked to consider jury representatives in the case of *R v Kokopenace.* In that case, the court interpreted section 11 (f) to include only a limited need for the jury to be representative. The Court ruled that the jury roll from which a jury is selected should, "represent, as far as possible and appropriate in the circumstances, the larger community."[20] It should legitimize the jury's role as the "conscience of the community" and promote public trust in the criminal justice system.[21]

The Court also found that this requirement of representativeness only extends to the jury roll (the list of people who can be asked to attend jury selection).[22] The government must make reasonable efforts to "(1) compile the jury roll using random selection from lists that draw from a broad cross-section of society, and (2) deliver jury notices to those who have been randomly selected."[23] The jury roll and the final make-up of the jury are not required to be perfectly representative.[24]

The Supreme Court has said that using Charter section 11(d) which requires independent and impartial jury, is the wrong vehicle for righting the history of discrimination Indigenous people have faced and the estrangement of Indigenous people from the justice system.[25]

Is jury representativeness an equality rights issue?

There has been an attempt to use section 15, equality rights, to address jury representation at the Supreme Court. In the *Kokopenace* case in 2015, the accused, who was Indigenous, argued that because the jury in his case did not include any visibly Indigenous person he was being treated differently than other people who were not Indigenous and whose juries were all white. This, he argued, was a violation of his equality rights under the *Charter of Rights and Freedoms*.

The Court dismissed the claim because Kokopenace was not able to show that he experienced a disadvantage as a result of the composition of the jury.[26] Showing that a difference in treatment creates a disadvantage that perpetuates prejudice is a necessary part of the test for proving discrimination using section 15 of the *Charter.*

An Issue for Parliament

There is nothing in the law at this time that requires a jury to be representative, so long as the jury roll is properly arrived at. Prime Minister Justin Trudeau and Federal Justice Minister Jody Wilson-Raybould have both made statements in response to calls to action on jury reform.[27] Prime Minister Justin Trudeau stated in Parliament that

underrepresentation of Indigenous people on juries is a problem.[28]

The federal government recently introduced new legislation to, among other things, get rid of peremptory challenges to prevent the dismissal of potential jurors based on grounds such as race or sex.[29] However, removing peremptory challenges (challenges to the appointment of a juror without giving a reason) may not be a particularly successful strategy for improving representation of Indigenous people on juries and/or addressing the disproportionate incarceration of Indigenous people by the legal system in Canada.

Removing peremptory challenges will produce a number of results:

- While defence lawyers can no longer exclude Indigenous-appearing jurors in cases where the victim is Indigenous, where the accused is Indigenous or of another minority group, defence counsel cannot use their peremptory challenges hoping to have a potential juror selected who appears to be of the same identity group as the accused;[30]
- Where a juror "is disinterested, appears biased or shows animus towards the accused," the defence counsel has no ability to challenge a juror;[31]
- If a lawyer performs an internet and social media search of the names on the jury roll and discovers that the potential juror is posting on social media in a manner that suggests they may not be able to act impartially, the lawyer cannot challenge their appointment;[32]

Doing away with peremptory challenges will mean that the only way to exclude a potential juror from serving on the jury, once deemed eligible, is through a "for cause" challenge – that is, a challenge where there is concern about, for example, racial bias.

It is useful to note that the Ontario Court of Appeal ruled in the case of *R v Gayle*, that peremptory challenges cannot be used by the Crown for "racial purposes."[33] While this ruling is not binding on courts outside of Ontario, it can still be persuasive on courts in other jurisdictions. If the crown prosecutor or defense counsel appear to have racial motivations for their use of their peremptory challenges, the other side can raise this with the judge.

The federal bill fails to address the larger problem that there is a lack of Indigenous people available for selection from the jury roll.[34] If there were more Indigenous people on the jury roll, peremptory challenges could not be used as effectively to exclude Indigenous jurors.[35]

Another challenge to improving Indigenous representation on juries is one that was identified in a report on Indigenous peoples and juries in Ontario – that many Indigenous people mistrust the criminal justice system and are reluctant to participate. Episodes of systemic discrimination in the criminal justice system and child welfare system have resulted in mistrust among many Indigenous people in the justice system as a whole and

with the jury system in particular[36]

The elimination of peremptory challenges by the federal government, therefore, would be a limited step in addressing the underrepresentation of Indigenous people on juries.

Conclusions

Those calling for reform to the jury selection process argue that in order for the criminal justice process and verdicts to be fair juries should be representative of the community. Indigenous people are underrepresented on juries, although they are over-represented in incarcerated population. This has contributed to a lack of confidence in the criminal justice system among Indigenous communities.

There are two avenues that can be pursued, the courts and the Parliament, to improve the representation of Indigenous people on juries. Neither have thus far been particularly successful. While *Kokopenace* was unsuccessful in his section 15 claim based on the specific facts of his case, it appears the door remains open for a section 15 challenge to the construction of the jury roll. This may be the avenue through which representation is increased. There would first, however, need to be research done to establish that lack of representation affects impartiality and trial fairness. Without this evidence, a section 15 claim is likely to fail.

The federal government is currently taking only a limited step towards increasing representation of Indigenous people on juries, however it has made statements that representation on juries is an issue that it is willing to address.[37]The government may yet address more fulsomely the issue of underrepresentation of Indigenous people on juries and over-incarceration.

[1] Global News, "Boushie family pushing for changes to the way jurors are selected after Gerald Stanley acquittal", *Global News* (12 February 2018), online: <https://globalnews.ca/news/4021413/boushie-family-pushing-for-changes-to-the-way-jurors-are-selected-after-gerald-stanley-acquittal/>.

[2] Global News, "Boushie family pushing for changes to the way jurors are selected after Gerald Stanley acquittal", *Global News* (12 February 2018), online: <https://globalnews.ca/news/4021413/boushie-family-pushing-for-changes-to-the-way-jurors-are-selected-after-gerald-stanley-acquittal/>.

[3] Dan Taekema, "Chief of Six Nations calls for Indigenous jury members as trial with echoes of Colten Boushie case begins", *CBC News* (10 June 2018), online: < http://www.cbc.ca/news/canada/hamilton/jon-styres-peter-khill-trial-colten-boushie-1.4698209>.

[4] Dan Taekema "Prospective jurors in Peter Khill trial questioned about potential racial bias", CBC News (11 June 2018), online < http://www.cbc.ca/news/canada/hamilton/peter-khill-jury-selection-1.4701156>.

[5] Steven Penney, Professor of Law at the University of Alberta, in Colin Perkel, "No shortage on jury-fix ideas over the decades, but reform elusive", *CTV News* (13 February 2018), online: <https://www.ctvnews.ca/canada/no-shortage-on-jury-fix-ideas-over-the-decades-but-reform-elusive-1.3801638>.

[6] Joe Friesen, "Justice Minister Wilson-Raybould concerned about low number of Indigenous people on juries", *The Globe and Mail* (4 February 2018), online: <https://www.theglobeandmail.com/news/national/justice-minister-wilson-raybould-concerned-about-low-number-of-indigenous-people-on-juries/article37850722/>.

[7] Canada, Office of the Correctional Investigator, Annual Report of the Office of the Correctional Investigator 2014-2015

[8] *R v Kokopenace*, 2015 SCC 28 at para 50, 2 SCR 398 ; *R v Williams*, [1998] 1 SCR 1128 at para 46, 159 DLR (4th) 493 .

[9] *R. v. Biddle*, [1995] 1 S.C.R. 761, 123 DLR (4th) 22.

[10] *Kokopenace, supra* note 8 at para 70.

[11] *Kokopenace, supra* note 8 at para 52.

[12] *R v Find*, 2001 SCC 32 at para 32, [2001] 1 SCR 863.

[13] For more information on the "for cause" challenge, see: Alberta Law Reform Institute, "Criminal Jury Trials: Challenge for Cause Procedures" (2007) Alberta Rules Of Court Project, online: <https://www-alri-ualberta-ca.login.ezproxy.library.ualberta.ca/docs/cm01220.pdf>.

[14] *R v Williams*, *supra* note 8 at para 2.

[15] *Criminal Code*, RSC 1985, c C-46, s 634(2).

[16] CBC News, "'Easy fix' that could prove no fix: Saskatoon lawyer disappointed with move to end peremptory challenges", *CBC News* (30 March 2018), online: <http://www.cbc.ca/news/canada/saskatchewan/peremptory-challenges-criminal-justice-system-bill-1.4600190>.

[17] Kent Roach, "The Urgent Need to Reform Jury Selection after the Gerald Stanley and Colten Boushie Case", *University of Toronto Faculty of Law* (28 February 2018), online: <https://www.law.utoronto.ca/blog/faculty/urgent-need-reform-jury-selection-after-gerald-stanley-and-colten-boushie-case>.

[18] Kent Roach, "The Urgent Need to Reform Jury Selection after the Gerald Stanley and Colten Boushie Case", *University of Toronto Faculty of Law* (28 February 2018), online: <https://www.law.utoronto.ca/blog/faculty/urgent-need-reform-jury-selection-after-gerald-stanley-and-colten-boushie-case>.

[19] *Canadian Charter of Rights and Freedoms*, s 11(f), Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 .

[20] *R v Sherratt,* [1991] 1 SCR 509 at 525, 63 C.C.C. (3d) 193 .

[21] *Kokopenace*, *supra* note 8 at para 55; *Sherratt,* supra at note 20 at 523-5, 63.

[22] *Kokopenace*, *supra* note 8 at para 2.

[23] *Kokopenace*, *supra* note 8 at para 2.

[24] *Kokopenace*, *supra* note 8 at para 2.

[25] *Kokopenace, supra* note 8 at para 64.

[26] *Kokopenace, supra* note 8 at para 128.

[27] Tonda Maccharles, "Liberals to propose jury selection changes after meeting with Colten Boushie's family", *The Star* (13 February 2018), online: <https://www.thestar.com/news/canada/2018/02/13/liberals-to-propose-jury-selection-changes-after-meeting-with-colten-boushies-family.html>.

[28] Amanda Connolly, "Colten Boushie verdict: Lack of Indigenous jurors reduces confidence in courts, Jagmeet Singh says", *Global News* (13 February 2018), online: <https://globalnews.ca/news/4022673/colten-boushie-gerald-stanley-jagmeet-singh/>.

[29] Kathleen Harris, "Liberals propose major criminal justice changes to unclog Canada's Courts", *CBC News* (29 March 2018), online: < http://www.cbc.ca/news/politics/liberal-crime-justice-reform-1.4598480>.

[30] Aidan Macnab, "Stanley acquittal should not lead to scrapping peremptory challenges, say criminal lawyers: More indigenous people on jury rolls would improve system", *Canadian Lawyer* (14 February 2018), online: <http://www.canadianlawyermag.com/legalfeeds/author/aidan-macnab/stanley-acquittal-should-not-lead-to-scrapping-peremptory-challenges-say-criminal-lawyers-15332/>.

[31] Aidan Macnab, "Stanley acquittal should not lead to scrapping peremptory challenges, say criminal lawyers: More indigenous people on jury rolls would improve system", *Canadian Lawyer* (14 February 2018), online: <http://www.canadianlawyermag.com/legalfeeds/author/aidan-macnab/stanley-acquittal-should-not-lead-to-scrapping-peremptory-challenges-say-criminal-lawyers-15332/>.

[32] Brian Pfefferle, "Why an all-white jury in Gerald Stanley trial is possible," CBC News (29 January 2018), online: < http://www.cbc.ca/news/canada/saskatoon/boushie-jury-selection-opinion-battleford-saskatchewan-1.4505592>.

[33] *R v Gayle*, [2001] 201 DLR (4th) 540 at para 66; 154 CCC (3d) 221 (Ont Ca).

[34] Aidan Macnab, “Stanley acquittal should not lead to scrapping peremptory challenges, say criminal lawyers: More indigenous people on jury rolls would improve system”, *Canadian Lawyer* (14 February 2018), online: <http://www.canadianlawyermag.com/legalfeeds/author/aidan-macnab/stanley-acquittal-should-not-lead-to-scrapping-peremptory-challenges-say-criminal-lawyers-15332/>.

[35] Aidan Macnab, “Stanley acquittal should not lead to scrapping peremptory challenges, say criminal lawyers: More indigenous people on jury rolls would improve system”, *Canadian Lawyer* (14 February 2018), online: <http://www.canadianlawyermag.com/legalfeeds/author/aidan-macnab/stanley-acquittal-should-not-lead-to-scrapping-peremptory-challenges-say-criminal-lawyers-15332/>.

[36] Ontario, Ministry of the Attorney General, *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honorable Frank Iacobucci* (Toronto: Ministry of the Attorney General, 2013) at para 27.

[37] Kathleen Harris, “Liberals review jury selection process after Boushie case uproar”, *CBC News* (12 February 2018), onlind: < http://www.cbc.ca/news/politics/jury-selection-diversity-indigenous-1.4531792>.