A BANDAGE ON A BROKEN SYSTEM: MOVING BEYOND PEREMPTORY CHALLENGES TO INCREASE INDIGENOUS JUROR REPRESENTATION IN CANADA

Kona Keast-O'Donovan*

Abstract

In 2016, Colten Boushie, a 22-year-old Indigenous man, was fatally shot by Gerald Stanley, a white farmer. Stanley was later acquitted of second-degree murder and manslaughter by an all-white jury. Peremptory challenges became the major legal focus, with the all-white jury attributed to the defense attorney's peremptory dismissal of five Indigenous individuals from the final jury panel. Following a raucous public debate, just two months after Stanley's acquittal, Canada's Government quickly introduced Bill C-75, eliminating peremptory challenges. While some legal actors view the ban on peremptory challenges as a step toward improving Indigenous juror participation, others argue that this elimination decreases Indigenous representation. As the insular debate endures, it continues to distract from numerous substantial issues with more profound implications on Indigenous juror representation. Through an analysis of the Jury Acts of Ontario, Saskatchewan, and Manitoba, this Article highlights how provincial jury pool selection and summoning policies continue to encourage Indigenous exclusion. For more representative juries, Canada must move past peremptory challenges and acknowledge that sustained efforts made in partnership with Indigenous communities are desperately needed. Examples are offered of structurally-oriented, deeper reform actions to begin the process of addressing root causes of white-washed criminal juries in Canada.

* Incoming LL.M. Candidate, Trinity College Dublin, University of Dublin, Ireland; J.D., William S. Richardson School of Law, University of Hawai'i at Mānoa; M.A., Criminology and Criminal Justice Policy, University of Guelph, Canada; B.A., Western University, Canada. I would like to thank Eleanore Sunchild, Meaghan Daniel, Richard Bell, Kent Roach, and Dr. Mary Ellen Turpel-Lafond for sharing their knowledge and experiences with me. I would also like to thank Professor Randle DeFalco for his guidance and assistance throughout the entire process.

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Introduction

On August 9, 2016, Colten Boushie, a 22-year old Indigenous man, and his friends were returning to Saskatchewan's Red Pheasant First Nation Reserve[1] when their car suffered a flat tire.[2] The group entered the farm of Gerald Stanley, a 56-year-old white man, in search of assistance, where they were approached by Stanley.[3] This interaction ended with Stanley using his semi-automatic handgun to fatally shoot Boushie in the back of the head.[4] As Stanley waited for police to arrive, he sat inside, drinking coffee at his dining table.[5] Prosecutors charged Stanley with second-degree murder, and on February 9, 2018, an all-white jury acquitted him of murder and the lesser-included offense of manslaughter.[6] Although there are varying accounts regarding the specific events that led up to the fatal interaction, the fact that Gerald Stanley shot and killed Colten Boushie is beyond dispute.

Stanley's acquittal came as no surprise to those familiar with Canada's troubled history of unequal relations between Indigenous and settler populations. Indigenous peoples[7] across the country continue to be victims of settler-colonial oppression and violence on a daily basis.[8] From each individual's unique lived experiences to their shared collective traumas, Canada persecutes Indigenous peoples in a myriad of ways, including through its criminal justice system where Indigenous peoples

1. In Canada, a Reserve is stolen Indigenous land set aside by the Federal Government for the use and occupancy of Indigenous peoples. *See What is a Reserve?,* Indigenous Awareness Canada (Apr. 20, 2021), https://indigenousawarenesscanada.com/indigenous-awareness/what-is-a-reserve/ [https://perma.cc/33SY-KGHC]. The *Indian Act* governs all Reserves in Canada and provides that Indigenous peoples cannot own title to land on Reserves, and that the Crown can use Reserve lands for any reason. *Id.* Over 80% of these Reserves are considered remote because of the extreme distances from service centers where basic goods can be obtained. *Id.*
2. *See* Guy Quenneville, *What Happened on Gerald Stanley's Farm the Day Colten Boushie was Shot, as Told by Witnesses*, CBC News (Feb. 13, 2018, 3:45 P.M.), https://www.cbc.ca/news/canada/saskatoon/what-happened-stanley-farm-boushie-shot-witnesses-colten-gerald-1.4520214 [https://perma.cc/PDY9-SMF8].
3. *See* Joe Friesen, *Gerald Stanley Acquitted in the Shooting Death of Colten Boushie*, Globe & Mail (Feb. 9, 2018), https://www.theglobeandmail.com/news/national/gerald-stanley-acquitted-in-death-of-colten-boushie/Article37929427/ [https://perma.cc/K9EK-PMES].
4. *See Id.*
5. *See* Quenneville, *supra* note 2.
6. *See* Friesen, *supra* note 3; Quenneville, *supra* note 2.
7. In this Article, I use the term "Indigenous" in reference to Inuit, First Nations, and Métis populations. My intention is not to conflate the significant cultural differences among these unique groups. Rather, I use a collective noun to reflect the similar ways in which these groups are targeted by settler-colonial practices in Canada.
8. I am a non-Indigenous individual who has benefited as a descendent of white settlers from the exploitation of Indigenous peoples. My intention through my research is to take action and use my privilege to help address Canada's systemic racism.

are overrepresented as victims of crime,[9] as criminal defendants, and in prison populations.[10] Simultaneously, Indigenous peoples have historically been nearly completely excluded from serving as jurors in criminal cases, calling into question whether Indigenous victims and defendants can ever receive the benefit of a fair trial.[11] This risk appears to have clearly manifested itself in the killing of Colten Boushie and the trial of Gerald Stanley, wherein proceedings were tainted by systemic racism that came into play far before the defense used peremptory challenges to ensure an all-white jury.[12]

Although peremptory challenges were used to dismiss five Indigenous potential jurors during Stanley's trial, the striking of these prospective jurors was merely one example of a much larger prejudicial process when it comes to the construction of criminal juries in Canada. The myopic focus on peremptory challenges of reformists and scholars discussed below ignores the larger problem that out of 750 people summoned as potential jurors for Stanley's case, only twenty Indigenous individuals arrived at the court, a fact indicative of Canada's much more deeply-seated problems when it comes to equity in juror representation.[13]

This Article considers whether the elimination of peremptory challenges actually represents a well-thought-out reform to target unrepresentative juries in Canada. Although peremptory challenges were used in a discriminatory way in Stanley's trial, it is unclear whether a similar dynamic is regularly at work in cases involving Indigenous defendants. For this reason, the Stanley case may not have been an ideal example to use for policy changes. Furthermore, the lack of research surrounding peremptory usages creates an overwhelming misconception that these challenges were the main barrier hindering Indigenous juror representation in the Stanley case. Arguably more important than who is struck from a panel of prospective jurors is how the pool itself is initially constructed and whether such pools reflect an appropriately

9. Canada Dep't of Justice, JustFacts: Indigenous Overrepresentation in the Criminal Justice System, 1-3 (2019).
10. *Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System,* Canada Dep't of Justice (Apr. 12, 2019), https://www.justice.gc.ca/eng/rp-pr/jr/gladue/p2.html, [https://perma.cc/CP84-AFBF].
11. *See* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act 1982 (UK), 1982 c 11 (U.K.).
12. Peremptory challenges are a jury selection resource that allow the prosecution and defence to dismiss a potential juror without needing to give a justification. The prosecution and defence are given a set number of peremptory challenges, depending on the criminal charge. *See* Kent Roach, *A Good First Step towards Diverse, Impartial Canadian Juries: U of T's Kent Roach*, Univ. of Toronto (2018), https://www.utoronto.ca/news/good-first-step-towards-diverse-impartial-canadian-juries-u-t-s-kent-roach, [https://perma.cc/WE9M-WZKR].
13. *See* Kent Roach, *Juries, Miscarriages of Justice and the Bill C-75 Reforms*, 98 Can. Bar Rev. 315, 320 (2020); Kent Roach, Canadian Justice, Indigenous Injustice 94 (2019).

representative number of Indigenous individuals. Thus, Stanley's all-white jury was not solely a product of five peremptory challenges. Rather, it was the result of a broader jury selection process that is skewed against Indigenous inclusion in Canada's flawed criminal justice system.

The historical exclusion of Indigenous individuals on juries is an injustice in itself and highlights the devaluing of Indigenous voices and the impunity white settlers have enjoyed in Canada's criminal justice system. Far from unique to the Stanley case, the longstanding issue of inadequate juror diversity has been largely ignored in Canada, despite numerous reports and recommendations for improving the system. Boushie's death added fuel to this fire, but the overwhelming focus on peremptory challenges arguably hinders progress in other key areas. By assessing how and why existing jury selection processes in Ontario, Manitoba, and Saskatchewan fail to produce adequately representative prospective jury pools, this Article offers suggestions for moving beyond Bill C-75, discussed in detail below, to reforms that more holistically encourage greater Indigenous juror participation.[14]

The motivation for this Article is an underlying concern that in focusing narrowly on peremptory challenges, the broader systemic barriers existing in Canadian jury selection processes will continue to be overlooked and hence, an opportunity to effect meaningful reform may be lost. If the goal is truly representative juries, Canadian provinces must pursue this goal long before the selection stage begins. Furthermore, federal and provincial entities must acknowledge that Indigenous peoples will rightfully view governmental action with skepticism after the governments' long history of perpetrating genocidal and violent acts against them.[15]

This Article proposes several discrete actions that could start the process of improving juror representativeness in Canada. Proposed initiatives include amended jury summoning policies, increased and upfront juror pay, expense reimbursement, reduced or eliminated criminal record restrictions, and affirmative-based partnerships with Indigenous communities. Sustained efforts made in true collaboration with Indigenous communities are necessary to fully address Canada's longstanding problem of unrepresentative criminal juries. Given this specific issue's

14. It is important to note that jury trials are far less frequent in Canada than in the United States, and are reserved for more serious criminal cases where the maximum punishment is imprisonment for five years or more. *See Charterpedia: Section 11(f) – Trial by jury*, Canada Dep't of Justice (Sept. 1, 2021), https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art11f.html [https://perma.cc/C8XQ-3VFX].

15. For example, the Residential School System resulted in thousands of deaths, countless instances of physical, mental, and sexual abuse, and intergenerational trauma. *See Residential Schools in Canada,* Canadian Encyclopedia (Oct. 10, 2012), https://www.thecanadianencyclopedia.ca/en/article/residential-schools [https://perma.cc/2NA3-2W9E].

deep entanglement with the broader process of settler colonial violence and oppression, these specific recommendations are presented as discrete, near-term steps in the right direction—steps that could form part of a much larger, long-delayed reckoning.

I. Contextualizing the Acquittal of Gerald Stanley by an All-White Jury

The acquittal of Stanley, despite the apparent existence of substantial evidence of his guilt, led to public and political uproar, placing peremptory challenges as the focal point of this injustice.[16] The defense's use of peremptory challenges to remove five visibly Indigenous individuals during the jury panel selection stage quickly became one of the major controversies in this highly contentious case.[17] Parliamentarian Jagmeet Singh, a former criminal defense lawyer and current leader of the Canada's New Democratic Party, stated that there was no justice for Boushie, and reiterated that representative juries are essential to instill confidence in the criminal justice system.[18] Prime Minister Justin Trudeau similarly stated that systemic issues in Canada's criminal justice system must be addressed to ensure justice for all Canadians.[19] Trudeau further pledged support for justice reforms to address the systemic discrimination that continues to plague Canada's criminal justice system.[20] Following this statement, in March 2018, Canada's Liberal Government proposed Bill C-75, a broad justice reform initiative intended to amend the country's Criminal Code and Youth Criminal Justice Act.[21] Bill C-75 contained proposals to reduce delays in the criminal justice system and modernize current legislation by incorporating updated wording and phrases.[22] More notably, however, Bill C-75 proposed the elimination of peremptory challenges—just two months following Stanley's acquittal.[23] Bill C-75 received Royal Assent on June 21, 2019, and by September of the

16. *See* Steve Bonspiel, *Canadian Justice System Needs Overhaul in Light of Gerald Stanley Verdict*, CBC News (Feb. 17, 2018, 4:00 AM), https://www.cbc.ca/news/indigenous/opinion-gerald-stanley-colten-boushie-shooting-verdict-1.4537925 [https://perma.cc/LH7Y-KVPA].
17. *See* Roach, *Juries, Miscarriages of Justice and the Bill C-75 Reforms*, *supra* note 13, at 317.
18. *See* Amanda Connolly, *Colten Boushie Verdict: Lack of Indigenous Jurors Reduces Confidence in Courts, Jagmeet Singh Says*, Global News (Feb. 13, 2018), https://globalnews.ca/news/4022673/colten-boushie-gerald-stanley-jagmeet-singh/ [https://perma.cc/KL83-RKYE].
19. *See* Katie Dangerfield, *Trudeau's Comments on Boushie Case May Have 'Tainted' a Potential Appeal Process: Lawyer,* Global News (Feb. 13, 2018 12:14 P.M.), https://globalnews.ca/news/4022425/colten-boushie-justin-trudeau-appeal/ [https://perma.cc/Y3WT-NVTY].
20. *See Id.*
21. An Act to Amend the Criminal Code, the Youth Criminal Justice Act and Other Acts and to Make Consequential Amendments to Other Acts, S.C. 2019, c 25 (Can.).
22. *See Id.*
23. *See Id.*

same year, peremptory challenges were officially eliminated throughout Canada.[24]

While the rapid ban of peremptory challenges was largely welcomed as a step in the right direction following Stanley's highly publicized trial, the move was also politically advantageous, as it helped deflect criticism away from the Trudeau government and re-instill shaken public confidence in the criminal justice system. It is also important to note that the decision to target peremptory challenges overlooks more substantial barriers hindering equitable representation of jurors in criminal cases. Hence, Bill C-75's arguably superficial reform has helped foster a mistaken public perception that the government is committed to addressing Canada's longstanding systemic racism, rather than simply taking one small step at best in banning peremptory challenges.[25]

The highly publicized banning of peremptory challenges shifted too much attention to this relatively small component of Canadian jury selection processes, especially considering the lack of evidence concerning whether this elimination will end up positively or negatively affecting overall Indigenous jury participation. The lack of significant data on jury demographics and selection procedures means there is no way to accurately assess the impact of Bill C-75.[26] As a result, Canada squandered an opportunity to meaningfully address systemic racism with Bill C-75 by leaving numerous factors contributing to white-washed juries and Indigenous juror exclusion throughout the country untouched.

The need for politically-driven reforms is underscored by Canada's failure to interpret its Charter of Rights and Freedoms as requiring anything approximating truly representative juries grounded in the country's demographic realities. The right to a fair trial by an impartial tribunal is enshrined in Section 11 of the Canadian Charter of Rights and Freedoms.[27] Although Section 11 does not guarantee a fully proportionate representation of all diverse groups in Canadian society on juries, it does create a constitutional obligation to provide a fair opportunity for

24. *See* Michelle Bertrand, et al., '*We Have Centuries of Work Undone by a Few Bone-Heads': A Review of Jury History, a Present Snapshot of Crown and Defence Counsel Perspectives on Bill C-75's Elimination of Peremptory Challenges, and Representativeness Issues*, 43 Man. L. J. 111, 130 (2020).

25. In this Article, I use the term "white-washed" juries, rather than all-white juries, because I believe that injustices do not end as soon as one non-white juror is added. Representative juries require inclusion that is much greater than that simple step. Thus, white-washed juries refer to any jury that is less than equitable and any jury where work must still be done.

26. *See* Colin Perkel & Hina Alam, *'What do you have to Hide?' Demographic Data on Jurors in Canada Lacking*, Vancouver Sun (Mar. 26, 2021), https://vancouversun.com/news/national/what-do-you-have-to-hide-demographic-data-on-jurors-in-canada-lacking [https://perma.cc/RPY9-LBYB].

27. *See* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act 1982 (UK), 1982 c 11 (U.K.).

a broad cross-section of society to participate in the jury process.[28] This obligation, however, has failed to actually produce anything resembling truly representative criminal juries.

The Supreme Court of Canada first seriously addressed jury representativeness in *R. v. Kokopenace*. In this case, the defendant, an Indigenous man, was charged with second-degree murder and ultimately convicted of manslaughter.[29] The jury that tried the respondent was drawn from the 2008 jury roll for Thunder Bay District of Ontario, which consisted of 699 potential jurors, of whom only 29 were Indigenous on-Reserve residents.[30] However, no Indigenous individuals living on Reserves were ultimately selected for the defendant's jury.[31] Kokopenace appealed his conviction on several grounds, including the unrepresentativeness of the jury roll where he was convicted.[32] The Ontario Court of Appeal held that there had not been reasonable efforts to provide a fair opportunity for the distinctive perspectives of Indigenous on-Reserve residents to be part of juries and, thus, the jury did not serve as the conscience of the community.[33]

The Supreme Court of Canada, however, after allowing the appeal, disagreed with the Ontario Court of Appeal and reinstated Kokopenace's conviction.[34] Despite acknowledging that representativeness is an important feature of jury trials, the Court's decision indicated that the meaning of this term is restricted.[35] The Court concluded that jury representativeness is assured through the process of compiling the jury roll and not the jury's ultimate composition, thereby holding that only "reasonable efforts" to provide a "fair opportunity" to compile a representative jury roll are required.[36] A fair opportunity is deemed to have been provided where a relevant province makes reasonable efforts to: (1) compile the jury roll using a random selection from lists drawing from a "broad cross-section" of society, and (2) deliver jury notices to those that have been randomly selected.[37]

This Supreme Court decision establishes that jury representation issues have been acknowledged by the Federal Court, but nothing—aside from the creation of minimal, ultimately ineffectual procedural requirements—has been done to actually address these issues. Thus, the courts

28. *Id.*
29. *See* R. v. Kokopenace, [2015] SCC 28, 2 S.C.R. 398 (Can.).
30. *See Id.*
31. *See Id.*
32. *See* Frank Iacobucci, First Nations Representation on Ontario Juries 13 (Feb. 2013).
33. *See* Thalia Anthony & Craig Longman, *Blinded by the White: A Comparative Analysis of Jury Challenges on Racial Grounds,* 6 Int'l J. for Crime & Soc. Democracy 25, 35 (2017).
34. *See* R. v. Kokopenace, [2015] SCC 28, 2 S.C.R. 398 (Can.).
35. *See Id.*
36. *See* Anthony et al., *supra* note 33, at 35; R. v. Kokopenace, [2015] SCC 28, 2 S.C.R. 398 (Can.).
37. *See Id.*

do not appear to present a presently practical avenue for challenging Canada's white-washed jury system. Moreover, aside from passing Bill C-75, Canada's Federal government has shown no interest in trying to improve juror representativeness. These facts, combined with the provincial nature[38] of Canada's various Jury Acts and the wide discretion afforded to each province pursuant to the low and wholly procedural bar established in *Kokopenace*, make it clear that overhauls of provincial juror selection processes are critically needed to meaningfully improve representation.

II. Understanding the Problem: Looking Beyond Peremptory Challenge

A. *Racist Stereotypes: Branding Colten Boushie a "Criminal"*

Many of the narratives contrived by the media following Boushie's killing reflects racist ideologies that continue to plague Canadian society. The description of Boushie and his friends as "trespassers," the notion that Stanley was in a "terrifying" situation, and the suggestion of the "reasonableness" of Stanley's actions all reinforce stereotypical depictions of Indigenous peoples as individuals complicit in their own victimization, for which settler-colonial society need not answer.[39] The complex, often land-based, tensions between Indigenous peoples and white farmers in rural Saskatchewan highlight unique hurdles the criminal justice system must overcome when acknowledging disparate treatment and racism. Tensions such as these exemplify why the simple removal of peremptory challenges will fail to bring more equitable treatment to Indigenous peoples within the Canadian criminal justice system. These stereotypical narratives are a useful resource for defense attorneys arguing their white client's innocence, including Stanley's, who relied heavily on racist depictions of Boushie and his friends as inherently dangerous and criminal.[40] Despite Stanley's farm not having a fence and there being no specific requests for the youths to leave the property, the ability for various actors in the justice system to utilize stereotypes to further their interests aptly reflects the gravity of the issues to be addressed and highlights just how deeply these issues are engrained.[41] The fact that muddy shoe prints and abandoned shoes were found along the driveway leading *away* from the house—an indication that the youths were attempting to leave at the time of the incident—was overshadowed by racist stereotypes that helped excuse or even justify Boushie's killing.[42]

38. In Canada, provincial laws govern how jury rolls are compiled, the process by which individuals are summoned, and who is qualified to serve as a juror.
39. *See* Alexandra Flynn & Estair Van Wagner, *A Colonial Castle: Defence of Property in R v Stanley*, 98 Can. Bar Rev. 359, 360 (2020).
40. *See Id.* at 361.
41. *See Id.* at 361-62.
42. *See Id.*

These and other racist tropes and narratives were similarly invoked by members of the Royal Canadian Mounted Police (RCMP), community supporters of Stanley, and Saskatchewan Councilor Ben Kautz.[43] Racist comments related to Boushie's killing and the resultant court case were posted to Facebook and other social media platforms, all with the common theme of Boushie deserving his death.[44] One of these commenters was Kautz, a councilor from the rural municipality of Browning, Saskatchewan, who resigned after posting to a Saskatchewan farm group's Facebook page that Stanley's "only mistake was leaving witnesses."[45] Allegations also spread concerning racist and discriminatory practices by the RCMP.[46] These accusations alleged that the RCMP had mishandled witnesses and evidence, discriminated against Boushie's mother, and that their media release following the shooting had left the impression that Boushie's death was "deserved."[47] Boushie's mother stated that when officers came to inform her of her son's death, they questioned her sobriety and credibility, going so far as to smell her breath and tell her to "get it together."[48] An internal RCMP review in November of 2017 concluded that these allegations were unfounded.[49] However, the Civilian Review and Complaints Commission (CRCC) launched a probe soon after Stanley's trial to assess whether the RCMP had acted in a racially discriminatory manner.[50] This probe followed the RCMP's conclusory findings and an appeal from Boushie's family for an independent review.[51] Ultimately, not only did the CRCC find that all allegations against the RCMP were substantiated, but it also concluded that the RCMP had depicted Boushie as a thief and sowed racial discord in the province.[52] These blatantly racist actions by the RCMP not only help perpetuate stereotypes of Indigenous peoples as alcoholics and thieves, but further demonstrates the eminent reasonableness of the skepticism many Indigenous peoples have toward the Canadian criminal justice system.[53]

43. *See* Canadian Press, *Timeline: Gerald Stanley Investigation and Murder Trial*, CTV News (Feb. 9, 2018), https://www.ctvnews.ca/canada/timeline-gerald-stanley-investigation-and-murder-trial-1.3797837 [https://perma.cc/6DGV-9KZJ].
44. *See Id.*
45. *See Id.*
46. *See Id.*
47. *See* Guy Quenneville, *RCMP Racially Discriminated Against Mother, Mishandled Witnesses, Evidence in Colten Boushie Case: Watchdog*, CBC News (Mar. 20, 2021), https://www.cbc.ca/news/canada/saskatoon/colten-boushie-rcmp-shooting-complaint-gerald-stanley-1.5934802 [https://perma.cc/HJY4-RZRA].
48. *See Id.*
49. *See* Canadian Press, *supra* note 43.
50. *See* Quenneville, *RCMP Racially Discriminated Against Mother, Mishandled Witnesses, Evidence in Colten Boushie Case: Watchdog*, *supra* note 47.
51. *See Id.*
52. *See Id.*
53. *See Id.*

These harmful stereotypes reflect the devaluing of Indigenous lives in Canadian society on a broad level, one from which the criminal justice system is not immune. The normalization of these narratives filter into the criminal justice system and exacerbate the magnitude of existing injustices. In the eyes of colonial society and white settler mentality, property is more highly valued than Indigenous lives.[54] In Stanley's case, the media and RCMP's portrayal of Boushie as a criminal were undoubtedly consumed by the broader Canadian public, while the defense simultaneously promoted similarly racist narratives to Stanley's jury.[55]

B. *The Broader Jury Selection Process in the Stanley Case (and Beyond)*

In the days leading up to Stanley's trial, 750 potential jurors were summoned to the Alex Dillabough Centre in Battleford, Saskatchewan for jury selection.[56] The jury boundary used for this high-profile case is one of the largest judicial boundaries in the province.[57] This area, which borders the Northwest Territories, includes several sizeable population centers. The closest significant population center to Battleford "is North Battleford, where 28 per cent of the population is Indigenous. . . ."[58] In Beauval, another center included in the boundary, 82 percent of the population is Indigenous.[59] In yet another location included in the boundary, the town of La Loche, Indigenous people make up 96 percent of the population.[60] However, La Loche sits 317 miles from Battleford, a desolate five-and-a-half-hour drive, one way. Uranium City, one of the most northernly centers included in the jury boundary, sits 470 miles from Battleford. To reach Battleford, a potential juror would need to travel by plane from Uranium city, or any town in the northern part of the boundary, due to the absence of permanent roads and the significant distances between locations. These vast distances between population centers within a single jury boundary are common in many parts of northern Canada, making prospective jurors' accessibility to courthouses hosting jury trials a major challenge.[61]

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54. *See 'We Deserve Better:' Family of Colten Boushie Calls for United Nations to Study Systemic Racism in Canada*, CBC News (Apr. 18, 2018), https://www.cbc.ca/news/canada/saskatchewan/colten-boushie-family-united-nations-study-systemic-racism-1.4625818 [https://perma.cc/AY9K-XQ79].
55. *See* Flynn & Wagner, *supra* note 39, at 360.
56. *See* Kyle Edwards, *Has the Right Jury Reached a Verdict? In the Stanley Trial, a Step Was Skipped in the Jury-Picking Process (Gerald Stanley Trial in Battleford, Saskatchewan)*, 131 Can. Bus. & Current Aff. 27 (2018).
57. *See* Guy Quenneville, *'Huge' Pool of 750 People Summoned as Potential Jurors for Colten Boushie Case*, CBC News (Jan. 28, 2018, 10:00 AM), https://www.cbc.ca/news/canada/saskatoon/huge-pool-750-people-summoned-potential-jurors-colten-boushie-1.4504633 [https://perma.cc/G98Q-HW4S].
58. *Id.*
59. *Id.*
60. *Id.*
61. Interview with Richard Bell, Def. Att'y, (Oct. 26, 2020) (notes on file).

In light of these distances, and countless other inherently discriminatory barriers, it is no surprise that only 178 people of the 750 potential jurors summoned actually arrived in Battleford for Stanley's jury selection.[62] What is surprising, especially with the large Indigenous populations living within the jury boundary, is that only approximately[63] twenty of these potential jurors were Indigenous.[64] Peremptory challenges were then used to remove five visibly Indigenous peoples from the 12 jurors, and two alternates, chosen from the 178 individuals.[65] Yet, peremptory challenges cannot explain why, out of the 750 people summoned to jury duty, only twenty Indigenous individuals made it to Battleford.[66] The fundamental problem is getting Indigenous people onto jury rolls and to the stage of jury selection where juries are formed—hurdles that occur far before peremptory challenges can have an effect.

III. The Bill C-75 Debate: Does it Even Address the Problem?

It is against the backdrop of this multifaceted set of limitations tending to reduce Indigenous juror participation in Saskatchewan, and Canada more broadly, that Bill C-75 was passed in the wake of Stanley's acquittal. Policy reform cannot be both a knee-jerk reaction and a well-thought-out decision. Unfortunately for Bill C-75, it has proven to be the former, rather than the latter. A common argument supporting Parliament's decision to remove peremptory challenges was the suggestion to do so by the 1991 Manitoba Aboriginal Justice Inquiry.[67] However, Bill C-75 was proposed approximately 27 years after this inquiry's recommendations were formulated. If the Canadian Government truly intended to follow this suggestion, it should not have taken almost three decades of consideration, the killing of a young man, and countless other injustices before doing so.

Notably absent from Bill C-75 were other, arguably far more important reforms, suggested by the inquiry, such as providing jurors with translators, developing public education programs to acquaint the

62. *See* Roach, *supra* note 13, at 320.
63. The number of Indigenous jurors who arrived at Battleford is approximate due to incomplete data. In most provinces, demographic information by jury is not tracked and race and gender data are not collected. *See* Colin Perkel & Hina Alam, *'What do you have to Hide?' Demographic Data on Jurors in Canada Lacking*, Van. Sun, (Mar. 26, 2021), https://vancouversun.com/news/national/what-do-you-have-to-hide-demographic-data-on-jurors-in-canada-lacking [https://perma.cc/J5MJ-9KPM]. In fact, Saskatchewan makes it illegal to provide such data. *See Id.* This makes assessing systemic racism in jury selection extremely difficult.
64. *See* Roach, *supra* note 13, at 320.
65. *Id.*
66. *Id.* (contemplating potential reasons such as the difficulty with travel, language issues, expenses, and "alienation from the criminal justice system").
67. *See* Report of the Aboriginal Justice inquiry of Manitoba, The Justice System and Aboriginal People 638 (1999).

public with the importance of jury selection, and altering jury summoning practices.[68] Instead of taking a more detailed and impactful route, the Government chose a quick fix of targeting the most publicized issue of the Stanley case—peremptory challenges—and relied on previously ignored reform suggestions made decades ago. Not only does this reflexive action illustrate the Government's indifference towards meaningful efforts to redress systemic racism against Indigenous peoples, it also overlooks the potential benefits of peremptory challenges, especially for Indigenous defendants. Furthermore, equitable jury representation cannot be solved with one isolated policy change. Rather, inquiry recommendations must be viewed holistically as interdependent actions—choosing to implement only one may do nothing at all when considering the nature of the issue and the inherently discriminatory roots of this problem.

A. *Responses from the Bar*

While in a general sense, there was at least some limited support for the removal of peremptory challenges from lawyers, judges, and some politicians, defense and prosecuting attorneys were overwhelmingly against this decision.[69] In a 2019 survey taken shortly after the decision to eliminate peremptory challenges, over 70 percent of responding prosecutors and slightly over 93 percent of responding defense attorneys believed that the removal of peremptory challenges would very negatively, or somewhat negatively, impact jury trials.[70] Very few attorneys believed the removal would have a positive impact, and only a little over 34 percent of respondents believed that this elimination would increase fairness and the administration of justice.[71]

Notably, respondents who believed the elimination would have a negative impact on jury selection cited ongoing issues with unrepresentative jury rolls, stating that because the majority of jury boundaries have primarily white populations, people of color will continue having a lower chance of being summoned for jury duty.[72] According to these attorneys, the exclusion of peremptory challenges removes a resource for attorneys to increase diversity by eliminating white jurors in order to make room for people of color. Although peremptory challenges played a fundamental role in the all-white jury responsible for Stanley's acquittal, they can be just as readily used to dismiss white jurors in cases involving an Indigenous defendant or another defendant of color. The Canadian Association of Black Lawyers echoed this position, arguing that the elimination of peremptory challenges can hinder the guarantee of a fair trial

68. *Id.* at 638–39.
69. *See* Bertrand et al., *supra* note 24, at 143.
70. This survey included 59 participants, comprised of 29 defense attorneys and 30 Crown prosecutors. *Id.* at 139.
71. *Id.* at 143–44.
72. *Id.* at 146.

for defendants of color by *increasing*, rather than reducing, the prevalence of all-white juries.[73]

Attorneys disagreeing with the change also cited the usefulness of peremptory challenges as a means of removing jurors with suspected, but likely unprovable, biases, and jurors who simply do not want to be there.[74] For example, if a potential juror provided an excuse to the judge as to why they are unable to act as a juror, and this excuse is rejected by the judge, peremptory challenges provided attorneys with an outlet to remove this potentially frustrated juror whose disinterest could negatively affect the interests of their client or the victim.[75] Challenges for cause, which require a reason to be provided for excusing a juror, do not replace peremptory challenges in situations where there is suspected bias or disinterest, but a lack of evidence to prove such bias or disinterest.[76] Challenges for cause allow prospective jurors to be disqualified on the basis of partiality following limited and simplistic questioning regarding bias.[77] Challenges for cause thus assume racism and prejudice can be identified by a few simple questions.[78] However, this assumption belies the reality of the ways in which biases actually operate. Individual prejudices can be unconscious or easily concealed and are rarely seen at the surface, which begs the question whether challenges for cause can adequately remove the majority of racist or otherwise biased prospective jurors.[79]

Another issue with explicitly vetting potential jurors for prejudice is the ability for potential jurors to state they are racist simply because they do not want to serve as a juror.[80] Alternatively, if a potential juror harbors an improper animus, yet desires to serve as a juror, such individual can relatively easily hide their biases by answering the scripted questions the "right" way.[81] As the British Columbia Civil Liberties Association echoed, peremptory challenges were the only measure capable of filtering out jurors' implicit racial bias, and no other methods are available to the court or litigants to target this commonplace form of prejudice.[82]

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73. Brian Platt, *Supreme Court Upholds Ban on Peremptory Challenges for Jury Selection*, Nat'l Post Oct. 7, 2020, https://nationalpost.com/news/colten-boushie-case-again-in-spotlight-as-supreme-court-hears-arguments-on-jury-selection-rules [https://perma.cc/9TQH-Q8Q9].
74. *See* Bertrand et al., *supra* note 24, at 147.
75. *See* interview with Richard Bell, *supra* note 61.
76. Canada' Supreme Court has recognized widespread bias against Indigenous peoples and allows an accused to question prospective jurors on the basis of racial bias if the accused has established a realistic potential for partiality. *See* R. *v.* Williams, [1998] 1 S.C.R. 1128 (Can.).
77. *See* Roach, *supra* note 13, at 349.
78. *Id.* at 350.
79. *Id.*
80. *See generally Id.*
81. *Id.* at 351.
82. Platt, *supra* note 73.

While many respondent lawyers expressed skepticism that banning peremptory challenges would decrease racism and other biases within the criminal justice system, many respondents did believe that the ban would hinder client relationships by removing one of the few ways in which defendants could exercise some degree of personal control over their trial proceedings.[83] For example, Northern Saskatchewan defense attorney, Richard Bell, stated that a defendant and potential juror can often look at each other for mere seconds before the defendant is able to make a decision regarding whether they feel the potential juror would be beneficial to their trial.[84] Pursuant to what he refers to as the "Rick Bell Process," Bell previously let his clients, 99 percent of whom he estimates are Indigenous, decide whether to use a peremptory challenge to remove a juror.[85] Bell believes that allowing the client to play a role in jury selection not only forms a trusting bond between attorney and client, but also removes the attorney from the process and makes the client front and center—as it should be in criminal jury trials.[86] Rather than using challenges for cause to eliminate potential jurors because of their career or place of residence, peremptory challenges allowed litigants to drive the selection process[87] and make instinctual decisions that did not require formal justifications.[88] With the removal of peremptory challenges, attorneys lost one of the few tools they had to ensure their client faced a jury with whom they were satisfied.

Finally, nearly 66 percent of responding attorneys had concerns with the Government's motivations for eliminating peremptory challenges, believing that it was a reactionary response to the outcome of Stanley's acquittal that was heavily influenced by politics and lacked evidence-based justifications.[89] The Criminal Lawyers' Association also objected to the elimination of peremptory challenges, arguing that it is a resource that can be used to increase the diversity of juries.[90] Although the Association stated that it supports jury selection reform, it argued that without significant work to increase the diversity of jury pools and make jury service economically viable for everyone, Indigenous and other racialized defendants will be harmed by this elimination.[91] It is also important to note that proponents of the elimination similarly agreed that solely removing peremptory challenges is not sufficient in itself to

83. *See* Bertrand et al., *supra* note 24, at 148-49.
84. *See* Interview with Richard Bell, *supra* note 61.
85. *Id.*
86. *Id.*
87. Although some attorneys, like Richard Bell, allow their clients to drive the selection process, this may not be commonplace practice. Thus, depending on the attorney and their individual practices, the defendant may not always be in the "driver's seat" when it comes to exercising peremptory challenges.
88. *See* Interview with Richard Bell, *supra* note 61.
89. *See* Bertrand et al., *supra* note 24, at 150–51.
90. *See* Criminal Lawyers' Association, *Position Paper Bill C-75*, 3 (Apr. 9, 2018).
91. *Id.*

remedy problems of Indigenous exclusion, and more must be done.[92] Regardless of attorneys' reasoning for disagreeing with the elimination of peremptory challenges, a large percentage of both defense and prosecuting attorneys saw this decision as problematic and politically expedient, rather than a well-thought-out action that actually assists with decreasing the prevalence of white-washed juries in Canada. Furthermore, despite all attorneys ostensibly wanting greater Indigenous juror representation, this heated debate keeps the focus on peremptory challenges, paradoxically distracting from the many other substantial participatory barriers, and thus hindering any real change.

B. *Responses from the Judiciary: R. v. Chouhan*

While the debate whether Bill C-75's banning of peremptory challenges was actually a meaningful step toward increasing jury diversity has continued, the Bill has already been challenged by criminal litigants. An early example of one such challenge was that brought by Pardeep Singh Chouhan, a defendant charged with first-degree murder in September 2016, with jury selection for his trial beginning September 19, 2019—the very day Bill C-75 came into force.[93] At trial, Chouhan made three submissions regarding the changes resulting from Bill C-75, arguing that the elimination of peremptory challenges restricted his ability to participate in jury selection, thereby infringing his *Charter* Section 11(d) and 11(f) guarantee of a right to a fair trial and Section 7 guarantee of life, liberty, and personal security.[94] Chouhan's challenge was rejected by the trial judge, who found Bill C-75's amendments to the criminal law constitutional and retroactively applicable, holding that sufficient safeguards already exist in the jury selection process to weed out juror bias, including the "randomness" of jury summoning.[95] Chouhan's jury ultimately found him guilty and he was sentenced to life in prison.[96]

Chouhan appealed the trial judge's holding regarding the constitutionality of Bill C-75's ban on peremptory challenges, arguing that widespread racism in cases involving a racialized defendant makes the supposed safeguards of the general jury summoning process insufficient to protect defendants of color from race-based bias among jurors.[97] The Ontario Court of Appeals upheld the trial judge's holding, finding that the elimination of peremptory challenges did not violate the *Charter*, reiterating the traditional concept that, " 'an accused is not entitled to a

92. *See* Email Correspondence with Kent Roach, Prof. of Law, (Feb. 2, 2021) (on file with author); Mary Ellen Turpel-Lafond. *Peremptory Challenge Changes in the Jury System Selection in Canada Memorandum* (Feb. 8, 2021).
93. *See* Sabrina Shillingford, *R v Chouhan: Accused Rights and Jury Selection*, The Court.ca, (Mar. 6, 2020), http://www.thecourt.ca/r-v-chouhan/ [https://perma.cc/NWN2-7RC2].
94. *Id.*
95. *Id.*
96. *See* R. v. Chouhan, [2020], 149 O.R. (3d) 365, para. 16 (Can. Ont. C.A.).
97. *Id.* at para. 37–8.

particular racial or ethnic composition of the jury selected for the trial.' "[98] Interestingly, the Court of Appeals did not examine how, or even *if*, the net result of the exercise of peremptory challenges decreased representation of racialized minorities on juries, despite submissions from Aboriginal Legal Services on this point.[99] With the lack of evidence surrounding discriminatory use of peremptory challenges, it is no surprise that the court refused to acknowledge whether these challenges do, in fact, decrease Indigenous representation.

Interestingly, the Ontario Court of Appeals did find that Chouhan's right to participate in jury selection and the composition of his jury was affected by Bill C-75, and held that removal of peremptory challenges should be applied prospectively only.[100] In doing so, the Court stated that peremptory challenges are a substantive, rather than "merely a procedural right."[101] For this reason, Bill C-75 would be applicable only to cases where the right to a trial by "jury was determined on or after September 19, 2019. . . ."[102] Consequently, the Court overturned Chouhan's conviction. However, on appeal the Supreme Court of Canada overturned the Ontario Court of Appeal on this issue, holding that the elimination of peremptory challenges is purely a procedural issue, one that does *not* infringe on substantive *Charter* rights.[103] The Court thereby held that the change should be applied retrospectively and restored Chouhan's conviction.[104]

IV. Contextualizing the Bill C-75 Debate: The Pervasive, anti-Indigenous Racism of the Canadian Criminal Justice System

Thus far, this Article has discussed how the killing of Colten Boushie and acquittal of his killer, Gerald Stanley, precipitated a nationwide legislative ban on the use of peremptory challenges in Canadian criminal cases. While the ban has been upheld by Canada's judiciary and continues to be subject to debate concerning its ultimate effects on juror representativeness issues, to properly understand the stakes in this debate one must consider it in light of the stark racialized realities of Canada's criminal justice system more broadly. This system over-incarcerates Indigenous people, while failing to prioritize the investigation of crimes involving Indigenous victims.

Indigenous peoples in Canada make up less than five percent of the country's population,[105] while simultaneously representing approximate-

98. *See* Roach, *Juries, Miscarriages of Justice and the Bill C-75 Reforms*, *supra* note 13, at 348; *See generally* R v. Kokopenace, [2015], 2 S.C.R. 398 (Can.).
99. *See* Roach, *Juries, Miscarriages of Justice and the Bill C-75 Reforms*, *supra* note 13, at 348–49.
100. *Id.*at 348.
101. Shillingford, *supra* note 93.
102. *Id.*
103. See R v. Chouhan, [2020] SCC 26, para. 94–101 (Can.).
104. *Id.* at para. 104.
105. *National Indigenous Peoples Day . . . by the numbers,* Statistics Can., Error! Hyperlink reference not valid.https://www.statcan.gc.ca/en/dai/smr08/2018/

ly 30 percent of the incarcerated population.[106] Similarly, rates of violent crimes committed against Indigenous victims are more than double that of non-Indigenous peoples.[107] Fair, representative juries are crucial not only in cases where the victim is Indigenous, such as the Stanley trial, but also in cases involving Indigenous defendants. In praising the removal of peremptory challenges, it is easy to overlook the benefit this resource provided to defendants, who are far too often Indigenous. In removing this practice, defendants lost the little control they had to participate in the selection process of those who would determine their fate.[108] If one considers jury representativeness issues exclusively in the context of Stanley's trial, eliminating peremptory challenges may appear to be the best decision.

Taking a step back and considering the long history of systemic racism and genocidal acts perpetrated by Canada, it becomes clear that this single, isolated change is manifestly insufficient to address these deeply rooted inequities. To understand the countless forms of systemic racism hindering representative juries, one must first acknowledge the ways settler-colonial society encourages Indigenous injustices. Canadian society encourages institutional violence, as seen through police brutality and deficient investigations, while the Government furthers these injustices through a lack of meaningful recognition and reconciliation.[109] Two of the many examples of fundamental failures of the Canadian criminal justice system to treat Indigenous peoples fairly are the infamous "Starlight Tours" killings of Indigenous men by law enforcement officers and the findings of the recent Commission on Missing and Murdered Indigenous Women and Girls.

A. *The "Starlight Tours" Police Killings*

One especially heinous example of police brutality against Indigenous individuals was the so-called "Starlight Tours," an oft-deadly practice commonly used by some Saskatchewan police forces. These "tours" involve police officers picking up Indigenous men on winter

smr08_225_2018 [https://perma.cc/2NCE-P8KT] (Jun. 20, 2018).

106. Can. Dep't of Justice, *supra* note 9.

107. *Id.*

108. *See* Anita Balakrishnan, *Lawyers wrestle with conflicting views on peremptory challenges*, Law Times (Nov. 7, 2019), https://www.lawtimesnews.com/practice-areas/criminal/lawyers-wrestle-with-conflicting-views-on-peremptory-challenges/321688 [https://perma.cc/FCS8-P5ZB].

109. This is aptly highlighted by the recent acknowledgment of "well beyond 10,000" unmarked graves at locations of former Residential Schools across Canada. *See* Ian Austen, *With Discovery of Unmarked Graves, Canada's Indigenous Seek Reckoning*, N.Y. Times https://www.nytimes.com/2021/06/26/world/canada/indigenous-residential-schools-grave.html [https://perma.cc/P6DF-N5SF] (March 28, 2022). These graves, primarily holding the remains of children, have been purposefully ignored by Canada for decades. *Id.* With countless more schools still to be searched, the gravity of this genocidal act and the deficient investigations into these crimes underscore Canada's failing of Indigenous peoples.

nights and driving them to the outskirts of population centers, where they were dropped off in sub-freezing temperatures. At least four Indigenous men died from exposure after being abandoned by police officers in this way since 1990, when 17-year-old Neil Stonechild was found dead in -7 °F weather, wearing only jeans and a light jacket.[110] In Stonechild's case, two officers unlawfully detained him with the intention of "having some fun" and "scaring him," which apparently went " 'too far.' "[111] Although Stonechild was initially dismissed as a drunk teenager responsible for his own death, a public inquiry conducted 13 years later revealed the officers' involvement and led to their eventual termination.[112] However, the officers were never criminally charged.[113] This public inquiry discussed race relations between Indigenous peoples and the settler institution of policing, calling for reforms including police accountability.[114] However, the inquiry's recommendations did not address systemic racism.[115]

Rodney Naistus, Lawrence Wegner, and Darrell Night are three other Indigenous victims of Starlight Tours, with Naistus and Wegner both dying as a result.[116] These tours reflect a culture of deep-seated indifference to Indigenous lives and basic rights among settler-colonial police forces. The lack of timely action to address these injustices illustrates the criminal justice system's devaluing of Indigenous lives. The law both produces and sustains these injustices through its discriminatory application, as seen in the acquittal of Stanley, and the lack of criminal charges for the officers responsible for these Starlight Tour killings.

B. *Missing and Murdered Indigenous Women and Girls*

The final report of Canada's National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG) powerfully documents settler-colonial violence against Indigenous populations, especially in relation to indifference and inaction in the face of rampant gender, sexual orientation, and race-based violence. The report documents the radically disproportionate rates at which Indigenous women and LGBTQ+ communities are victims of violent crimes, including homicides, and how many such crimes have gone uninvestigated and unsolved. Indigenous women and girls are 12 times more likely to be murdered or go missing than any other women in Canada, a rate that climbs to 16 times when

110. Meagan Campbell, *New Light on Saskatoon's Starlight Tours,* Maclean's (Apr. 8, 2016), https://www.macleans.ca/news/canada/new-light-on-saskatoons-starlight-tours/ [https://perma.cc/72DA-Q44G].
111. Michelle Stewart, *Michelle Stewart: Remembering Indigenous Teenager Neil Stonechild, Found Frozen in a Field*, Vancouver Sun (Dec. 13, 2019), https://vancouversun.com/opinion/op-ed/michelle-stewart-remembering-indigenous-teenager-neil-stonechild-found-frozen-in-a-field [https://perma.cc/D663-L3HC].
112. *Id.*; Campbell, *supra* note 110.
113. Campbell, *supra* note 110.
114. Stewart, *supra* note 111.
115. *Id.*
116. *See* Sherene Razack, *It Happened More Than Once": Freezing Deaths in Saskatchewan*. 26 Can. J. Women & L. 51, 53–54 (2014).

compared solely to white women.[117] Of these missing and murdered women, nearly half of the cases remain unsolved, with no charges laid in approximately 40 percent of cases, reflecting a troubling de-prioritization of cases involving Indigenous victims.[118] Furthermore, in a 2013 national report by the RCMP it was estimated that, between 1980 and 2012, approximately 1,200 Indigenous women and girls went missing or were murdered.[119] Despite the Government only initiating a report into the thousands of instances of MMIWG in 2013, these injustices have been a reality in Canada for many prior decades. Additionally, a 2019 national inquiry requested a two-year extension from the Canadian Government due to the substantial instances of violence it discovered.[120] The Government declined this request, highlighting its familiar pattern of minimally addressing issues without providing more resources to disrupt cycles and actually effect change.[121]

Injustices perpetrated against Indigenous victims by the criminal justice system, including illegal detentions, deaths in custody and prisons, police violence, and a lack of thorough investigations into victimization, have led some to argue that the Indigenous body is not one fully recognized as human, and thus incapable of being "murdered."[122] Settler society objectifies Indigenous peoples as a form of colonial property, exemplified by the Residential School experience, which prevents the perception of Indigenous peoples as victims.[123] Boushie was killed by Stanley, but the criminal justice system prevented the branding of this act as homicide, thereby eliminating Boushie's label as a victim. Settler-colonial society's indifference to injustices, including those involving the killings of Boushie, Stonechild, Naistus, Wegner, and Night, must be considered in discussions of what amounts to a "fair" trial or "representative" jury in relation to Indigenous peoples.

When considering the myriad of systemically racist instances perpetrated against Indigenous peoples by the Canadian Government and criminal justice system, it becomes clear that the elimination of peremptory challenges is not enough to produce meaningful change. The Supreme Court's ruling in *Kokopenace* posited that only the jury selection process, not the particular composition of a jury, is protected by the Charter, and the Supreme Court has now shown any interest in revisiting this issue.[124] These procedural rights are quite basic and minimal in na-

117. Nat'l Inquiry into Missing & Murdered Indigenous Women and Girls. Reclaiming Power and Place 55 (2019).
118. *See* Myrna Dawson et al., Canadian Femicide Observatory for Justice and Accountability, #CallItFemicide*:* Understanding Gener-Related Killings of Women and Girls in Canada 2018 (2018).
119. Reclaiming Power and Place, *supra* note 117, at 54.
120. *Id.*, at 5, 74-75.
121. *Id.*
122. *See Id.* at 53–54.
123. *See Id.* at 238, 254, 288–89.
124. R *v*. Kokopenace, [2015] 2 S.C.R. 398 (Can.).

ture, resulting in a very low federal standard for a "representative" jury. It is in the hands of the provinces to create jury selection processes that require representation to be defined more narrowly than a simple "reasonable effort."[125] With the limited applicability of *Kokopenace*, and the minimal federal action displayed through Bill C-75, provincial action is a necessity for structural reform seeking truly representative juries. With most Indigenous issues federally governed, jury reform is an opportunity for provincial activism. Despite Bill C-75 missing the opportunity for a provincial call to action to address systemic barriers, provincial governments have the ability to create significant change with their own Jury Acts. Justice goes both ways, and Indigenous peoples deserve a fair jury regardless of which position they fulfil. These realities underscore the pressing need to more comprehensively address the systemic racism that pervades Canada's criminal justice system, including all aspects of jury summoning practices. The remainder of this Article identifies some of these pervasive issues and offers suggestions on further steps that could be taken to improve the representativeness of Canadian juries, with a particular emphasis on Indigenous representation.

V. Provincial Jury Acts: Addressing the Systemic Barriers Hindering Representation

The Canadian Charter and Criminal Code delegate authority to the provinces in determining policies related to juror qualifications and processes.[126] For this reason, each provincial Jury Act governs jury selection procedures. Despite their importance, these acts have received scant attention in the wake of the Stanley case. The following (use "subpart" per CJLR Style Conventions) analyzes the Jury Acts of Ontario, Manitoba, and Saskatchewan, in an effort to assess how existing jury selection processes may be reformed to improve Indigenous juror representation.

A. *Ontario*

1. Sounding the Alarm on Discriminatory Practices

In Ontario, juries have been used in criminal proceedings since 1763, in civil proceedings since 1792, and in coroner's inquests[127] since at

125. *See Id.*

126. Canada Dep't of Justice. Steering Committee on Justice Efficiencies and Access to the Justice System 25 (2009).

127. In Ontario, a coroner's inquest is a formal court proceeding with a five-person jury. The inquest is held to publicly review the circumstances of a death and may be utilized if the Chief Coroner determines that it would be beneficial for: addressing community concern about a death, assisting in finding information about the deceased or circumstances around a death, and/or drawing attention to a cause of death if such awareness can prevent future deaths. These inquests rely on the same jury roll as jury trials. *Coroner's Inquest*, British Columbia Gov't, https://www2.gov.bc.ca/gov/content/life-events/death/coroners-service/inquest-schedule-jury-findings-verdicts (last visited Feb. 17, 2022).

least 1763.[128] However, between 2005 and 2015, numerous longstanding issues with unrepresentative jury rolls came to the forefront following a coroner's inquest.[129] Not only was it revealed that fundamental jury roll problems were consistently overlooked by the Ontario Government, but the issues appeared to have worsened during the decade preceding the inquest.[130] Between 2000 and 2011, seven Indigenous students died in tragic circumstances after relocating from their remote communities to attend high school in Thunder Bay, a city in northwestern Ontario.[131] One of these students was Reggie Bushie, a 15-year-old youth, who drowned in the McIntyre River near Thunder Bay in 2007.[132] In the same year, Jacy Pierre, a 27-year-old Indigenous man, died of an apparent drug overdose in the Thunder Bay District Jail.[133] Following the suspicious deaths of the seven students, and the death of Pierre as an inmate in a correctional facility,[134] a coroner's inquest was ordered.[135] However, before the commencement of these inquests, the families of the deceased contacted both the Office of the Coroner and the Attorney General to express concerns regarding the lack of Indigenous jurors on the jury roll for the District of Thunder Bay.[136] The families sought to ensure that the coroner's inquest, which uses the same jury roll as jury trials, had a representative jury.[137]

The families' concern was prompted by the recent 2008 inquest into the deaths of Jamie Goodwin and Ricardo Wesley ("the Kashechewan Inquest"), two other Indigenous individuals, which found that in the Kenora District,[138] which adjoins that of Thunder Bay, jury rolls were drawn from only 14 of the 49 First Nations communities represented by the Nishnawbe Aski Nation (NAN).[139] The Kashechewan Inquest also resulted in the summoning of Ontario Government court employees to explain this deficiency.[140] These government employees revealed that there were no individuals from Kashechewan First Nation on the jury panel for the

128. Iacobucci, *supra* note 32, at 22
129. Interview with Meaghan Daniel, Barrister & Solicitor (Feb. 26, 2021) (notes on file).
130. Iacobucci, *supra* note 32, at 13.
131. Jody Porter, *20 Cases Delayed by Ontario's Jury Roll Problem*, CBC News (Jan 2, 2015, 6:00 A.M.), https://www.cbc.ca/news/canada/thunder-bay/20-cases-delayed-by-ontario-s-jury-roll-problem-1.2865727 [https://perma.cc/2MFF-MFCQ].
132. Pierre *v*. McRae, 2011 ONCA 187, para. 1 (Can. Ont.).
133. *Id.*
134. In Ontario, inquests are mandatory whenever an inmate dies at a correctional institution. *Supra* note 131.
135. *See* Iacobucci, *supra* note 32, at 13.
136. *Id.*
137. *Id.*
138. For reference, Kenora and Thunder Bay, two northern Ontario cities, have Indigenous populations of approximately 18 percent and 9.5 percent, respectively. *See* Statistics Canada. *NHS Focus on Geography Series*, https://perma.cc/QFJ4-XDVM; https://perma.cc/JQ83-52AR.
139. Iacobucci, *supra* note 32, para. 50.
140. Interview with Meaghan Daniel, *supra* note 129.

2008 inquest because there was not a single Kashechewan First Nation individual on the entire jury roll.[141] This disturbing disclosure caused an uproar, with the public questioning how it was possible for a province to use a jury roll with such obvious defects.[142] More summons were sent to court employees, signaling to the Ontario Government that unrepresentative jury rolls represented a major problem impacting the provincial justice system.[143] Rather than seeking further information and addressing the issue directly, the provincial Government simply instructed court employees to ignore future summons.[144]

Following this revelation, each family, along with NAN representatives, requested that the presiding Thunder Bay and Kenora coroners each issue a summons to the Regional Director of Court Operations to inquire how the District of Thunder Bay's jury roll was compiled.[145] However, both coroners refused to issue the requested summons, prompting the families and NAN to apply for a judicial review of each coroner's decision and a stay of the inquests pending the hearing of their application.[146] Following this judicial review, the Ontario Court of Appeal held in *Pierre v. McRae* that the families had produced sufficient evidence to justify an inquiry into the representativeness of the jury rolls.[147] The court also ordered that the Director of Court Operations appear before both inquests to testify about the production of jury rolls in the Thunder Bay District.[148] As a result, the coroner determined that Thunder Bay's jury roll was not representative and the inquest was stayed until a representative jury roll was created.[149]

The debacles in Kenora and Thunder Bay revealed that one of the major systemic issues hindering Indigenous representation on juries is how jury rolls are compiled from the very start. At this time, names of potential jurors are taken from municipal assessment lists, which rely on taxation records.[150] Since Indigenous people living on Reserves are not subject to property taxes, these individuals are automatically excluded.[151] Furthermore, any individual who did not own a house, including renters, students, or those unable to afford a house, are similarly excluded.[152] Because of the poverty experienced by Indigenous communities,

141. Iacobucci, *supra* note 32, para. 50; Interview with Meaghan Daniel, *supra* note 129.
142. Interview with Meaghan Daniel, *supra* note 129.
143. *Id.*
144. *Id.*
145. Can. Ministry of the Atty. General, *supra* note 32, para. 51.
146. *Id.*
147. *Id.*
148. *Id.*
149. Nikita Rathwell, *Lack of First Nations Representation on Ontario Juries Symptomatic of Larger Problems: Iacobucci Report*, The CT. (Oct. 5, 2014), https://canliiconnects.org/en/commentaries/30009.
150. *Id.*
151. Kent Roach, Canadian Justice, Indigenous Injustice (2019) at 97.
152. Interview with Meaghan Daniel, *supra* note 129.

these practices produce an even greater exclusion of Indigenous individuals. Since its inception, this discriminatory procedure has systemically excluded roughly 25,000 residents of approximately 49 predominantly Indigenous communities from jury rolls in Ontario.[153]

In the early 2000's, after acknowledging the exclusion of Indigenous peoples from jury rolls, the Ontario Government contacted Indigenous and Northern Affairs Canada (INAC) for Band lists.[154] The Ontario Government intended to supplement the property assessment rolls with these lists, in hopes of improving Indigenous jury participation.[155]

However, the Federal Government soon determined that, due to confidentiality reasons, Band lists could not be used.[156] In response to this setback, the Ontario Government decided that, rather than changing inherently discriminatory jury roll compilation practices, it would write formal letters to Chiefs requesting lists of Band members.[157] Unsurprisingly, the majority of Chiefs either completely disregarded the letter or were unsure of how to respond to such a request, especially in relation to confidentiality concerns.[158] After this tactic failed, the Government reverted to relying on the previous lists compiled using Band lists, despite these quickly becoming outdated and consequently resulting in greater Indigenous exclusion for each year the practice continued.[159] Furthermore, the Jury Act at this time simply stated that the Sheriff may obtain the names of inhabitants of a Reserve from "any record available," without any further guidance.[160]

A second set of appeals arose from these findings, brought by Indigenous defendants whose jury convictions used the same flawed jury rolls as those in the coroner inquiries.[161] These defendants argued that the lack of Indigenous representation on these lists had infringed on their right to a representative jury.[162] This led to some judges staying proceedings until the jury rolls were fixed, which sent the Ontario Government into a panic, highlighting the urgent need to address and reform these issues.[163] One of these defendants was Kokopenace, who, as stated earlier, appealed his conviction on several grounds, including the unrepresentativeness of Thunder Bay District's jury roll.[164]

153. *Id.*
154. *Id.;* "Band" is a term the Canadian government uses to refer to certain First Nation communities that function as municipalities, John A. Price and Rene R. Gadacz, *Band (Indigenous Peopels in Canada)*, The Canadian Encyclopedia (Jun. 6, 2011), https://www.thecanadianencyclopedia.ca/en/article/band.
155. Interview with Meaghan Daniel, *supra* note 129.
156. *Id.*
157. *Id*.
158. *Id.*
159. *Id.*
160. Juries Act, R.S.O. 1990 c J.3 (Can.).
161. Interview with Meaghan Daniel, *supra* note 129.
162. Iacobucci, *supra* note 32, para. 52.
163. *See* Interview with Meaghan Daniel, *supra* note 129.
164. *See Id.*

By the time *Kokopenace* was appealed by the Crown to the Supreme Court of Canada, the Ontario Government had begun to address the skewed jury rolls and summoning practices.[165] This included the appointment of former Supreme Court of Canada Justice, Frank Iacobucci, to carry out an independent review into the barriers hindering Indigenous juror representation.[166] However, this progress was halted after the Court concluded that jury representativeness is assured through the process of compiling the jury roll and not its ultimate composition, thereby holding that only reasonable *efforts* to compile a representative jury roll are required.[167] No longer pressed by pending litigation before the Supreme Court, the Ontario Government ultimately determined that no representativeness issue existed in relation to provincial jury selection processes, and backed away from the major changes it had been working toward.[168] This included disregarding Iacobucci's key recommendation to compile jury rolls from the province's health card database, rather than property assessment rolls, despite the comprehensive inclusion of Indigenous peoples in the health card database.[169]

Beyond establishing a low procedural floor, the *Kokopenance* decision itself did not provide any avenues to achieving greater representation, making provincial jury reform even more imperative. However, in the years since this decision, limited progress has been made toward addressing Indigenous excluded on jury panels in Ontario. Provincial jury panels continue to disproportionately consist of white, middle- and upper-class Ontarians who can afford to take time off work or to be paid less than minimum wage for jury participation.[170] Expenses, such as travel, parking, meals, and childcare, are not compensated by the province, and require the potential juror to cover these costs upfront.[171] Furthermore, Ontario does not compel companies to compensate employees for jury duty, nor does the province provide resources to those who are self-employed or in temporary/contract positions.[172]

2. Recent Amendments: Small Steps Falling Short

It took until 2019—more than a decade after alarms sounded on the province's discriminatory jury selection policies—for amendments to be proposed through the provincial Budget Bill. This Bill recommended,

165. *See Id*.
166. *See* Rathwell, *supra* note 149.
167. *See* Anthony et al., *supra* note 33, at 35; R *v*. Kokopenace, [2015] SCC 28, 2 S.C.R. 398 (Can.).
168. Interview with Meaghan Daniel, *supra* note 129.
169. *Id.*
170. Ebyan Abdigir, Kvesche Bijons-Ebacher & Palak Mangat, *How a Broken Jury roll Makes Ontario Justice Whiter, Richer and Less Like Your Community*, Star (Feb. 16, 2018), https://www.thestar.com/news/investigations/2018/02/16/how-a-broken-jury-list-makes-ontario-justice-whiter-richer-and-less-like-your-community.html.
171. *Id.*
172. *Id.*

just as Iacobucci had years before, supplanting the property assessment rolls with the provincial health card database as the primary source for establishing rolls of potential jurors.[173] This change targeted a large systemic barrier existing in the provincial jury roll, but meaningful change appeared to stop there. The Bill failed to address other restrictive policies, such as implementing a law that requires employers to pay employees during mandatory time off for jury duty.[174] Thus, following the 2019 amendment of the *Jury Act*, many substantial issues still persist. Although using the healthcare database expands the potential jury pool, barriers preventing individuals from actually serving on a jury, such as insufficient pay, have not been addressed.

The amendment's failure to consider direct compensation for jury duty continues to be a significant issue.[175] Ontario remains as the only Canadian provinces that does not compensate jurors for the first 10 days of jury duty, only beginning compensation[176] on the 11th day of duty.[177] Juror pay in the province is also the lowest in the country, providing only $40[178] per day.[179] Ontario also lags behind other provinces by failing to reasonably compensate jurors for expenses including transportation and childcare.[180] For example, only prospective jurors living further than 25 miles from the courthouse receive a travel allowance.[181] However, this allowance must be requested, is not paid in advance, and does not cover expenses such as parking.[182] Furthermore, if selected as a juror, individuals are only compensated for travel if they live outside the city hosting the jury trial and are only paid after the trial begins—meaning jurors must pay these costs upfront.[183] Childcare compensation is never provided.[184] The amendment further fails to significantly address the issue by continuing to exclude from jury rolls any person convicted of an offence that may be prosecuted by indictment, which disproportionately excludes Indigenous individuals from potentially serving on juries due to their general overrepresentation in the criminal justice system.[185] The

173. Star Editorial Board, *Ontario's Changes to Jury Duty are Good, But More is Needed*, Star (Apr. 24, 2019), https://www.thestar.com/opinion/editorials/2019/04/24/ontarios-changes-to-jury-duty-are-good-but-more-is-needed.html.
174. *Id.*
175. *Id.*
176. This compensation is less than minimum wage. *See Id.*
177. *Id.*
178. From day 11 to 49, jurors are compensated $40. As of day 50, the pay is raised to $100, but trials this length are rare. *See* Gov't of Ontario. *Jury Duty in Ontario* (Jul. 29, 2019).
179. Star Editorial Board, *supra* note 173.
180. *Id.*
181. Gov't of Ontario. *Jury Duty in Ontario* (Jul. 29, 2019).
182. *Id.*
183. *Id.*
184. *Id.*
185. Juries Act, R.S.O. 1990 c J.3 (Can.).

Jury Act amendments have also removed any reference to Indigenous peoples, perhaps signaling that the Government now believes the system applies equitably to everyone.[186]

Widening the jury pool on its own will not significantly increase Indigenous representation unless the system is made more inclusive in other aspects, including providing reasonable compensation and removing discriminatory barriers, such as barring individuals with a criminal record. These and other continuing issues with Ontario's Jury Act remain untouched by the elimination of peremptory challenges.

B. *Manitoba*

1. The First Provincial Inquiry into Unrepresentative Juries

Manitoba appears to be the only province to have conducted a major review of its *Jury Act* following extensive issues with unrepresentative juries.[187] In 1988, a public inquiry into the Administration of Justice and Indigenous Peoples was created following two instances involving Indigenous injustices: a 17-year delay in bringing a 1971 murder on a First Nation Reserve to trial and the 1988 killing of an Executive Director of a tribal council by a police officer who was exonerated the following day.[188] This inquiry addressed the numerous ways Manitoba has failed Indigenous peoples and set forth recommendations for reforming the criminal justice system.[189] One of the inquiry's most troubling findings was the lack of adequate Indigenous representation in cases involving Indigenous defendants.[190] In 1999, the Manitoba Aboriginal Justice Implementation Commission was created to develop an action plan based on the inquiry recommendations.[191] However, this commission focused primarily on broader Indigenous-justice system interactions and shifted responsibility for the majority of representation issues to the Federal Government, where they were subsequently ignored until Bill C-75.[192]

The 1988 inquiry was not the first time that the Manitoba government had been made aware of systemic jury selection defects. Prior to 1983, Manitoba relied on voting lists to compile its jury pool, despite Indigenous people not having the right to vote between 1886 and 1952.[193] This approach directly excluded Indigenous peoples from the jury roll, but the problem was not resolved even after the right to vote was granted. Unlike mayors, Indigenous officials were not required to submit the names of potential jurors, resulting in further systemic exclusion until

186. *Id.*
187. Can. Ministry of the Atty. General, *supra* note 32, para. 151.
188. *Id.* at para. 152.
189. *Id.*
190. Richard Jochelson, Michelle I. Bertrand, R.C.L. Lindsay, Andrew M. Smith, Michael Ventola & Natalie Kalmet, *Revisiting Representativeness in the Manitoban Criminal Jury*, 37 Manitoba L.J. 365, 366 (2018).
191. *Id.*
192. *Id.*
193. Iacobucci, *supra* note 32, at 39.

1971 when submissions of all names became mandatory.[194] In 1983, the province finally began using computerized records from the Manitoba Health Services Commission to compile jury rolls as it included names of both Indigenous and non-Indigenous residents.[195] Although the inquiry acknowledged that this was the first time Indigenous peoples were properly represented on jury rolls, this policy reform did not address any of the numerous logistical problems hindering representation.[196]

Notably, the inquiry also found that Indigenous peoples are systemically excluded from jury selection through both summoning practices and pre-trial jury-selection processes.[197] Summoning practice biases include jury summons sent by mail, despite numerous on-Reserve individuals not having regular mail service.[198] Furthermore, the lack of telephone service for some people living on Reserves hinders their ability to respond to the summons.[199] Interestingly, the inquiry also noted that although health records are now used to compile jury rolls, Indigenous peoples living in urban centers are more likely to rent rather than own, and, consequently, accurate records of their current addresses may not exist.[200] Summons may not be sent to the proper addresses, promoting further exclusion. The excessive cost to travel from remote Reserves, and the fact that potential jurors must pay these costs upfront, continue to eliminate financially disadvantaged individuals.[201]

As for pre-trial jury selection biases, the inquiry focused on peremptory challenges, citing numerous instances wherein Indigenous jurors were eliminated from juries through the exercise of these challenges.[202] In response to this finding, the Law Reform Commission of Canada stated that peremptory challenges were the only tool that ensured the defendant had some control over their jury—further highlighting that opinions surrounding peremptory challenges have never been clear-cut.[203] The inquiry ultimately suggested the elimination of peremptory challenges along with numerous other recommendations. However, Bill C-75 ignored every other recommendation.

The inquiry also proposed jurors be drawn from within approximately 25 miles of the community where the trial is to be held, and, if this is not feasible, that jurors be pulled from a community that most closely resembles the community in which the offense took place, both demographically and culturally.[204] Moreover, the inquiry also recommended

194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *See* Iacobucci, *supra* note 32, at 39.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *See* Iacobucci, *supra* note 32, at 40.
204. *Id.*

amending the Jury Act to provide translation services for First Nations jurors who do not speak English or French, but are otherwise qualified to serve.[205] Further, the province should appreciate that it takes longer for individuals living in remote areas to receive summons while still ensuring such individuals receive equal consideration as a potential juror.[206]

In 2002, *R. v. Lamirande* was heard before the Manitoba Court of Appeal.[207] This case involved an Indigenous defendant who raised the lack of Indigenous individuals on his jury as an issue of representativeness.[208] Subsequently, his counsel demanded the recruitment of more Indigenous jurors.[209] However, as with *Kokopenace*, the court determined that jury members are presumed to be impartial and noted that so long as jurors are randomly selected from the community, the jury pool does not need a particular racial composition to be representative.[210] *Lamirande* highlights the tendency of Canadian courts to evaluate juror representation from a surface-level perspective that dismisses systemic barriers existing in jury selection processes. If courts do not address the inherent discrimination in so-called "random" selection processes, or acknowledge the necessity for equitable representation, provincial legislative jury reform becomes even more critical for achieving meaningful change.

2. Current Jury Legislation: Decades of Dismissing Reform Opportunities

Manitoba's Jury Act remained primarily unchanged until August 21, 2021 when it was progressively amended. Prior to this date, Manitoba compensated jurors only $30 a day, beginning on the 11th day of service.[211] Today, jurors are compensated $80 per day, with pay beginning on their first day of attendance.[212] However, it should still be noted that this falls below minimum wage. The recent amendment also provides that jurors will be reimbursed for transportation, parking, meals, and accommodation fees, replacing the previously-broad terminology that failed to clearly state what expenses were compensated.[213]

Manitoba's amended Jury Act also altered its disqualifications for criminal records. Unlike Ontario that solely excludes jurors convicted of an indictable offense, Manitoba previously excluded all individuals who had been: (1) convicted of an indictable offense, (2) convicted within the

205. *Id.*
206. *Id.*
207. R. v. Lamirande, [2002] MBCA 41, para. 150 (Can. Man.).
208. *Id.*
209. *See* Jochelson et al., *supra* note 190, at 373.
210. *Id.*
211. Olivia Stefanovich, *As Courts Prepare to Restart Jury Trials, Advocates Call for Fair Pay for Jurors*, CBC News (Aug. 4, 2020 4:00 AM), https://www.cbc.ca/news/politics/stefanovich-jury-duty-post-covid19–1.5648374 [https://perma.cc/ZNC8-EFHU].
212. The Court Practice and Administration Act, S.M. 2021, c. 40, s. 26, 28 (Can.) (amending The Jury Act).
213. *Id.*; The Jury Act, C.C.S.M. c. J30, s. 42 (Can.).

previous five years with an offence that is punishable by a $5,000 fine or more, or by imprisonment for one year or more, or, (3) charged within the previous two years with an offense punishable by a $5,000 fine or more, or by imprisonment for one year or more, and has not been acquitted, had the charge dismissed/withdrawn, or had a stay of proceedings.[214] This aspect of Manitoba's Jury Act produced major discriminatory effects against Indigenous peoples, especially by its exclusion of those who are merely *charged* with an offense. Manitoba's amendment narrows its previously-strict criminal record exclusions and now provides that only individuals *convicted* of an indictable offense, and who have not received a pardon or a record suspension, are disqualified from serving.[215] Although there has been progression, any blanket disqualification remains as a significant barrier in the way of participation.

Despite the recent amendment, Manitoba's Jury Act remains inflexible to postal delays for returning summons. The Jury Act states that, if a summons is sent by mail, it must be done so at least 17 days before the individual's appearance is required.[216] This limited notice makes it very difficult for summonses sent to remote areas to be received, and responded to, within 17 days, and furthers the discrimination against Indigenous individuals living on Reserves in distant locations with limited mail service.

Although Manitoba was the first province to conduct a major review of its Jury Act, its recent amendment overlooks many areas desperately requiring greater reform. By failing to acknowledge the numerous ways its Jury Act continues to hinder Indigenous representation, the myriad of discriminatory policies in Manitoba's jury selection processes remain predominantly unaddressed.

C. *Saskatchewan*

1. Legislative Action and Judicial Inaction

In 1979, the Law Reform Commission of Saskatchewan completed a report for the Attorney General proposing reforms to the provincial *Jury Act*.[217] Prior to the release of this report, 27 years had passed since the province's jury legislation was last updated, rendering the system obsolete and disconnected with the present social realities.[218] One of the main recommendations from this report was an alteration to summoning processes for jury duty, citing that existing sources of information concerning the names and addresses of potential jurors were entirely inadequate and that a more reliable source is required.[219] At the time

214. The Jury Act, C.C.S.M. c. J30, s. 3 (Can.).
215. The Court Practice and Administration Act, S.M. 2021, c. 40 s. 22 (Can.).
216. The Jury Act, C.C.S.M. c. J30, s. 23 (Can.).
217. Law Reform Comm'n of Saskatchewan. *Proposals for Reform of the Jury Act* (Dec. 1979).
218. *Id.* at 7.
219. *Id.* at 4.

of the report's release, jury lists were manually compiled from city and telephone directories, which was both time-consuming and wholly inadequate when considering the likelihood for systemic exclusion.[220]

The report cited statistics indicating that a large percentage of accused persons tried by juries in Saskatchewan are Indigenous and highlighted the need to involve Indigenous persons in the administration of justice.[221] The report suggested that the province employ the Register of the Saskatchewan Hospital Services Plan to compile jury lists, as it contained names and addresses of 98 percent of Saskatchewan's population.[222] The report also made suggestions regarding compensation and widening the jury pool to include every provincial resident and Canadian citizen 18 years and older (subject to further exclusions), and increasing juror pay to meet the provincial minimum wage standard.[223] In 1981, following these recommendations, the provincial *Jury Act* was amended to allow use of the *Saskatchewan Hospitalization Act* database to compile jury lists.[224] However, with significant jury issues remaining, this was no 'magic pill' to solve exclusion.[225] Although potentially ten percent of individuals summoned for jury selection are now Indigenous, due to the myriad of other systemic factors left unaddressed, this does not translate directly to ten percent indigenous representation on jury selection pools.[226]

In 1994, after a defendant challenged his jury panel, *R v. Yooya* was heard before the Saskatchewan Court of Queen's Bench.[227] Yooya, an Indigenous man, was charged with assault, sexual assault, unlawful confinement, and handling a firearm without reasonable precautions.[228] Yooya was originally scheduled for trial at Prince Albert, with a jury panel drawn from this area.[229] However, both Yooya and the victim were residents of Black Lake, Saskatchewan,[230] and all offences were alleged to have taken place at or near Black Lake.[231] Prince Albert is located approximately 500 miles from Black Lake, a remote area only accessible by plane. For this reason, Yooya requested to be tried before a jury chosen from a jury panel representative of Black Lake, or from the region

220. *Id.* at 7.
221. *Id.* at 4.
222. Law Reform Comm'n of Saskatchewan, *supra* note 213, at 4.
223. *Id.* at 7.
224. R *v*. Yooya, [1994] SKQB 5084, para. 8 (Can. Sask. Q.B.).
225. *See* Interview with Richard Bell, *supra* note 61.
226. *See Id.*
227. *See* R *v*. Yooya, [1994] SKQB 5084, para. 1 (Can. Sask. Q.B.).
228. *See Id.*
229. *See Id.*
230. Black Lake is a Denesuline First Nations community located in Northern Saskatchewan with an Indigenous population of approximately 95%. To reach Black Lake, one must fly into Stony Rapids and take a taxi service 14 miles by all-season gravel road to the community. *See* Mark Israel, *The Underrepresentation of Indigenous Peoples on Canadian Jury Panels*, 25 L. & Policy 37, 51 (July 2003).
231. *See* R *v*. Yooya, [1994] SKQB 5084, para. 1 (Can. Sask. Q.B.).

in which Blake Lake resides.[232] Furthermore, he sought to have his jury trial take place in Black Lake or a convenient place within the same region.[233] The defense argued that this would allow "Indigenous witnesses to be understood properly by the jury, ensure that racial biases of the non-Indigenous community did not affect the verdict, and grant greater legitimacy to, and understanding of, the trial and verdict among the local population."[234]

Following this request, the trial was moved to La Ronge, a community more northern than Prince Albert.[235] Despite La Ronge's location being in the same judicial district as Black Lake, it failed to include any jurors from Black Lake or the surrounding geographical region.[236] After Yooya again requested to have some of his community represented on his jury, the La Ronge trial was cancelled and the jury panel discharged.[237] Yooya then brought an application for relief to the court, arguing that both the common law and constitutional right to have his trial in or around Black Lake had been violated.[238] Ultimately, and not surprisingly considering the outcome of other cases previously discussed, the court held that no such violations had occurred and ordered that Yooya stand his trial in the City of Prince Albert.[239]

This decision had been complicated by the fact that the Sheriff, in allowing the trial to be moved to La Ronge, had exceeded his discretion and subsequently violated the provincial Jury Act passed in 1981, which required the Inspector of Legal Offices to determine the geographical area within which a Sheriff operates.[240] However, the court did hold that juries should be drawn from the whole of a judicial district, not just a specific city or population center.[241] When the entire judicial district was relied upon, the court reasoned, on-Reserve residents hypothetically have the same random chance of being summoned for jury duty as any other resident in Saskatchewan.[242] However, as was the case with *Yooya*, this does not alter the fact that there is only a small chance for a member of a specific community to appear on a jury panel, let alone a member of the defendant's community.[243] This is highlighted by the fact that even after his trial was improperly moved to La Ronge, a city in the same judicial district as Black Lake, no members of Yooya's community were summoned. Despite minimal legislative action, no judicial action has

232. *See Id.*
233. *See Id.*
234. Mark Israel, *supra* note 230, at 48.
235. *See* R *v*. Yooya, [1994] SKQB 5084, para. 4 (Can. Sask. Q.B.).
236. *See Id.*
237. *See Id.*
238. *See Id.* at para. 43.
239. *See Id*. at para. 44, 63.
240. *See* Israel, *supra* note 230, at 50.
241. *See Id.*
242. *See Id.* at 50–51.
243. *See Id.* at 51.

been undertaken to increase Indigenous representation on Saskatchewan juries. Rather, as the court held in *Yooya*, Indigenous defendants do not have a right to a representative jury including members of their community, nor do they have a right to be tried in or near their community, where racial prejudices are presumably lessened.

2. Cut Corners and Missed Opportunities for Greater Reform

Despite the fact that much progress remains to be done, Saskatchewan has one of the most progressive Jury Acts in Canada. For instance, as of 2019, Saskatchewan jurors are paid $110 a day, which is one of the highest in the country.[244] Furthermore, jurors can submit their expenses for childcare compensation and receive a maximum of $40 per day, or up to $80 per day for eldercare expenses.[245] Jurors are compensated for parking, meals, accommodations deemed to be reasonable, and mileage if they travel from outside city limits.[246] Interestingly, if a summoned individual still cannot afford to serve, they can complete an application for relief with supporting documentation that reflects their financial hardship, and they may be excused.[247] However, this simply removes them from the equation, rather than providing greater resources to ensure that they can afford to serve.

Saskatchewan is also less restrictive than Ontario in regards to individuals with a criminal record, excluding only those presently incarcerated or those convicted of an offence for which they were sentenced to a term of imprisonment of two years or more and for which no pardon or record suspension is in effect.[248] Although any criminal record restriction will disproportionately discriminate against Indigenous peoples, Saskatchewan's Jury Act is marginally more inclusive by allowing some individuals with records to participate in jury service. Saskatchewan also continues to rely on medical information to compile jury rolls, now utilizing the Saskatchewan Medical Care Insurance Act for purposes of selection.[249] This method, although not perfect, remains more inclusive than methods such as voting or taxation records.[250]

Saskatchewan's Jury Act requires a two-step random selection of potential jurors.[251] First, at the request of the Ministry of Justice, the provincial body that manages health records randomly assembles a list of residents residing in the geographical area from its medical insurance database and provides the list to the Inspector of Court Offices.[252] The

244. *See* CBC News, *Sask. Jurors Get Pay Bump to $110 a Day for Criminal and Civil Trials*, CBC News (Aug. 22, 2019 10:02 AM CT), [https://perma.cc/6SGE-2M2H].
245. *See Id.*
246. *Court of Queen's Bench, Jury Information,* Sask. L. Ct (last visited Apr. 15, 2022), [https://perma.cc/9AN9-CPR9].
247. *See Id.*
248. *See* The Jury Act, R.S.S. 1998 c J-4.2 (Can.).
249. *See Id.*
250. *See* Roach, *supra* note 13, at 333.
251. *See* Edwards, *supra* note 57.
252. *See* The Jury Act, R.S.S. 1998 c J-4.2 (Can.); Edwards, *supra* note 57.

Inspector then randomly selects a smaller number of names and addresses from this list and provides it to the local Sheriff, who writes and mails the summonses.[253] This two-step selection, drawn by two different institutions, appears to be a protective measure against biases.[254] However, despite this provincial legal requirement, it appears that the second selection is rarely, if ever, performed.[255] Not only was this the case in Stanley's trial, but it has also occurred in countless other jury trials throughout the province.[256] The Saskatchewan's Justice Ministry defended this faulty practice, stating that although it does not comply with provincial legislation, it still meets the "overall legislative intent."[257] This raises serious questions about the province's desire for equitable juries when, despite protective legislative measures set forth in law, these laws are not followed. Not only must Saskatchewan reconsider some of its more discriminatory and restrictive jury policies, but it must also ensure that its Jury Act is uniformly followed by provincial officials.

Saskatchewan courts have also missed opportunities to improve the province's jury system. For example, in *R v. Cyr*, an Indigenous man was charged with committing aggravated assault and using a weapon, both of which occurred on Pasqua First Nation Reserve.[258] Prior to his trial, Cyr brought an application that sought: (1) a finding that as a Treaty 4 Indian, he has a right to a mixed jury,[259] consisting of four to six jurors who are Treaty 4 Indians, pursuant to the Treaty's Assistance Clause, or, alternatively, (2) to have his charges stayed, on the basis that his Charter Section 11(d) and 11(f)'s guarantees could not be met through the existing jury selection process of the Saskatchewan Jury Act.[260] Cyr's evidence also included testimony from an individual who served as a Sheriff summoning jurors in the Regina District of Saskatchewan since 1996.[261] This testimony focused mainly on the provincial jury selection process which has been in place for the past 15

253. *See* The Jury Act, R.S.S. 1998 c J-4.2 (Can.).
254. *See* Edwards, *supra* note 57.
255. *See Id.*
256. *See Id.*
257. *See Id.*
258. R. *v*. Cyr (S.L.), (2014) 439 Sask. R. 159 (Can. Sask.).
259. In Canada, Mixed juries that composed of six francophones and six anglophones were used in Quebec and Manitoba into the 1970s. Mixed juries composing of equal numbers of citizens and noncitizens were used in England in cases involving non-citizens from 1189 to 1870. Additionally, mixed juries of six Indigenous and six non-Indigenous individuals were used in the 18th and 19th centuries in some North American colonies, including New Zealand and Hawai'i. *See* Roach, *supra* note 13, at 324; Kent Roach, *Jury Reform will be Contentious and Limited After the Stanley Trial*, Pol'y Opinions (Sept. 25, 2018), https://policyoptions.irpp.org/magazines/september-2018/jury-reform-will-be-contentious-and-limited-after-the-stanley-trial/.
260. *See* R. *v*. Cyr (S.L.), (2014) 439 Sask. R. 159 (Can. Sask.); L. Soc'y of Saskatchewan, *Summary of R v Cyr*, Can. L. II (Jul. 2, 2015), [https://perma.cc/U43C-T7CK].
261. *See* R. *v*. Cyr (S.L.), (2014) 439 Sask. R. 159 (Can. Sask.).

years and highlighted issues with summoning practices.[262] For instance, when an intended recipient resides on-Reserve, the summons is not sent to a postal address on the Reserve, but is instead mailed to a post office box in the town or village nearest to the Reserve where the intended recipient resides.[263] This issue, which persists to this day, results in the return of approximately 10 percent of summons, which disproportionately affects Indigenous on-Reserve residents.[264] Even more shockingly, the retired Regina District Sheriff stated that he was "unable to recall any trial where a First Nations person sat on the jury in circumstances where the accused was also First Nations."[265]

Nonetheless, the court dismissed the application, holding that Cyr did not show that mixed juries had been a concept within the contemplation of the parties when Treaty 4 was negotiated.[266] The court held that Cyr had failed to prove that the jury selection process is flawed to such an extent that his right to a fair trial was infringed upon, citing that as per *Kokopenace* (which had been heard by the Ontario Court of Appeal at this time), Charter compliance does not necessarily mean each jury roll must mirror the composition of the community from which it is drawn.[267] After citing *Kokopenance*, the court distinguished Saskatchewan's jury process from the Ontario system, which only uses a one-step random draw, despite the fact that Saskatchewan does not strictly follow its two-step selection policy.[268] The court stressed that Cyr had not produced statistical evidence that Indigenous peoples were less likely to be summoned for jury selection, notwithstanding his introduction of testimonial evidence that showed otherwise.[269] Despite this opportunity to address defective jury summoning practices by providing Indigenous defendants with more representative juries, the court left the systemic flaws untouched. This reiterates, yet again, the importance of reforming provincial Jury Acts and ensuring that these laws are followed.

Emphasis must also be placed on the vast geographical span of Saskatchewan, similar to that of Ontario and Manitoba. There are no courthouses in Northern Saskatchewan that host jury trials, meaning summoned individuals may travel hundreds of miles to reach the

262. *See Id.*
263. *See Id.*
264. *See Id.*
265. *See Id.*
266. *See* R. *v*. Cyr, (S.L.), (2014) 439 Sask. R. 159 (Can. Sask.).
267. *See Id.*
268. *See Id.*
269. *See* R. *v*. Cyr, (S.L.), (2014) 439 Sask. R. 159 (Can. Sask.); Roach, *supra* note 13, at 330–31.

courthouse[270] before they are even selected as a juror.[271] This is extremely troubling, especially when considering that of the roughly 37,000 Northern Saskatchewan residents, over 36,000 are Indigenous.[272] Prince Albert, where Yooya was tried, North Battleford, where Stanley was tried, and Melford are the three most northerly locations that host jury trials.[273]

La Ronge is the largest community in Northern Saskatchewan and Lac La Ronge is the largest Indigenous Band[274] in the province. However, La Ronge and Lac La Ronge are over 150 miles from Prince Albert, which is the closest jury-hosting court. Following *Yooya*, there was a push by legal actors to hold jury trials in the north, and, incidentally, La Ronge court is properly outfitted to host jury trials, with both a jury room and a jury box.[275] Although the legal actors acknowledged the logistical challenge of attempting to have possibly hundreds of individuals travel to La Ronge for jury summoning, they determined that jury selection could be conducted in Prince George, and the selected jurors could be moved to La Ronge for trial.[276] While this would still require individuals to travel to Prince George, it is a progressive idea in the right direction. Nevertheless, the Court Services pushed back against this idea, with the Court of Queen's Bench for Saskatchewan refusing to host jury trials in La Ronge until a new courthouse was constructed, despite the current courthouse already having the necessary elements for a conservative-sized jury trial.[277] It has been approximately twenty years since this push for more remote jury trials began, and still no plans exist for a new La Ronge courthouse, thus leaving a significant systemic barrier untouched.[278]

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270. Limited roads, significant distances, and treacherous winter weather conditions makes travel extremely difficult. It can cost a summoned individual over $300 USD to fly one-way from a remote community to Prince George for jury selection. These individuals are required to pay for this transportation, hotel accommodations, and any other costs upfront. This can result in expenses totaling hundreds of dollars before compensation if compensation is even provided. *See* Interview with Richard Bell, *supra* note 61.
271. *See* Interview with Richard Bell, *supra* note 61; Logan Ewanation, et al., *The Issue of Indigenous Underrepresentation in Canadian Criminal Juries*, Am. Psych.-Law Soc'y.: Newsl. (June 2017), https://www.apadivisions.org/division-41/publications/newsletters/news/2017/06/indigenous-underrepresntation.aspx [https://perma.cc/VH58-N4PK].
272. *See Census Profile, 2016 Census: Northern [Economic Region], Saskatchewan and Saskatchewan [Province]*, Stats. Can. (2016), https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/details/page.cfm?Lang=E&Geo1=ER&Code1=4760&Geo2=PR&Code2=47&SearchText=-Northern&SearchType=Begins&SearchPR=01&B1=All&TABID=1&type=0 [https://perma.cc/BES7-XTRC]. Most recent statistics are from 2016 census.
273. *See* Interview with Richard Bell, *supra* note 61.
274. *See* Indian Act, S.C. 1876, c 18 (Can.).
275. *See* Interview with Richard Bell, *supra* note 61.
276. *See Id.*
277. *See Id.*
278. *See Id.*

VI. Thinking Beyond Peremptory Challenges: Some Proposals for Broader Reforms

If provincial governments are genuinely committed to including Indigenous peoples on juries, they must look at policies existing in other locales where representation is greater. Enacting meaningful jury reform comes down to provincial priorities—none of these suggestions is far-fetched or impractical. The provinces have the jurisdiction to increase accessibility and encourage participation for those who want to engage as jurors. Even if many Indigenous peoples still choose not to partake in Canada's oppressive criminal justice system, provinces must remove barriers for those who do. Due to the Supreme Court only requiring reasonable efforts to obtain a representative jury roll, and the Federal Government seemingly discharging responsibility for additional changes following its knee-jerk proposal of Bill C-75, the provinces must seize the initiative if further reforms are to occur. By identifying inherent systemic barriers existing in their Jury Acts, provinces can begin the much-needed process of addressing the roots causes of white-washed juries.

A. *Progressive Policies Existing in Canadian Provinces and Territories*

The Northwest Territories has implemented purposeful jury reform for decades, making its progressive policies a model for the rest of Canada to follow.[279] With its vast size and low population density, the Northwest Territories faces considerable logistical barriers with jury selection.[280] Despite the Territories' large Indigenous population, between 1955 and 1968, Indigenous peoples served on only approximately 40% of the 66 jury trials conducted.[281] Following this discovery, numerous policies were implemented to increase representation. For example, the Northwest Territories acknowledged the importance of holding jury trials in the community where the crime took place.[282] To assist with this, the Northwest Territories established a circuit court to travel throughout the territory and hear criminal cases.[283] This practice continues today, with the Supreme Court of the Northwest Territories—which has jurisdiction over all criminal matters—holding trials throughout the 442,000 square-mile region.[284] A traveling court can mitigate many of the logistical issues

279. *See* Iacobucci, supra note 32, at 42. Despite the Northwest Territories' unique characteristics, there are notable similarities to some Canadian provinces, including the size and remoteness of many Indigenous communities in northern judicial districts, their perspectives on justice issues, and the fact that some Indigenous individuals still speak only Indigenous languages. For this reason, it is possible to effectively implement its jury policies in other jurisdictions, including Ontario, Manitoba, and Saskatchewan; Charles Davison, *The Quest for Representative Juries in the Northwest Territories*, 50 N. Rev. 195 (Apr. 2020).

280. Iacobucci, *supra* note 32, at 41.

281. *Id.*

282. *Id.*

283. *Id.*

284. *See Courts of the Northwest Territories*, Gov't. Nw. Terrs., https://www.justice.

that exist in other provinces when individuals are summoned from more isolated communities. Moreover, traveling courts increase the likelihood that defendants are tried by members of their community, which, in turn, reduces the chances that a minority defendant is tried by an unrepresentative jury.

In 1988, the Northwest Territories amended its Jury Act to permit individuals fluent in any one of its eleven official languages to serve as a juror.[285] Unlike Ontario, which restricts eligible jurors to only those who can read, speak, and understand English or French, the Northwest Territories' policy makes the jury role accessible to all.[286] This inclusive approach ensures that an Indigenous person who speaks one of the many Indigenous languages may still serve on the jury.[287] To better implement this reform, the Northwest Territories Government established an interpreter training program, which consists of an eight-week course with two of these weeks focusing exclusively on jury trials.[288] These trained interpreters then assist Sheriffs with assembling the jury panels, explaining to individuals why they have been summoned and what the role entails, and translating evidence, arguments, examinations, and opening/closing statements.[289] A more expansive language policy means that Indigenous peoples are no longer told that they must forego their own language for that of Canada's settler-colonial society in order to participate in the jury system. While a small step, this recognition of Indigenous languages assists with diminishing Canada's longstanding dismissive attitude toward Indigenous culture within governance systems.

All three of Canada's territories, along with Quebec and Saskatchewan, compensate jurors at a rate approximate to minimum wage.[290] Although it can be argued that minimum wage is barely satisfactory, these rates are significantly higher than those in other Canadian provinces. For example, Yukon and the Northwest Territories pay jurors $80 a day, while Nunavut pays $100 a day for the first five days, then $150 per day starting on the second week.[291] Quebec is the second-highest paying province, compensating jurors $103 per day, falling just behind Saskatchewan that pays $110 a day.[292] In contrast, British Columbia pays jurors only $20 per day for the first two weeks, and Ontario, which pays $40 per day, only begins compensation on the 11th day of service.[293]

Without sufficient pay, individuals most likely to respond to jury summonses are those who can afford it—primarily white, middle and

gov.nt.ca/en/courts/ (last visited Apr. 15, 2021), [https://perma.cc/J9US-JZLW].

285. Iacobucci, *supra* note 32, at 41.
286. Juries Act, R.S.O. 1990, c J.3 (Can.).
287. *See* Iacobucci, *supra* note 32, at 41.
288. *Id.*
289. *Id.*
290. *See* Stefanovich, *supra* note 211.
291. *Id.*
292. *See Id.*
293. *Id.*

upper-class individuals.[294] This only furthers the unattainable nature of the jury role and preserves the partiality towards white-washed juries. Increasing juror pay is a step towards more representative juries as summoned individuals are better able to take time off work. In order to make the juror position even more viable, compensation must either make juror pay comparable to an individual's employment wages or require employers to provide a paid leave of absence to those summoned. Unfortunately, Newfoundland and Labrador is the only province in Canada with legislation stipulating that employers must grant a paid leave of absence to employees serving on a jury.[295] If provincial Jury Acts were to require employers to provide a paid leave of absence, the jury system would immediately become more accessible to more than just those who can afford days off. However, provincial governments must still adequately compensate unemployed and self-employed individuals who will not benefit from employer legislation.

B. *The Need for Adequate Compensation*

Jurors require more than just daily wages to make the role feasible. Provinces must also compensate for additional expenses incurred, including travel, child and elder care, food, and accommodation. Quebec, for example, compensates jurors for public transportation, taxi costs, parking, meals, and accommodation.[296] Furthermore, judges can determine allowances for childcare and psychological treatment.[297] In Alberta, most expenses are compensated including childcare, parking, travel, and approved accommodation for overnight stays.[298] However, most provinces lag behind in their compensation schemes, with some, like Ontario, not providing any recompense for food, transportation, childcare, or parking.[299] Many encompassing provincial compensation schemes provide inadequate allowances for daily costs and have arbitrary limits on what is deemed to be reasonable.[300]

Yet, even if the province has a more comprehensive compensation scheme, jurors are not compensated up-front, meaning they must pay for these expenses out-of-pocket and hope that they are later reimbursed.[301] For those traveling from distant locations where the cost of transportation is significant, insufficient compensation represents a considerable deterrent. Additionally, both an internet connection and credit card are

294. *See* Abdigir et al., *supra* note 170.
295. Stefanovich, *supra* note 211.
296. Miriam Katawazi, *Can you Afford Jury Duty? Here's How Each Province Compensates you for your Service*, The Star (Feb. 16, 2018), https://www.thestar.com/news/investigations/2018/02/16/can-you-afford-jury-duty-heres-how-each-province-compensates-you-for-your-service.html [https://perma.cc/4Q2K-9ET7].
297. *Id.*
298. *Id.*
299. *Id.*
300. See Jacobucci, *supra* note 32, para. 33.
301. *See* Interview with Richard Bell, *supra* note 61.

normally required to book hotel accommodation or flights, which are a necessity when individuals are traveling from remote locations.[302] This assumes that all individuals have access to a reliable internet connection, possess a credit card, and can understand an English or French website or receptionist, which represents an ignorant and inherently discriminatory transgression of jury policy.[303] Furthermore, all of these overlooked—or blatantly ignored—factors disproportionately affect Indigenous peoples.[304] This economic constraint perpetuates the inaccessibility of the jury role by essentially barring those without the financial resources to afford jury duty. By preserving these systemic barriers in the jury system, provinces are facilitating white-washed juries as the norm. Thus, greater representation requires an inclusive system that does not make jury duty a financial burden.

C. *Criminal Record Exclusions and the Australian Model*

Automatic criminal record exclusions and a lack of knowledge and access to pardon procedures further the exclusion of Indigenous individuals from jury duty.[305] To remove this discriminatory barrier, provinces must cease or, at the very minimum, alter the outright exclusion of individuals with certain criminal records. Several recommendations have been set forth to address this barrier, including amending Jury Acts to exclude a narrower group of individuals,[306] providing greater education and resources for individuals to apply for pardons to remove criminal records, implementing a pre-defined time period for which individuals with a criminal record are ineligible to serve, or fully removing[307] this restriction.[308] For example, some states in Australia[309] have amended their Jury Acts to remove the ten-year automatic exclusion of those individuals with criminal records and replaced it with a graduated scheme of exclusion based on criminal history.[310] As a result, most individuals[311] are

302. *See* Interview with Meaghan Daniel, *supra* note 129.
303. *See Id.*
304. *See Id.*
305. Jacobucci, *supra* note 32, para. 33.
306. For example, exclude only those individuals convicted of the crime in which the jury is summoned to hear (e.g. if the jury is hearing a burglary case, exclude only those who have been convicted of burglary to reduce the likelihood of bias).
307. If this restriction was fully eliminated, challenges for cause could be relied upon as a resource to remove potentially biased jurors.
308. Jacobucci,, *supra* note 32, para. 44.
309. Similar to Canada, Australia is a large country with sizeable Indigenous populations. Furthermore, Australia has also faced significant issues with unrepresentative juries. For this reason, Canada could look to Australian policies for reform suggestions.
310. Jacobucci, *supra* note 32, para. 183.
311. In Australia, some convictions permanently bar an individual from serving on a jury, but these are limited. For example, those serving a life sentence, or those convicted of a terrorist offense, public injustices offense (e.g. perverting the course of justice), or some sexual offenses result in permanent exclusion. However, these are much narrower exclusions than the wide net thrown by

subject to only temporary exclusions, ranging from ten to three years, depending on the type of offense and criminal record.[312]

The outright, generic exclusion of individuals with criminal records, or charges, is both erroneous and highly prejudicial. With Indigenous individuals vastly overrepresented in Canada's incarcerated population, this barrier not only disproportionately targets them, but also further promotes the systemic racism inherent in the criminal justice system. Many Indigenous peoples have criminal records for minor offenses from many years ago, but, due to the lack of information and costs associated with pardon procedures, they choose to simply live with their record.[313] The broad criminal record exclusions existing in many provincial Jury Acts do not protect the jury system, nor do they prevent biases. Rather, the exclusions encourage inherent racial biases in summoning procedures and increase the likelihood of white-washed juries. If provinces seek to increase representation, removing the broad exclusion of those with a criminal history is a step in the right direction.

D. *Recommendations from Legal Experts*

Numerous legal experts agree that jurors deserve higher pay and more wide-reaching compensation for costs associated with jury duty.[314] Minimally, provincial governments should simply arrange transport, accommodations, and meals for summoned individuals from remote communities. Furthermore, pay and compensation should be provided, at least partially, upfront.[315] Not only would this prevent individuals from having to use their own funds at the outset, but it would also encourage participation from those who are wary about compensation promises. Moreover, expenses incurred during jury summoning stages, regardless of if an individual is chosen as a juror, must be fully compensated.[316] Unless the provinces pay these costs up front, or provide immediate compensation, the promise of future reimbursement are empty ones.[317]

Experts also agree that criminal record exclusions should be removed, and that the inaccessibility of pardons must be addressed.[318] The threat of criminal sanctions for those who refuse to participate or respond to their summons must be eliminated.[319] Not only is this sanction rarely,

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numerous Canadian provinces. *See* SYDNEY CRIM. LAWYERS (Nov. 5, 2018), https://www.sydneycriminallawyers.com.au/blog/what-disqualifies-or-exempts-a-person-from-serving-as-a-juror-in-nsw/ [https://perma.cc/G2XN-TE8C].

312. *Id.*
313. Jacobucci, *supra* note 32, para. 244.
314. *See*, *e.g.*, Interview with Richard Bell, *supra* note 62; Interview with Eleanore Sunchild, Att'y, (Mar. 3, 2021) (notes on file).
315. *Id.*
316. *Id.*
317. *Id.*
318. *See, e.g.,* Interview with Meaghan Daniel, *supra* note 129.
319. *See, e.g.,* Interview with Meaghan Daniel, *supra* note 129; *See also* Interview with Eleanore Sunchild, *supra* note 314.

if ever, imposed,[320] it is offensive to those who choose not to participate in Canada's oppressive criminal justice system.[321] Despite Canada's unjust treatment of Indigenous peoples, and the economic disparities and overall inaccessibility to justice experienced by a large percentage of these people, they continue to shoulder the blame when choosing not to participate.[322] For example, the stereotypes of the "lazy Indian" are fed when summons are not responded to, despite the criminal sanction threat and overall settler-colonial nature of the summons representing a considerable deterrent to participation.[323] Rather than threatening populations, provinces should focus on engaging with Indigenous communities and proactively seeking input to encourage their representation on juries, especially those involving Indigenous defendants or victims.[324] While there will not be one uniform answer, meaningful consultation is a necessity to creating an inclusive system that recognizes and respects Indigenous culture.

Some experts also suggest the creation of a voluntary opt-in system for jury rolls.[325] In 2003, Ontario created a pilot project that allowed Indigenous peoples to volunteer for coroner inquest juries.[326] Thus, coroner inquests could draw from both the provincial jury roll and the special opt-in list.[327] However, the pilot project appeared more feasible in theory than it practice, with some Indigenous peoples opting-in, only to later struggle with the vast distance they had to travel, and the significant time spent away from their families and responsibilities.[328] Nonetheless, an opt-in system for criminal juries could address these issues and potentially become more successful than the ill-conceived pilot project. Not only would an opt-in system ensure that those summoned were interested in participating as jurors, it would also provide individuals with the choice to participate in a Canadian system. Rather than forcing assimilation, this approach would be a more culturally respectful system that values an individual's decision.[329] Opting-in would not create any issue with biased verdicts, as individuals would opt-in to serve on a jury, not to serve on a specific case.[330]

It is important to note that coroner inquest juries do not determine guilt like criminal juries do. Although individuals volunteered during the

320. Amber Hildebrandt, *Jury duty: Tracking No-Shows and Compensation Across Canada*, CBC News (May 27, 2013), https://www.cbc.ca/news/canada/jury-duty-tracking-no-shows-and-compensation-across-canada-1.1412886. [https://perma.cc/9VT8-EKJ9].
321. *See, e.g.,* Interview with Meaghan Daniel, *supra* note 129.
322. *See, e.g.,* Interview with Eleanore Sunchild, *supra* note 314.
323. *Id.*
324. *See, e.g.,* Interview with Meaghan Daniel, *supra* note 129; *See also* Interview with Eleanore Sunchild, *supra* note 314.
325. *See*, *e.g.*, Interview with Meaghan Daniel, *supra* note 129; *See also* Email Correspondence with Mary Ellen Turpel-Lafond, *supra* note 92.
326. *See, e.g.,* Interview with Meaghan Daniel, *supra* note 129.
327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.*

pilot project, many Indigenous peoples were interested in participating because it was not about determining guilt, but rather attempting to prevent similar deaths from occurring in the future.[331] Since some Indigenous cultures do not condone judging others, the entire Canadian criminal jury system fails to align with their beliefs. Thus, it is important to recognize that Canada's system is not their system, and the decision not to participate must be respected.[332] Although an opt-in system is somewhat more respectful of this cultural consideration, its success may not be possible within the criminal context. Until the jury system is reformed in other ways, many Indigenous people may still not wish to participate, or will be unable to do so, due to the myriad of barriers.[333]

It must be understood that Canada's settler-colonial society is biased against Indigenous peoples in every way. The skewed nature of institutions in fields such as healthcare and education also discourage jury participation by eliminating many necessary resources to make jury duty more feasible.[334] Beyond removing barriers for affirmative action-based efforts, this underscores the need to provide additional, targeted support for Indigenous peoples willing to serve on juries. Provinces must work towards making the jury system as inclusive as possible for those who are willing to participate. This includes ensuring that provincial jury rolls and selection algorithms are as fair as possible and then addressing practical concerns, including pay and compensation.[335] When provinces consider how to initiate meaningful change, they must focus first and foremost on creating truly representative jury rolls and ensuring that summoned individuals face no insurmountable barriers in order to participate in the jury selection process. Alterations to jury panel selection procedures, including the removal of peremptory challenges, are largely futile until provinces address the numerous underlying systemic barriers hindering equitable jury summoning practices.

VII. Conclusion: The Need for an Ongoing Commitment to Juror Representativeness

Representative juries are essential to ensure a fair trial by an impartial tribunal is provided to all individuals. However, representation requires far more than the elimination of peremptory challenges. Peremptory challenges can only be used to decrease representation amongst summoned individuals who have already arrived at the courthouse for jury selection. Numerous roadblocks to equitable representation must first be addressed before the jury panel selection stage even occurs; provincial jury rolls must be inclusive and individuals must not be barred by arbitrary language or

331. *See* Interview with Meaghan Daniel, *supra* note 129.
332. *Id.*
333. *See, e.g.,* Interview with Eleanore Sunchild, *supra* note 314.
334. *See*, *e.g.*, Interview with Richard Bell, *supra* note 61; Interview with Eleanore Sunchild, *supra* note 314.
335. *See, e.g.,* Interview with Richard Bell, *supra* note 61.

criminal record exclusions, prospective jurors must properly receive their summons and have sufficient time to respond, and these individuals must be able to take time off work and/or have the financial freedom and ability to pay for travel, child and elder care, accommodation, meals, and more. As this list highlights, Colten Boushie, like many others, did not receive justice for reasons extending far beyond peremptory challenges.

Boushie's injustice remains in the media's spotlight following findings that the RCMP acted in a racially discriminatory manner during their investigation. The RCMP's racist mishandling of Boushie's case echoes the many ways in which settler-colonial institutions perpetuate violence against Indigenous populations, as seen through numerous injustices such as Residential Schools, Starlight Tours, and MMIWG. This racism only furthers Indigenous skepticism of the Canadian criminal justice system and discourages their participation on juries.

Stanley's acquittal shines light on the substantial underlying systemic issues and underscores the need to make more expansive and holistic changes to the jury system. Adequate jury reform will not exist until Canada confronts its long history of systemic racism and genocidal acts and acknowledges that isolated changes are manifestly insufficient to address these deeply rooted inequities. This is Canada's time to take responsibility and acknowledge that the elimination of peremptory challenges is not the panacea for a fundamentally flawed system. Canada must promote sustained efforts and commit to addressing systemic barriers until meaningful and measurable change is evident. One must, as evidenced by Bill C-75's half-hearted measures, be incredibly skeptical of quick fixes that proport to deal with multi-faceted issues. Increasing jury representation cannot be solved with one isolated policy change, but must be reformed through fundamental and interdependent actions, including recognizing Indigenous languages, implementing interpreter programs, removing criminal record exclusions, and utilizing traveling courts.

This is a call to action for Canadian provinces—a genuine desire for equitable juror representation and the pursuit of justice for all requires an honest commitment to enact foundational change through recognition of, and in consultation with, Indigenous peoples. Though the varying opinions of Indigenous individuals need to be respected, provinces must, nonetheless, pursue meaningful partnerships with Indigenous communities to understand their concerns and embrace their input. Provinces must also accept that some individuals will not want to take part in the system, while simultaneously encouraging participation for those who do by making the system as accessible as possible. It is clear that neither the Supreme Court nor the Federal Government intends to address the discriminatory policies hindering adequate representation anytime soon, but provinces should not be complicit in this attitude of indifference. Change must happen now, and a meaningful reform of provincial Jury Acts is the most logical starting point towards the abolition of white-washed juries.