

# Report on Jury Reform 1994

## **1994 Charlottetown PE**

### **Civil Section Documents - Report on Jury Reform**

For Use in Discussion Session

*(prepared by Chair, Moira McConnell)*

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*The following is a list of the issues with proposed recommendations or comments from the Committee. It must be noted that the Committee did not reach an agreement on all issues but rather than adopting a process of voting or majority rule decided to raise the point with the Conference.*

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## **1. SHOULD THE PROVINCIAL AND FEDERAL JURY SYSTEMS BE REFORMED?**

### **Comment**

In 1993 the ULCC agreed that it would be useful to ask a Committee to consider whether reform to the jury system was warranted (law and operation) and, if so, whether there was basis for uniformity. Given the differing language and court systems in each province it was felt that it would be more useful to articulate common principles which each jurisdiction could consider and implement in line with their own situation. The Committee was also aware of an interest in change in the federal law and system governing juries in criminal trials. The Committee reviewed the federal and provincial law and decided in light of the interdependence between the two process in criminal cases that it would be useful to also consider recommendations for reform of the *Criminal Code* provisions. In general the concerns related to the extent to which the law expressly and in its operation systemically either excluded/privileged certain groups from jury duty. The result was that the credibility of the justice system as a whole was called into doubt. In addition the law itself was not developing with the benefit of the views of all Canadians. Provisions under the *Charter of Rights and Freedoms* as well as emerging case law suggested that a review in both sectors was necessary.

**RECOMMENDATION:** Both the Federal and Provincial laws and systems governing Jury selection should be reviewed to ensure that juries are representative and impartial and to promote administrative efficiency.

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## **2. WHAT PRINCIPLES SHOULD GOVERN REFORM?**

### **Comment**

Although there is a debate as to whether jury service is a duty or a privilege there is agreement that the principles of representativeness and impartiality should govern the jury system. In addition given the effect of economics on juror participation the question of convenience must be addressed.

If representativeness and impartiality and administrative efficiency are the principles to guide reform, how can this be achieved in changes to the law and the administration of the jury system? In general, the provinces control the "out of court" selection process, subject to federal review and some regulation during the "in court" proceedings under the *Criminal Code*. The point of debate generally involves the question of whether juries or jury panels should be structured to ensure representation by a specified cross-section of the community or whether it can be achieved in another way. This turns in part on the definition of the local community and the idea of a jury of "one's peers". Two main approaches can be taken to this issue. The decision on this issue affects the approach to every other issue. First, a province could adopt some type of "quota" system, guaranteeing the presence of members of specified groups on every jury, or perhaps on every jury where a member of that particular group is on trial. Alternatively, the province could attempt to remove any systemic discrimination from the jury selection process, by ensuring that juries are chosen from a cross-section of the community, and that the process is random (up to the point of the "in court" proceedings). The first approach raises the danger of jury members coming to see themselves as "representatives" of one side or the other rather than as impartial decision-makers. It also requires us to assign an "official" race to everyone in the province, and may be impossible to put into practice (must jurors only share the race of the accused, or the sex as well? - the economic status? - the religion? - the age?). The second approach, while it does not guarantee the accused any jury members of his or her race, is fair to the extent that every effort is made to ensure that no one is arbitrarily excluded.

**RECOMMENDATION:** Changes should guarantee that Jury selection procedures do not have the effect of arbitrarily excluding members of any identifiable group. The jury selection process should be evaluated to guarantee that it is as representative as possible using random selection of jurors in the community.

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### **3. IF RANDOM SELECTION IS AN APPROPRIATE METHOD OF ENSURING JURIES ARE AS INCLUSIVE AS POSSIBLE, WHAT SOURCES SHOULD BE USED FOR ASSEMBLING THE JURY LIST?**

#### **Comment**

In order to achieve representativeness it important to use lists of names for jury duty which minimize, as much as possible, bias or exclusion. While medical health lists would appear to be the most comprehensive list available in that there are very few built in biases or exclusions, the main point is that the most comprehensive list be developed. In addition the administration of the system needs to be reviewable or accountable to ensure that it is inclusive. For example, at present, the jury lists in many provinces are often assembled from federal, provincial, and municipal electoral rolls. This source is unsatisfactory, because

as it becomes dated it becomes inaccurate, resulting in a high return rate of jury notices. Further, these inaccuracies are not random, and will tend to mean that home-owners and others less likely to move frequently - that is, middle and upper income groups - will dominate jury panels. Other possible source lists are as likely to be inaccurate. The appropriate course of action is to recommend that no single source list be used, and also that community groups and others should be able to propose source lists to be included among those from which the jury list is drawn up. The out-of-court portions of jury selection are an extremely labour intensive process, if for no other reason than the great amount of data-entry required. Computerization of the process would save a great deal of time. More importantly, computerization would reduce any scope for discretion, or its misuse, in the drawing up of the jury list. Fairness can be guaranteed by periodic "audits" of the system.

There should be fewer exclusions or disqualifications and all of these should be examined for stereotypes and biases. It is suggested that only those which truly constitute disqualification(s) be included. All other exclusions should be regarded as excuses based on specified hardship, illness or inconvenience. In order to facilitate convenience, the process of excusing or deferring service should be assigned to an official under supervision by the judges. For example, the disqualification of people who are not citizens is a matter which should be reconsidered. In addition, the federal government may consider an amendment to s.626 of the *Criminal Code* to extend the prohibition of exclusion on the basis of sex to include other equality concerns such as age, race, religion, ethnic origin, abilities and sexual orientation. This may also mean that the challenge for cause provisions must be reviewed with particular reference to the *Charter* including the provisions regarding physical ability, comprehension of the juror, aliens and criminal record. It may also be appropriate to recommend that language and comprehension disqualifications be removed from provincial legislation.

#### **RECOMMENDATION:**

1. The most representative list of people should be used as the jury list. In particular the Medical service list or each province are recommended.
2. Computerization of data and use of computers to generate a list will assist in the process.
3. All disqualifications, exclusions and exemptions from liability for service should be reconsidered. Only those truly considered disqualifications because of concerns for fairness should be maintained. All the people should be required to serve as jurors or subject to being able to be excused or deferred for reason of hardship, illness or inconvenience. The Committee is unresolved as to whether non-citizens should be able to serve. The Committee is unresolved as to whether language and comprehension disqualifications be removed from the Provincial legislation.
4. The Committee is unresolved as to whether the Federal government should amend s.626 of the *Criminal Code* to prohibit the exclusion of jurors based on age, sex, race, religion, ethnic origin, ability, sexual orientation.

5. The challenges for cause in the Criminal Code should be reconsidered to the extent that they disqualify people contrary to the Charter of Rights and Freedoms.

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#### **4. HOW CAN JURY PANEL SELECTION PROCEDURES BETTER ENSURE REPRESENTATIVENESS?**

##### **Comment**

Assuming a representative source list the issue for Jury Panel selection relates mainly to the definition of community and the need to account for demography. The issue of increasing centralization and fewer courts serving larger areas should be considered. Jury selection districts should be reconsidered to take this into account. In particular this is a problem where juries are drawn from areas based on a specified number of kilometres from a trial. The principal that jurors should be drawn as much as possible, subject to the right of the accused or the Crown's right to apply for a change of venue, from the "community" in which the offence occurred (or some suggest "charged") should be adopted. Use of juror disqualification and juror requests for excuses from Panel service based on written responses which can be scrutinized for any abuses of administrative discretion will also assist in ensuring more representative jury Panels. The effect of operational practices which create systemic discrimination should be taken into account. The supervisory power of the federal government in criminal trial(s) through the challenge to the array or panel should be broadened to reflect case law which does not require intentional design on the part of the personnel administering the jury system as a basis for challenge.

##### **RECOMMENDATION:**

1. The Jury Panel selection process should be performed by computer as much as possible.
2. Jury Panel selection should be taken into account demographic differences and the increasing centralization of the courts.
3. As much as possible, subject the right of the accused (or Crown) to change venue, the jury should be drawn from the community in which the offence occurred (or charge is laid) irrespective of the location of the trial. Disqualifications from Panels and excuses should be based on juror initiated requests in writing and subject to audit to detect any abuse of administrative discretion that should exist. The challenge to array provisions in the Criminal Code should be changed so that the element of intent is no longer required to form a challenge to any array.

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#### **5. HOW CAN THE "IN-COURT" JURY SELECTION PROCESS BE REFORMED TO UPHOLD THE PRINCIPAL OF REPRESENTATIVENESS AND IMPARTIALITY**

##### **Comment**

The "in court" process at this stage is governed by the *Criminal Code* for criminal trials. It has been recommended that the challenges for cause be reviewed to ensure consistency

with the *Charter of Rights and Freedoms*. They should also be reviewed in light of current case law which would permit challenge to the array and also to jurors based on concerns about racism and other forms of discrimination. In addition the peremptory challenges should be eliminated as these provide an avenue through which stereotypes and biases can be asserted in the selection of the jury thereby undercutting its representativeness. In addition the compensation of jurors should be considered in each jurisdiction to determine the extent of which the fees are creating economic discrimination for some groups of people who encounter a sufficient hardship that it is an undue obligation to require them to serve as jurors. To excuse people on the basis of economic problems results in systemic discrimination in that it can impact on some group more than others, notably the self-employed or those that receive wages rather than salaries or work under contracts which provide for juror service.

**RECOMMENDATION:**

1. Jury selection should codify current case law which broadly interprets challenge for cause to take into account case law allowing concerns about racism and other forms of discrimination as a bias of challenge.
2. The Committee is unresolved on the issue of whether the peremptory challenge should be eliminated or, alternatively, reduced.
3. The jury system should take into account concerns about economic discrimination arising from the low fees and the impact on some groups of people more than others.

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**6. SHOULD JURIES CONTINUE TO BE AVAILABLE IN CIVIL CASES AND, IF SO ON, ON WHAT BASIS?**

**Comment**

The provinces have varying rules regarding civil juries. For example, Nova Scotia has liberal rules regarding the use of juries in civil matters, which permit them as of right in any case, and places the onus on the other side to justify why a jury should not be used (though despite these liberal rules, civil juries are very uncommon). In other provinces civil juries are either not available or only allowed in a restricted number of cases and their utility has been questioned. Whether juries are actually as well equipped to decide cases as judges is open to dispute. Further, the use of civil juries makes damage awards more speculative, less likely to be in line with precedent, and potentially unfair to one side or the other. Some have concluded that in many cases, civil juries are selected only as a bargaining tactic, rather than as an attempt to get a fair decision. If this is so, then it would make sense to restrict automatic access to civil jury to matters where character is in issue - libel and slander cases, and so on - where predictability is a less important concern. However on the other hand civil juries can provide an avenue for assuring that the law changes to reflect community standards. There is also a concern regarding the responsibility for payment of juror fees.

**RECOMMENDATION:** Juries should be available in civil cases as requested by the parties. Concerns about the selection process to ensure representativeness and impartiality should be reflected in the civil jury process. However to ensure that the burden is less in civil cases the jury selection and number should be more circumscribed.

## **7. SHOULD THE *CRIMINAL CODE* BE AMENDED TO PROVIDE FOR A RIGHT TO A TRIAL IN AN ABORIGINAL LANGUAGE?**

### **Comment**

In some jurisdictions the participation of unilingual Aboriginal jurors has been provided for where the population warrants or where the accused is Aboriginal. While the provision requiring the jury be drawn from the community which the offence occurred (or charge laid) may in part address this concern, there are still problems relating to the overall provision of service. In addition in some jurisdictions there is more than one Aboriginal language spoken. It may however be possible to provide that whether or not the accused or the parties are Aboriginal where a person chosen to be on a Panel is an Aboriginal person then the participation of that person will be facilitated with translators. It is necessary to make this change in the Federal law in that currently the accused has right to a trial in French or English and to provide for translation for juror would appear to be contrary to this right and also the challenge for cause provision regarding comprehension in the *Criminal Code*. This change would also be important to compliment the removal of comprehension and language provisions from provincial legislation assuming this approach is accepted. However, as noted in the Background Paper, there is also a view that these provisions should be retained.

**RECOMMENDATION:** The Committee is unresolved as to whether the Criminal Code should be amended to provide for the participation of unilingual Aboriginal jurors with provision for translation irrespective of the ethnic origin of the accused. It seeks the advice of the ULCC.