

## **PRESS RELEASE**

June 24th, 1994

### **JURIES IN NOVA SCOTIA**

The Law Reform Commission of Nova Scotia is pleased to announce the release of its Final Report for reform of the provincial Jury system. The Report, which is submitted to the Minister of Justice, contains a number of recommendations and a new *Juries Act* which reflects the recommendations of the Commission.

The Executive Director of the Commission commented that:

"Juries play a fundamental role in our justice system. Perhaps this is because the idea of being tried by others in your community captures the image of being called to account for one's behaviour. There has been a great deal of criticism of the jury system in recent years, largely centering on concerns about the definition of the community in a multicultural society and the impact of systemic exclusion of some groups of people from juries. There has also been a great deal of concern about the inconvenience and cost to the public and individuals of juror service.

There is an underlying difference of opinion as to the role of jury duty in our society. Some people believe it is a privilege to serve on a jury, others believe it is a social responsibility. Ultimately, however, most people agree that if we are to have juries in criminal and non-criminal cases, then juries should include as many people in the community as possible. The Commission has sought to resolve the issue of community by setting out recommendations which should help ensure a generally random selection process for jurors. There is a division of opinion in the Commission, however, as to how best to ensure random selection in the context of the demography of Nova Scotia and the move to court reform and administrative centralization."

The Law Reform Commission's Report notes that the Jury system is a mix of law and administrative practice which must be considered in the geographical and social context of Nova Scotia. This means that in addition to a new *Juries Act*, the Commission has recommended various procedures which take into account computerization and centralization, removal of local discretion in jury selection, having jurors initiate exclusions from service and accountability through records. These changes, which are reasonably simple, will streamline the process and should also ensure that any exclusions are traceable. The Report notes, however, that it is important to understand that in the case of criminal juries, the Province only controls the first part of the process of juror selection. This is the first stage of

selection and determines who is brought into court to be considered for a jury. After that point, the matter is governed by the *Criminal Code of Canada*, a federal law, which sets out the basis for challenges to jurors and the rules for the selection of the 12 jurors. Provincial law governs the selection process for juries in non-criminal trials, the main difference being that only 7 jurors are required and the jury deliberation period is limited.

The main recommendation of the Commission is that the draft *Juries Act* and Juror Information Forms be adopted by the Government of Nova Scotia and that the necessary changes be made to fully implement the principles of representativeness, impartiality and administrative efficiency. The Report recommends:

- \* Reform of the jury system be based on principles of representativeness, impartiality and administrative efficiency for the participants and the government in a multicultural society.
- \* The majority of the Commission believes that the principles of representativeness, impartiality and administrative efficiency in the context of the jury system should be achieved through random selection and removal of systemic and other discriminatory exclusions and exemptions rather than through selective representation.
- \* Juries should continue to be available in Nova Scotia for criminal and civil matters.
- \* The rules governing the availability of juries for civil trials should not be changed, however, all the rules regarding civil juries in Nova Scotia should be consolidated in a new *Juries Act*. The continued availability of peremptory challenges should be considered.
- \* The voters' list should no longer be the only source from which jurors are chosen, rather a more comprehensive computerized list such as the medical service insurance list should be used.
- \* Anyone who is concerned that his or her name might not be on any of the lists to be used should be able to register with the Court Administrator.
- \* The twelve month residency requirement in a jury district should be removed.
- \* Fewer categories of people should be disqualified or excused from serving as jurors.
- \* The majority of the Commission recommends that Canadian citizenship remain a qualification and that medical practitioners be automatically excused from service. Civil Procedure Rule 34.03 automatically excluding a pregnant woman should be repealed.

- \* The majority of the Commission recommends that the Governments of Canada and Nova Scotia should examine access to justice issues involved in recognition of the language rights of the Mi'kmaq people in Nova Scotia.
- \* Jury Committees should be eliminated and the Jury Panel List should be prepared by the Court Administrator based on a centralized computer generated selection process.
- \* Disqualifications and excuses should occur at the time of Jury Panel selection and should be on the basis of a request by the Panelist recorded on the Juror Information Form.
- \* A Jury Panelist should be able to be excused in advance of a trial by a Court Administrator with broader supervisory power to be exercised by the Courts. Jurors should be able to defer service.
- \* The juries system and law should be reformed to ensure that its principles are implemented consistently with other Court structure and administration of justice reforms. In particular, the impact of Court reform in the context of the demography of the Province and the representativeness of Jury Panels should be considered.
- \* The provisions concerning juror fees should be changed to use the resources more equitably and to ensure that systemic discrimination based on economic barriers is eliminated. In particular:
  - (i) the fees paid for service should be higher although no one will be paid for appearing for selection from a Panel. The amount of the fee should be set out in Regulations rather than legislation.
  - (ii) employers should not be required to continue to pay when employees serve, however, jurors who are paid should not get jury fees.
- \* There should be increased Public Legal Education regarding juries, particularly in schools.
- \* A new *Juries Act* should reorganize and update the provisions in the existing *Juries Act* which are no longer applicable to current practice, including simpler Juror Summons and Juror Information Forms.

The Executive Director commented:

"Many of the most recent cases concerning bias in jurors and manipulation of jury selection are based on stereotypes around issues such as race or gender and have involved matters governed by federal law. This does not mean that the provincial procedures are unimportant. The federal procedures can only work fairly and properly to the extent that the provincial procedures have ensured a fair cross-section of the community in the court room. Where exclusions occur for discriminatory reasons at a provincial level, then the problem is compounded by the later "in-court" procedures. The main issue then for provincial reform is ensuring that a fair cross-section of the community is, in fact, on the Panel from which the jurors are chosen. In the case of Nova Scotia, this has meant carefully considering the way in which the provincial system operates to see if there are practices or rules which may mean that Jury Panels are not comprised of an appropriate cross-section of the community. In addition to addressing this concern, it is believed that the procedures outlined in the Report and the Draft *Juries Act* should reduce the administrative cost of the system and this in turn, should also mean that there are resources available for greater financial compensation for jury service."

**A copy of the Report is available free of charge from:**

**The Law Reform Commission of Nova Scotia  
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Halifax, Nova Scotia  
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Phone: 423-2633  
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**Copies of the Report or a Summary in English, French or Mi'kmaq can be made available on Word Perfect 5.1 diskette.**

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# Law Reform Commission of Nova Scotia

## Final Report on Juries in Nova Scotia

### SUMMARY

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The Law Reform Commission of Nova Scotia's Final Report on reforms to the provincial law and practices governing juries in Nova Scotia contains a number of recommendations to the Government of Nova Scotia. It proposes a draft *Juries Act* which the Commission believes reflects the principles in those recommendations.

In a Discussion Paper published and distributed throughout Nova Scotia in 1993, the Commission commented on the role that juries play in ensuring that the justice system reflects the changing values of the community. This role is drawn from and expands upon the historical principle that an individual should be judged by his or her peers. Determining who is an accused person's peer group in an increasingly diverse and mobile population where shared values depend on many factors that were not relevant when the idea of judgement by one's peers was developed, is a problem which is hard to resolve. It is clear, however, that it is important that all members of the community have an equal opportunity to be on a jury. There was concern that the jury system, under the existing *Juries Act*, did not draw on as wide a group of people as it should. In particular, there is concern that people from the Black and Aboriginal communities in Nova Scotia are rarely seen on Jury Panels. Intentionally or not, the process for selecting jurors is systematically excluding some groups of Nova Scotians. This is a result of the combination of factors such as the list used as a source of juror names, some of the processes involved in selecting jurors, and also the demographic structure of the Province which reflects the concentration of Aboriginal and Black people of Nova Scotia in specific areas.

A related issue is the need to respond to concerns regarding the costs of jury duty both on individuals and on the government. Jurors are currently given a small fee for their service to the community. The inconvenience and the lack of compensation means that jury duty may impose a significant burden on individuals and their employers. This burden is accommodated to some extent by the power of a Judge to excuse people who may encounter hardship in serving on a jury. However, this has an effect of potentially excluding a large group of people, whose income is affected by their absence from work and who cannot afford to lose that income or be absent from work for other reasons. This is a form of discrimination in that it can have more effect on groups of people who historically have not been able to participate equitably in the provincial workplace or in the formation of values in the criminal justice system. At the same time, however, it seems unfair to force people to be on juries at the risk of losing their livelihood or ability to support themselves or their families.

The issue of costs of juries in both criminal and civil cases and the concern about systemic

discrimination are matters currently being considered in other jurisdictions in Canada. Since the jury selection process is governed in criminal cases by both Federal and Provincial law, it is also important to ensure that the changes to eliminate systemic discrimination and promote greater inclusion of all community members on juries be undertaken through cooperative Provincial/Federal/Territorial reform initiatives. There is on-going national research examining the areas of the jury system which fall under Federal jurisdiction and their effect on the inclusiveness of juries. Aboriginal self-government and issues relating to Aboriginal justice generally are matters of particular concern which are being considered and must be addressed comprehensively and affirmatively in the context of constitutional and justice system reforms.

In addition to these issues of principles, the entire Court system in the Province is in the process of structural reform, with the Supreme and County Courts merged into one, which requires changes to language, practices and some of the concepts in the *Juries Act* and its administration. These changes must also reflect concerns for fairness, inclusiveness and cost to individuals and government.

After carrying out legal research, seeking advice provincially and nationally from people involved in the jury system, and carrying out public consultation by publishing and widely distributing a Discussion Paper setting out proposals for change, the Commission has developed a number of principles which it believes will meet some of the concerns for reform of the system. In addition, the principles set out in this Report will be considered as a basis for reform in other jurisdictions in Canada by the Uniform Law Conference of Canada and also as part of a Federal/Provincial/Territorial initiative considering issues relating to representation and multiculturalism in the jury system in Canada. Since both the language, as well as many of the concepts in the existing *Juries Act* require change, the Commission decided that it would be simpler to prepare a new *Juries Act* which could be accepted by the government and replace the existing *Act*.

The main recommendation of the Commission is that the Draft *Juries Act*, which is part of the Report, be adopted by the Government of Nova Scotia and that the necessary changes be made to fully implement the principles of fairness, inclusiveness and efficiency recommended in the Report.

In the Commission's opinion, the following recommendations will assist in reforming the jury system in Nova Scotia to make it more consistent with these principles:

- The principles of inclusiveness, fairness and efficiency be the basis for reform of the jury system.
- The majority of the Commission believe that the principles of fairness and inclusiveness in the context of the jury system should be achieved through random selection and affirmative removal of systemic and other barriers to inclusion rather than through selective representation of specified groups or quotas. There is a dissenting opinion that there must be specific action taken to increase the probability of representation of Black

and Mi'kmaq people on juries and Jury Panels in Nova Scotia in order to ensure more equitable representation amongst Jury Panelists. In their view, this will advance the principle that the accused is judged by his or her peers.

- The majority of the Commission believes that the Governments of Canada and Nova Scotia should jointly consider and respond to access to justice issues involved in recognition of the language and cultural rights of the Mi'kmaq people in Nova Scotia. There is a dissenting opinion that much of this has been done through the work of the Royal Commission on the Donald Marshall, Jr., Prosecution and action should be taken now.
- In particular, the Commission recommends that following changes be made to the jury system in Nova Scotia to make the system more consistent with the principles of inclusiveness, fairness and efficiency:
  1. The jury selection process should be reformed to ensure that it is more reflective of a multicultural society.
  2. Jury Lists should be created from a group of lists that are as comprehensive as possible. In addition, members of the public should be able to ensure that their names are included among those from which Jury Lists are chosen.
  3. The Jury List should be prepared by the Court Administrator based on a centralized computer generated selection process and no attempt to eliminate disqualified persons should be made at that stage.
  4. The majority of the Commission believes that citizenship should remain as a qualification to be a juror, however the disqualifications and exemptions from jury service should be changed to exclude fewer people. The residency requirement should be changed and armed forces personnel, members of the clergy and women who are pregnant, should no longer be automatically excused from jury duty.

There is a dissenting opinion by a Commissioner who believes that jury service is a social duty which is imposed by law on members of a society.



It should, therefore, be required of all people in Nova Scotia who are subject to and benefit from the justice system. The decision to qualify or disqualify certain groups of people has an effect on inclusiveness and also privileges certain groups of people from having to contribute their services to society on the basis of historical assumptions about the value and influence of particular employment in a community.

5. The provisions concerning juror fees should be changed to use the resources more equitably and to ensure that systemic discrimination based on economic barriers is eliminated.
- The juries system and law should be reformed to ensure that it is consistent with other Court structure and administration of justice reforms.
  - The rules governing the availability of juries for civil trials should not be changed, however, all rules regarding civil juries in Nova Scotia should be consolidated in a new *Juries Act*.

A new *Juries Act* should contain provisions to:

1. Enable Court Administrators to excuse people from jury service.
2. Provide guidance to Judges and Court Administrators as to the basis for excusing people from service.
3. Provide for the postponement of juror service in some cases.
4. Remove or change provisions which are no longer applicable to current practice.

**COMMISSION DE RÉFORME DU DROIT  
DE LA NOUVELLE-ÉCOSSE**

**RAPPORT FINAL SUR LES JURYS EN NOUVELLE-ÉCOSSE**

**SOMMAIRE<sup>1</sup>**

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Le Rapport final de la Commission de réforme du droit de la Nouvelle-Écosse sur la réforme du droit provincial et des pratiques concernant les jurys en Nouvelle-Écosse contient une série de recommandations adressées au gouvernement de la Nouvelle-Écosse. Dans ce document, la Commission propose un projet de *Loi sur les jurys* qui, selon elle, reflète les principes contenus dans ces recommandations.

Dans un Document de réflexion publié et distribué partout en Nouvelle-Écosse en 1993, la Commission traitait de l'importance de tenir compte, au sein du système judiciaire, des changements dans les valeurs des différentes communautés et du rôle que les jurys jouent dans le respect de ce principe. Au niveau historique, ce rôle découle du principe qu'un individu doit être jugé par ses pairs. A notre époque, alors que les populations sont de plus en plus hétérogènes et mobiles et que les valeurs qu'elles véhiculent dépendent de plusieurs facteurs qui n'existaient pas au moment où ce principe est né, il devient de plus en plus difficile de déterminer à quel groupe un accusé appartient et qui sont ses pairs. Il est cependant essentiel que tous les membres d'une même communauté puissent avoir des chances égales de faire partie d'un jury. Tel qu'il existe sous la présente *Loi sur les jurys*, le système de jurys ne fait pas appel à tous les groupes existant à l'intérieur du bassin de population. Par exemple, les membres des communautés noire et autochtone font rarement parties des jurys. Que ce soit de façon intentionnelle ou non, le processus de sélection des jurés exclut systématiquement certains groupes de Néo-Écossais. Cela résulte d'un ensemble de facteurs tels la liste dans laquelle sont puisés les noms des jurés(ées) potentiels, les mécanismes de sélection des jurés(ées) de même que la structure démographique de la province laquelle reflète la concentration de groupes autochtones et noirs dans des régions spécifiques.

Le problème des coûts associés au devoir d'agir comme juré(ée) pour un individu et pour le gouvernement a aussi été étudié. Les jurés(ées) reçoivent actuellement une compensation monétaire minimale pour avoir servi leur communauté. Une telle absence de compensation de même que les autres inconvénients reliés au devoir d'agir comme juré(ée) constituent, dans certains cas, un lourd fardeau pour un individu et son employeur. Ce fardeau peut être allégé par le pouvoir d'un juge d'exempter un individu de remplir son devoir de juré(ée) lorsque cela crée des problèmes insurmontables. Cependant, cela a pour effet d'exclure un grand nombre

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<sup>1</sup> Traduit de l'anglais par Me Nathalie Bernard, LLB (Université Laval, Dalhousie University), LLM (Dalhousie University).

d'individus dont le revenu sera affecté par leur absence au travail et qui ne peuvent se permettre de voir leur revenu diminué ou qui ne peuvent s'absenter du travail pour d'autres raisons. Il s'agit d'une forme de discrimination dont l'effet se fait sentir avec acuité sur les groupes d'individus qui traditionnellement n'ont pu participer de façon équitable à l'évolution du milieu de travail en Nouvelle-Écosse et à l'élaboration des valeurs à la base du système de justice criminelle. Malgré tout il apparaît injuste de forcer un individu à remplir son devoir de juré(ée) au risque de perdre son emploi ou sa capacité de subvenir à ses besoins ou à ceux de sa famille.

La question des coûts associés aux procès par jury en matière civile et criminelle de même que l'existence de discrimination inhérente au système fait présentement l'objet d'études dans d'autres juridictions au Canada. Le processus de sélection des jurés(ées) est régit, en matière criminelle, autant par le droit fédéral que le droit provincial. Il s'avère donc primordial de s'assurer que les réformes visant à éliminer la discrimination inhérente au système et à promouvoir la représentation des différents groupes au sein des jurys résultent d'initiatives auxquelles participent autant les autorités fédérales que les autorités provinciales. Des recherches ont été entreprises à l'échelle nationale relativement aux éléments du système de jurys relevant du droit fédéral et de leur effet sur la représentation de tous les groupes au sein des jurys. Le droit à l'autodétermination des peuples autochtones et les questions de justice autochtone revêtent un intérêt particulier et font l'objet d'études sérieuses et d'actions positives en vue de réformes constitutionnelles et de réformes du système judiciaire.

En plus de ces questions fondamentales, le système judiciaire de la Nouvelle-Écosse fait présentement l'objet d'une réforme au niveau de son organisation. Par exemple, la fusion des cours Suprême (Supreme court) et de comté (County court) exige des changements au niveau du langage utilisé, à la procédure et à certains concepts découlant de la *Loi sur les jurys* de même qu'à l'application de cette loi. Ces modifications doivent aussi tenir compte des problèmes d'égalité, de représentation de tous les groupes et des coûts imposés aux individus et au gouvernement.

La Commission a élaboré un certain nombre de principes relativement au système de jurys lesquels, à son avis, tiennent compte des différents problèmes reliés à la réforme du système. Ces principes ont été élaborés à l'aide de recherches effectuées par des spécialistes du droit et d'enquêtes menées à l'échelle provinciale et nationale auprès des personnes impliquées dans le système de jurys. A cela s'ajoute un mécanisme de consultation avec le public découlant de la publication d'un Document de réflexion contenant de nombreuses recommandations. De plus, les principes ainsi élaborés dans ce Rapport seront étudiés par le Uniform Law Conference of Canada lors de réformes dans d'autres juridictions canadiennes de même que par les autorités fédérale, provinciales et des Territoires lorsqu'elles traiteront des questions de représentation et de multiculturalisme dans le système de jurys au Canada. En raison des nombreux changements à apporter au langage utilisé dans la *Loi sur les jurys* et aux concepts qu'elle renferme, la Commission a tout simplement décidé de présenter au gouvernement un projet de *Loi sur les jurys* afin de remplacer la présente loi.

La recommandation principale de la Commission consiste en ce que le gouvernement de la Nouvelle-Écosse adopte ce projet de *Loi sur les jurys* et procède aux changements qui s'imposent dans le but de respecter les principes d'égalité, de représentation de tous les groupes et d'efficacité, mis de l'avant par le présent Rapport.

La Commission est d'avis que les recommandations qui suivent guideront la réforme du système de jurys en Nouvelle-Écosse tout en respectant les principes énumérés précédemment:

- \* Les principes d'égalité, de représentation de tous les groupes et d'efficacité devront être les piliers de la réforme du système de jurys.
- \* La majorité des commissaires croit que les principes d'égalité et de représentation de tous les groupes seront mieux respectés par le biais d'une sélection au hasard des jurés(ées) et par des programmes d'action positive visant à éliminer les barrières inhérentes au système que par une sélection effectuée à l'intérieur de groupes spécifiques ou par l'imposition de quotas. Deux commissaires croient, au contraire, que la préférence devrait être donnée aux membres des communautés noire et Mi'kmaq afin de permettre une représentation plus équitable de ces groupes au sein des jurys. Selon eux, cela servira à mieux promouvoir le principe qu'un accusé doit être jugé par ses pairs.
- \* La majorité des commissaires croit que les gouvernements du Canada et de la Nouvelle-Écosse devraient, ensemble, considérer les problèmes d'accès à la justice associés à la question de la reconnaissance des droits linguistiques et culturels de la communauté Mi'kmaq en Nouvelle-Écosse. Un courant minoritaire soutient que cet objectif a déjà été atteint lors de la commission royale d'enquête sur l'affaire Donald Marshall, Jr. et qu'il est plutôt l'heure de passer à l'action.
- \* Plus précisément, la majorité des commissaires croit que les changements qui suivent devraient être effectués afin de rendre le système de jurys en Nouvelle-Écosse plus en harmonie avec les principes d'égalité, de représentations de tous les groupes et d'efficacité:
  1. Le mécanisme de sélection des jurés(ées) devrait être modifié afin mieux refléter le caractère multiculturel de la société.
  2. La liste des jurés(ées) potentiels devrait être dressée à l'aide de listes ressources aussi complètes que possible. De plus, les membres du public devraient pouvoir s'assurer que leur nom fait partie de ces listes ressources.

3. La liste des jurés(ées) potentiels devrait être dressée par l'officier coordonnateur du tribunal à l'aide d'une banque de données centrale informatisée. Les personnes ne pouvant agir comme jurés(ées) ne devraient pas être retranchées à cette étape du processus.
4. La majorité des Commissaires croit que la citoyenneté devrait demeurer un critère de sélection des jurés(ées). Néanmoins les exemptions et exceptions au devoir d'agir comme juré(ée) devraient être modifiées afin d'exclure moins d'individus. Les prérequis concernant le lieu de résidence devraient être modifiés. Les membres des forces armées, les membres du clergé et les femmes enceintes ne devraient plus être automatiquement exemptes.

Une opinion dissidente fut émise par un Commissaire à l'effet que l'obligation d'agir comme juré(ée) est une obligation envers la société imposée par la loi aux membres de cette société. Pour cette raison, chaque Néo-Écossais(e) qui bénéficie du système judiciaire et est régi(e) par ses règles devrait se voir imposer l'obligation d'agir comme juré(ée). L'option d'exempter ou non certains groupes d'individus a des conséquences sur le principe de représentation de tous les groupes. De plus, ce choix entraîne la suppression de cette obligation envers la société dans le cas de certains groupes d'individus pour des raisons historiques basées sur un jugement de valeur posé sur certains types d'emplois dans une communauté donnée.

5. Les dispositions concernant la compensation payée aux jurés(ées) devraient être modifiées afin de répartir les fonds de façon plus équitable et d'éliminer la discrimination inhérente au système fondée sur les barrières économiques.

\* La réforme du système de jurys devrait s'harmoniser avec les autres réformes touchant l'organisation des tribunaux et l'administration de la justice.

\* Les règles concernant le droit au procès par jury en matière civile ne devraient pas être modifiées. Cependant, toutes les règles relatives aux procès par jury en matière civile en Nouvelle-Écosse devraient être réunies dans la nouvelle *Loi sur les jurys*.

La nouvelle *Loi sur les jurys* devrait comprendre des dispositions visant à:

1. permettre aux officiers coordonnateurs d'exempter des individus de leur devoir d'agir comme juré(ée);

2. faciliter la décision prise par les juges et les officiers coordonnateurs d'exempter certaines personnes de leur devoir d'agir comme juré(ée);
3. permettre la remise à plus tard du devoir d'agir comme juré(ée) dans certains cas; et
4. éliminer ou amender les dispositions désuètes.

## LAW REFORM WJIT NOPA SKO'SIA

Mawi wtejkewey kisi wikasik wjit ju'ri'l Nopa Sko'sia<sup>2</sup>

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Law Riform Kmisnaq wjit Nopa Sko'sia mawi wtejkewey riportmuow wjit ta'n tli-ila'tuness teplutaqn Nopa Sko'sia ta'n teli nujo'tkl ju'ri'l kisi wikasik kulaman kapmntaq wjit Nopa Sko'sia nmitutaqq ta'n jiptuk tli-il'jo'qwa'tuness. Riport wesku'tk ta'n kmisnaq etlite'tmi'tij nuta'q tli-il'jo'qwa'tasin.

Ula tiskasn pe'prek tewiaqnek aq tepi'kasiknek Nopa Sko'sia 1993ek kmisnaq wesku'tmi'tip ju'ri'l me' koqqajaptmnew jajikimtumkewey ketloqo tli-ankamkutn l'pa kjitmiw maliaptmn ktlqamiksutiminal kiskukewe'l. Ula ta'n teluekek ju'ri'l kiskuk wejiaq mimajuinu ilsumkun mimajuinu' ta'n elakutki. Mu teli nqamasianukw nike' kiskuk skmtuk wen kisi ketlewein ansma ta'n mimajuinu'l wetakutmlij teli pkije'k mili malie'ultiliji aq se'siqatmu'tiliji kisa'lukwi'tij mu ansma wijey tli-ktlamsitasultinew koqoey stage amskwes mu tetuji knekk al'ta'tikwek mimajuinu'k. Ketlewe'k na'sik ksi-nuta'n msit mimajuinu'k wiki'tijik tepaw e'tasiw wen tetpi-ku'knmn kisi naspin ju'ri. Telite'tasikip na nike' kejikawike'l ta'n teltek Ju'ris Act mu tli-ankamkutn msit wen kisi naspin ju'ri. Jel me', kan'takkwejk aq l'nu'k awisiw nemu'jik ju'ri naspultijik. Wji-tla'taqlik kiswa mu ju'ri'riaq ta'n teli-mknujuk nike' kesi-tli-ankamkuk stage ejikleiwajak keknuakutmu'tiliji mimajuinu'k Nopa Sko'sia. Weji kis-tla'sik na u't mita stage list etekel ki's ta'n wisunn wja'tuten wjit ta'n wenik ju'ri naspultitaqq, wjit ta'n tel-keknue'k ju'ri'riaq teli mknuj, aq ta'n kan'takkwejk aq l'nu'k tel-tepkisi-wiki'tijik ula Nopa Sko'sia.

Ap ta'n koqoey miamuj ankaptasik na ta'n mimajuinu'k aq kapmnt teli-ksika'takwi'tij wjit naspit ju'ri wen. Anawtik apankituj ju'ri'riaq wjit teli apoqmatmi'tij jajikimtumkewey. Wjit ta'n teli lukwaqna'lij wen aq teli euli-apankituj keska'taj wen pasik ju'ri naspilij aq wiaqi-ksika'tuatl ta'n wenl elukowatl. Me' na katu ekel jaj asite'lmatl mimajuinu'l mna'silin ta'n teli-mknuj wjit ju'ri naspin tl-nmitoq awsam-kitnmeyakun aq ksika'takun. Katu a, awsamelk mimajuinu na telamu'k eyk ta'n wji-n'tutew suliewey mu lukwekw kiswa mu kisi ngatmukw wtlukwaqn wjit me' na't koqoey. Amiw na stage l'nua'lujel wen u't teli-pkije'k keknue'kik mimajuinu'k mu wijey kis-tli-apoqmatmi'tikw koqoey ula Nopa Sko'sia lukwaqniktuk ela'tekemk aq ta'n mu kekkunmi'tikw tepiknaq klusuaqn ta'n me' jiptuk kisi apoqmatmi'tiss tltes jajikimtumkewey. Katu pa na wijey stage mu tetpaqtenukwel ktmogjenuksinew mimajuinu'k

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<sup>2</sup>*Mi'kmaq translation prepared by Bernie Francis, Sydney, Nova Scotia.*

naspultinew ju'ri togo jiptueke'l wji-n'tunew wtlukwanual ta'n tl-kisi-tetpaqi-maliama'tita wikmawa.

Ta'n teli-ksika'tuek ju'ri'l kitk krimnl aq sipl ke'sl aq wjit ta'n teli l'nua'luj wen, kitk pemi-wsku'tasikl ktikl etlaqati'tij mimajuinu'k Kanata. Teli-pkije'k ju'ri ta'n teli-mknasik wejiaq kitk fetrley aq propinjley teplutaqn ansma wijey tel-nuta'q kiwa'ska'tasin ta'n teli l'nua'luj wen aq ktmogjenasin ta'n pasik tett kisi-wja'luksin mimajuinu ta'n kisi naspiss ju'ri. Nuta'q pra'pns aq fetrl kapmnt il'jo'qwa'tunew na nekmowey. Kanata nike' pemi ankaptasik ju'ri sistm ta'n fetrl kapmnt etli alsutk aq ta'n tlkitew ta'n pasik tett ju'riaq kisi wjo'luksinew. L'nui-mtmo'taqn aq l'nueyey jajikimtumkewey kitk pemi ankaptasikl aq miamuj wajui-ankaptiten aq wlte'tten ta'n tli-nastagne'wasital ka'nstitu'sniktuk aq ta'n tel-pil-lukwasik jajikimtumkewey.

Me' jel atelk ta'n koqoey kiwa'sk-wikasik aq ta'n kisoqe'k ewikasikl. L'pa ta'n tetutki'k kort sistm ula pra'pns kiwa'ska'tasik ta'n tel-pmiaq stage nike' supri'm kort aq kaunti kort kis-tli-tqwa'tasikl. Na na teluemk nike' miamuj elt pikweltiew ap ta'n koqoey kiwa'ska'tasik stage nike' klusuaqnn pil-wekasital, pilu-wekasitew Ju'ris Act aq ta'n tel-pmiaq. Ula pemi kiwa'sk-wikasikl miamuj wijey tleiwata mimajuinu', msit asite'lmaten kis-naspin ju'ri aq ta'n tli-ksika'takutew mimajuinu aq kapmnt.

Ta'n kisa'tasikip li'kl risrj aq apoqnmastuti kwilasikip ula pra'pns aq ta'n tetutki'k Kanata ta'n tla'tasiss ula ju'ri sistm aq ta'n kisi wikasikip aq tepki'kasikip tiskasn pe'pr ewikasik ta'n jiptuk tli-il-wi'kiten koqoey kmisnaq kisite'tmi'titl kiwa'ska'taqnn ta'n etlite'tmi'titl klu'ltu wjit teli apoqnmatak kort. Jel me' ap ta'n koqoey ewikasik ula riportiktuk weketutaqq Uniform Law Conference of Canada aq apoqnmakutaqq jiptuk ta'n tl-kiwa'sk-wi'kiten ta'n kort tel-pmiaq. Se'k ap Kanata aq ta'n fetrl, propinjl aq teritori'l weketutaqq ta'n tel-kiwa'sk-wi'kmi'tij tel-pmiaq aq teli-mknasik ju'ri wjit Kanata. Teli-pkije'k ta'n telatuek aq teli-nsitasik Ju'ris Act miamuj kiwa'sk-wi'kiten. Kmisnaq kisita'sultipnik me' aji-nqamasiatew l'pa piley l'tasin Ju'ris Act ta'n wlaptitew kapmnt aq l'pa kas-wi'kiten sa'qewey.

Ta'n koqoey maw-puatmi'tij kmisnaq na Draft Juries Act ta'n wiaqi-wikasik riportiktuk wsua'tun kapmnt wjit Nopa Sko'sia aq ta'n koqoe'l kisi kiwa'sk-wikasikl wekasin kulaman mimajuinu'k wijey tleiwaten, msit wen asite'lmaten kis-naspin ju'ri aq nqamasi-pqoji-pqoji-wekasitew ta'n teluek riport.

Ula nike' pem-wikasikl kmisnaq etlite'tmi'tij wli-apoqnmattew ju'ri sistm ula Nopa Sko'sia ta'n mimajuinu'k me' tetpeiwatan:

- . Ta'n pasik wen kis-naspin ju'ri, tetpo'tasuti aq naqmasiaq tel-pmiaq na msit wekasin wjit tel-lukwasik ju'ri sistm.



- . Suel msit kmisneraq tetpi-ktlamsitmi'tij tetpo'tasuti aq ta'n pasik wen asite'lmuksin ju'ri kis-naspin kis-tla'sin pasik kapaqsi-mknuj wen ta'n naspiss ju'ri aq jikla'tasik me' ta'n koqoe'l enqajji ta'n pasik weni kis-naspultinew ju'ri aq mu tli-ankamkutn pasik mkniknk kisi-mknuksinew. Tapusijik kmisneraq kijka' piluite'tmi'tij. Nekomw menueke'tij keknu'-wikasin Ju'ris Act ta'n me' naji-nqamasiatew kan'takkwejk kiswa Mi'kmaq kis-nasita'new ju'ri'l ula Nopa Sko'sia. Ta'n nekmow tel-nmitu'tij me' at-tli-ankamkutew ta'n wen elsu'tmut ilsumkun ta'n weni elakutki.
- . Suel msit Kmisn teli-ktlamsitk kapmnt wjit Kanata aq Nopa Sko'sia nuta'ql ankite'tmnew aq apoqmatmnew jajikimtumkewey ta'n teli-kpmite'tk wtli'sutiwow aq wtlqamiksutiwow Mi'kmaq ula Nopa Sko'sia.
- . Eykik telua'tijik ki's pikwelk u't telamu'k tlian aq wejiaq Royal Commission on the Donald Marshall Jr. Prosecution aq nuta'q ankmayiw ktmoqjenasin.
- . Suel msit Kmisn tel-mnuekej ula nike' pem-wikasikl kiwa'ska'tasitn ju'ri sistmiktuk ula Nopa Sko'sia kulaman majulkwattew tetpa'ltimkewey kis-naspultinenew elt kinu ju'ri aq wl-pmian koqoey:
  1. Nuta'q il-lukwasin ta'n teli-mknuj ju'riaq kulaman kaqisi-milakutmu'tijik mimajuinu'k kisi naspultitaqq.
  2. Wisunn ta'n ewikasikl ju'ri listiktuk nuta'q wjian keknue'kl listl ta'n ki's kisitasikl aq msit wen ewikasit ta'n kisi wikasit. Jel me' ap mimajuinu'k kisi ankaptmi'tiss ketloqo wtuisnmual wikasin elt nekmow ta'n wejitasik ju'ri list.
  3. Kort atministre'tr nuta'q l'tun ju'ri list e'watl kampiutrr aq ma' nekm kisi mn-wi'kaqwl wenl ta'n etlite'lmatl mu klu'lktn naspilin.
  4. Suel msit kmisnaq me' etlite'tmi'tij nuta'n tett tleyawin we'kayiw kis-naspin ju'ri katu awnaqa ta'n koqoe'l wji-mn-wi'kuliness nuta'q kiwa'sk-wikasin kulaman aji-tkle'jitew ta'n wen mu kis-naspikw ju'ri. Nuta'q kiswa'sk-wikasin "residency requirement" kulaman sma'knisk, ta'n wenik nikanpukuulti'titl alasutmo'kuoml aq e'pijik eskmaqtma'tijik mu nkutukwayiw mn-wi'kuksinew wjit ta'n tl-naspulti'tiss ju'ri.

Newte'jit kmisnr teli-ktlamsitk miamuj wen naspin ju'ri ta'n tujiw wikumuj ksatk kisna mu teli-pkije'k teplutaqn teluek ula wiki'tikw. Na na wet-nuta'q msit mimajuinu'k Nopa Sko'sia ta'n jiptueke'l kisi ajkneyakwi'tiss kisna kisi wtapesi'tiss jajikimtumkewey tlten miamuj naspultinew ju'ri ta'n tujiw wikmuj. Kisutaqn ketloqo tepaskma'tinew kisna mu eykik mimajuinu'k teli ankamkuk stage keknue'kik pasik asite'lmuksinew naspultinew ju'ri aq stage teluekel eykik mimajuinu'k mu nuta'new apoqmatmnew ta'n tel-pmiaq koqoey teli-pkije'k wejkwataqnek etlite'tasik ataskman kisna aji-eulaskman ta'n telamu'k ktlukwaqn.

5. Nuta'q kiwa'sk-wikasin ta'n tel-apankitujik ju'ri aq me' aji-wl-wekasin suliewey aq kulaman ma' l'nua'lat wen aq wji-n'tukw meko'tik suliewey teli-pkije'k miamuj naspit ju'ri.
6. Nuta'q propinjl kapmntaq ktmoqjenanew Federal Department of Employment and Immigration aq kiwa'ska'tunew ta'n tel-wikasik palisi wjit unemployment insurance wjit mimajuinu'k ta'n naspultijik ju'ri.
- . Nuta'q ju'ri sistm aq teplutaqn il-wikasin kulaman majulkwattew ktik kort ta'n tel-pmiaq aq ta'n tel-pmiaq eskwiaq jajikimtumkewey.
- . Keknue'kl nike' ru'lsi ta'n teli-msnmik ju'ri wjit sipl traill mu nuta'nukw kiwa'ska'tasin katu msit ru'lsi wjit sipl ju'ri'l ula Nopa Sko'sia nuta'q wiaq-wi'kasin piley Ju'ris Actiktuk.

Piley Ju'ris Actiktuk miamuj tetal ula pem-wikasikl kulaman:

1. ta'n wenik maliaptmi'tij tel-pmiaq kort kis-tlimanew mimajuinu'l mu nuta'n naspin ju'ri;
2. kisi kinua'tuanew jajaq aq kort atministre'traq ta'n koqoey wjit weji-kisi-mna'lsit miamuj ju'riiktuk;
3. wikasin ta'n teluek mimajuinu pe'l mu nike' kis-naspin ju'ri wjit me' na't koqoey;
4. mn-wi'kmnew kisna kiwa'ska'tunew ewikasikl ta'n mu ewekasinukul nuku' nike' kiskuk.

# I INTRODUCTION

## 1. The Project

In 1992, the Law Reform Commission decided to examine ways in which the jury system in Nova Scotia could be reformed to better ensure that juries were as representative as possible of all Nova Scotian society. In Canada, jury trials are a constitutional right in many criminal cases<sup>1</sup> and are also available as a way of deciding many civil (non-criminal) cases.<sup>2</sup> Although a jury can be requested by either party in civil trials, in most cases the decision to have a trial by jury is made in criminal cases by the accused person exercising his or her rights under the *Criminal Code*<sup>3</sup> and under the *Charter of Rights and Freedoms*. The jury has several functions, particularly in criminal trials, relating to both the individual rights of the accused and also the public's obligations and rights in the justice system. Primarily the jury has a role as an impartial trier of fact and in this role, the Judge and jury are there to represent the public interest in fair trials. This role has been given constitutional importance under s.11(d) of the *Charter* which states that:

"Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

Juries are also seen as a way of ensuring that the law in both the civil and criminal areas keeps up to date with and reflects the current values of the community. To fulfil these roles properly, it is important that all members of the community share the responsibility and have an equal likelihood of serving on a jury.

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- <sup>1</sup>Section 11 (f) Any person charged with an offence has the right except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment; (*Charter of Rights and Freedoms*, Part I of the *Constitutional Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter the *Charter*]).
- Section 471 Except where otherwise expressly provided by law, every paccused who is charged with an offence shall be tried by a court composed of a judge and jury. (*Criminal Code of Canada*, R.S.C. 1985, c.C-46 [hereinafter the *Criminal Code*]).

<sup>2</sup> *Juries Act*, R.S.N.S. 1989, c.242; *Judicature Act*, R.S.N.S. 1989, c.240, s.35.

<sup>3</sup> Section 536 provides that a person charged with an indictable offence may elect or choose to have his or her trial either by Judge and jury or by Judge alone. There is a very limited provision in the *Criminal Code*, s.568, where the Attorney General may require a jury trial.

In order to develop recommendations for reform, the Law Reform Commission of Nova Scotia was fortunate in making use of the many thoughtful commentaries that had been prepared in other Provinces and Federally. The Commission reviewed the history of the Canadian jury system and the way the system works in Nova Scotia today. The Commission also compared the Nova Scotia *Juries Act* to the laws in the other Provinces and Territories in Canada. To a lesser extent, it also looked at the systems in other countries, including Great Britain, Australia and the United States. Prothonotary offices and other officials throughout the Province were consulted and a group of advisors with various interests or experience with the jury system were consulted, contributing greatly to the project. The time and assistance of the following people is gratefully acknowledged: Thelma Costello, Executive Director, Courts and Registries; Heather Chandler, Juries Officer; Professor Bruce Archibald, Dalhousie Law School; Chris Manning, Barrister; Daniel Paul, former Executive Director of the Association of Mainland MicMacs; Justice J. Doane Hallett, Nova Scotia Court of Appeal; Susan Potts, Special Prosecutor, Department of Justice; Dean Jobb, Journalist; Alison Davidson, Director of Legal Research, Canadian Bar Association, Nova Scotia Branch; and Thomas MacDonald, Chair, Canadian Bar Association Criminal Law Section (Nova Scotia).

In order to obtain public participation and comment on this research and suggestions, the Commission prepared a Discussion Paper entitled *Juries in Nova Scotia*. This Discussion Paper was published in May 1993 and 700 copies were distributed freely with requests for comments. Feedback was received from various individuals and groups in Nova Scotia and the Commission considered those comments in preparing these final recommendations. A list of the people who responded to the Discussion Paper is included at the end of this Report.

The Commission's main recommendation is that the Government of Nova Scotia adopt the draft *Juries Act* which reflects its views on reform. The draft *Act* is found at the end of this Report. It includes extensive comments on each of the sections explaining the reasons for each of the changes. In the Commission's opinion, the most straightforward way to make the necessary changes to the jury system is to rewrite the existing *Juries Act* rather than try to amend it in piecemeal form. In some cases, the change from the current legislation is minor, but this approach, which uses contemporary language and ideas about the justice system,<sup>4</sup> is the simplest way to show how the changes should be put into practice. The draft *Juries Act* also re-organizes the *Juries Act* so that it is easier to follow, a change which reflects the Commission's mandate to clarify and simplify the law and to remove provisions of the law which are outdated.<sup>5</sup>

It is important to recognize, particularly in the context of Court reforms and the move to

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<sup>4</sup> This is part of the statutory mandate of the Commission:

"The object of the Commission is... to develop new approaches to, and new concepts of law that serve the changing needs of society and of individual members of society." (*Law Reform Commission Act*, S.N.S.1990, c.17, s. 4(a)).

<sup>5</sup> *Law Reform Commission Act*, S.N.S. 1990, c.17, s. 4(b)(c).

administration through computer databases, that many of the recommendations regarding administration of the jury system are equally important, but not appropriate or possible to directly translate into legislation. For example, one of the more important recommendations involves elimination of areas where the exercise of administrative discretion cannot be reviewed through public records. This reform, in principle, is implicit in the recommendation to eliminate local Jury Committees and computerize and centralize the creation of Jury Lists so that people are selected within a designated community on a random basis using a computer. Similarly, the recommendation that the source of the Jury List be the most comprehensive list with the least possibility for systemic bias, in this case the Provincial medical services insurance numbers, reflects the principle of representation. The ability of people to check the list and submit their names if they are, for some reason, not on this source list, is an added safeguard. Given advances in technology, however, it did not seem useful to specifically designate the list in the legislation, but rather to refer to the principles of random selection and representativeness to be achieved in source lists and administrative practices.

Finally, it should be noted that although the Commission recommends changes in Provincial legislation to include more people as potential jurors, the fact that the *Criminal Code* also provides a list of qualifications and disqualifications for jurors means that some people who may be potential jurors under Provincial law may still be disqualified from service at a later stage in the selection under the *Criminal Code* rules relating to matters such as language, prison record, status and ability. In these areas, the Provincial Minister of Justice may choose to advocate changes to the Federal Minister of Justice.

## 2. Language

The draft *Juries Act* contains its own definition section. However, there are terms which are used in this Report which may need definition in order to fully follow the discussion:

- (a) Juror - the person who is selected to be a member of a jury;
- (b) Jury - the people (12 in criminal cases or 7 in civil cases) people who are selected from the Jury Panel through procedures set out either in the *Juries Act* (civil) or *Criminal Code* (criminal) to form a jury;
- (c) Jury Committee - a small group of people who prepare the Jury List each year in various regions in Nova Scotia;
- (d) Jury District - an area of the Province designated as a district for the purposes of Jury Lists which currently corresponds to the Counties in Nova Scotia but with Court reform may be changed to be consistent with Court districts;

- (e) Jury Lists - the list of all people in a jury district or area who may potentially be called for jury service (this is created yearly and is sometimes called the source list);
- (f) Jury Panels - the people drawn from the jury source list who are called for a trial when a jury is needed; and
- (g) Jury Service - the requirement imposed by law on people to take part in the justice system by acting as a Juror if called upon to do so.

## II THE CURRENT SYSTEM IN NOVA SCOTIA

### 1. Background

The importance of the qualities of impartiality and representativeness in juries in Canada has been recognized by the Supreme Court of Canada. Justice L'Heureux Dubé writing for the majority of the Supreme Court of Canada commented:

"The modern jury was not meant to be a tool in the hand of either the Crown or the accused and indoctrinated as such through the challenge procedure, but rather was envisioned as a representative cross-section of society, honestly and fairly chosen. The perceived importance of the jury and the *Charter* right to a jury trial would be meaningless without some guarantee that it will perform its duties impartially and represent, as far as possible and appropriate in the circumstances, the larger community. Indeed without the two characteristics of impartiality and representativeness, a jury would be unable to perform properly many of the functions that make its existence desirable in the first place. Provincial legislation guarantees representativeness, at least in the initial array. The random selection process, coupled with the sources from which this selection is made, ensures the representativeness of Canadian criminal juries."<sup>6</sup>

The Court also commented at length on some of the rationales for the criminal jury system. These included its role as a collective finder of fact; as the conscience of the community; as a bulwark against oppressive laws or their enforcement and as a means of increasing public knowledge and trust in the system.<sup>7</sup>

The Supreme Court of Canada in its comment appeared to have confidence in the operation of the Provincial area of responsibility over juries. However, concern was expressed by Judges and others in Nova Scotia that the current method of juror selection under the *Juries Act* does not draw on as wide a group of people as would be necessary to secure the required quality of representativeness in the initial group, the Jury Panels, appearing in Court from which the jury is drawn. There are concerns that people from Black and Aboriginal communities are rarely seen on Jury Panels.<sup>8</sup> This suggests that the Provincial areas of

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<sup>6</sup> *R. v. Sherratt*, [1991] 1 S.C.R. 509 at 525. This was the majority decision but Justice Stevenson agreed in the result on narrower grounds.

<sup>7</sup> *Ibid.* at 523-524. In listing these functions the Court referred to a Paper of the Law Reform Commission of Canada, *The Jury in Criminal Trials*, 1980. There are some additional reasons for juries in civil trials such as their role as a catalyst for encouraging settlement. These are discussed in a Consultation Paper, *The Use of Jury Trials in Civil Cases*, Ontario Law Reform Commission, 1994.

<sup>8</sup> In the *Report of the Royal Commission on Donald Marshall, Jr., Prosecution*, 1989, Part 2 - Recommendations at 177, it was noted that:

"The lack of Natives on juries in Nova Scotia concerns members of the Native

responsibility, that is, the jury source lists and the random selection procedures, are not operating properly to ensure that Jury Panels are representative of the community. Whether intended or not, this failure increases the effect of the narrowing or screening procedures already available in the *Criminal Code* to the accused and the Crown during "in-court" selection of the jury itself. These in-court procedures, which are intended to ensure the second aspect of the jury, that of impartiality, are also a matter of concern to the Federal Government and people involved in the justice system because in some cases, people are eliminated from juries by the accused or prosecutor or other parties based on assumptions regarding their capability to make decisions because of their abilities, gender, race or ethnic origin.<sup>9</sup> The final result is that when assumptions which either privilege some people from being called for jury service or exclude other people for discriminatory reasons, are combined with the express exclusion of some people under the *Criminal Code* provisions, juries do not represent a fair cross-section of the community. This fact may also call into question their impartiality from the perspective of the accused person in criminal cases. This issue is one that has generated concern in other Provinces and is also a matter of concern for the Federal Government which has commissioned a number of studies evaluating *Criminal Code* procedures.<sup>10</sup>

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community. We know of no evidence that suggests that Natives are deliberately excluded from jury duty in Nova Scotia. It has been indicated to us that, in fact, no Native has ever been on a jury in Nova Scotia."

A similar point was made in the *Report of the Aboriginal Justice Inquiry of Manitoba*, 1991, Vol 1., at 378:

"Studies conducted for our Inquiry confirm that Aboriginal people are significantly under-represented on juries in Northern Manitoba and are almost completely absent from juries in the city of Winnipeg."

It was noted that under-representation in the jury source lists was addressed when Manitoba moved to the use of the computerized Medical Health Service Lists, although there were still operational and administrative practices which resulted in a under-representation in the initial array or the Jury Panel.

<sup>9</sup> The issue of multiculturalism and the *Criminal Code* provisions was the subject of a Reference in 1990 to the Law Reform Commission of Canada by the then Minister of Justice, Kim Campbell (Reference dated 8 June 1990). It is significant to note that a recent sitting in Halifax County was the first time the Juries Coordinator had seen a physically challenged person included in a jury. Problems of court access meant that people with physical disabilities were discouraged from being on a jury panel.

<sup>10</sup> Some of the national reform initiatives are being undertaken through research by the Federal Department of Justice. This national research is considering the areas of jury reform which fall under federal jurisdiction such as the challenges under the *Criminal Code*. In addition, the Uniform Law Conference of Canada has agreed to consider uniform principles for jury selection to ensure broader representation is ensured by Provincial and Federal legislation. These may be adopted in August, 1994.



The issue of representation and the question of identifying where the exclusion and narrowing is occurring might appear to be fairly uncontroversial and, aside from the complications arising out of the fact that the jury system in criminal cases is also controlled by the Federal Government, even fairly straightforward. However it is important, when considering law reform for juries, to recognize that many people have differing points of view about the nature of jury service. Most would agree with the need to make the jury system more inclusive but the reasons for this differ significantly. For some people, jury service is a privilege which is granted to some people in society but from which many are excluded, often for discriminatory reasons. In their view, reform should be directed to ensuring the involvement of people who had been excluded from this privilege. Other people believe that jury service is a social or civic obligation which is often a severe burden and from which certain elite groups are excused. In their view, any reform should be directed at spreading this duty or obligation as evenly as possible throughout society. Whichever point of view is adopted, it is clear that common to both views is the need to ensure that the system for jury selection is as representative as possible of all Nova Scotians in terms of their participation, time and extent of social contributions.

In seeking to consider possible areas for reform, it is important to understand the different ways in which groups of people are excluded in the jury system. The jury is a costly institution from both the individual and Governmental perspectives. For some people, jury duty can have significant impact on their lives.<sup>11</sup> For example, jurors are currently compensated at a very low rate. This means that jury service can be a hardship to people who may not earn wages while sitting on a jury.<sup>12</sup> Concern about differing obligations being imposed on jurors was discussed in 1968 by Justice McRuer in a Report of the *Royal Commission Inquiry into Civil Rights*<sup>13</sup>. The Report commented that:

"The hardship of jury service bears most heavily on a juryman who is a wage earner as distinct from a juryman who is paid a salary. The latter usually continues to draw his salary while performing jury service; on the other hand, the hourly-rated wage earner usually serves on a jury at substantial sacrifice."<sup>14</sup>

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<sup>11</sup>This has recently been noted in a study called "The Jury Project" in New York State which considered why many people experience jury service as cumbersome and unpleasant and recommended ways in which the duty can be made less onerous.

<sup>12</sup> The amount set in the *Juries Act* for juror fees means that all people appearing to be selected or to act as jurors are compensated at \$15.00 per day irrespective of the degree of inconvenience or hardship imposed. On occasion, this amount has been changed by the judge in cases of extreme inconvenience. The rationale for this seems to be that it is a civic obligation.

<sup>13</sup>Report Number 1, Vol. 2, at 858.

<sup>14</sup>McRuer's recommendations include requiring that the Province assume total responsibility for fees and that the fees be increased to an amount which would provide a reasonable minimum compensation. It was also recommended that juries in civil trials, other than defamation actions,

Out of sympathy for this situation, Judges are more inclined to exercise their discretion to excuse people either because their wages will not be paid or because they are self-employed, and cannot afford to lose income by serving on a jury. That decision, which is reasonable and understandable on its own, operates as a form of systemic discrimination in that it can have more effect on groups of people who historically have not been able to participate in the formation of values in the legal system. At the same time, however, it seems unfair to force people to be on juries at the risk of losing their livelihood or ability to support themselves or their families. The entire question of juror fees and whether people serving on juries should be paid for this service at all, is an issue being considered in many other Provinces.<sup>15</sup> The issue of juror fees is not a new problem although its relationship to economic discrimination is a more recent factor in the analysis. A related question is whether juries should continue to be available for non-criminal or civil cases.<sup>16</sup> If civil juries are still available, the question arises as to whether it is appropriate that the people be required by law to sit on these juries and whether the people seeking this service should have to pay for the cost of a jury.

A further factor to consider is the restructuring of the Court system in Nova Scotia, including the merger of Supreme and County Courts. Additional changes are planned which may involve the closing of some Court offices and the discontinuation of regular Court sittings in some counties.<sup>17</sup> All of this will require changes to the *Juries Act*. More substantively, the division of the Province into larger Court districts,<sup>18</sup> which is part of an overall centralization, will occur in a context in which the demography of Nova Scotia is not

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be abolished.

<sup>15</sup> For example, in New Brunswick and Newfoundland, jurors are paid nothing (although employers are required to continue to pay wages) or, in the case of Ontario, paid varying amounts depending on service.

<sup>16</sup> This issue is currently being considered in New Brunswick and in Ontario. A recent Paper, *The Use of Jury Trials in Civil Cases* (Ontario Law Reform Commission, 1994) recommends that civil juries be available in only a few situations and New Brunswick is considering the possibility of abolishing civil juries, see *Law Reform Notes #2*, March 1994 at 2-3.

<sup>17</sup> These changes are in response to the recommendations in the *Report of The Nova Scotia Court Structure Task Force*, 1991.

<sup>18</sup> The division of the province into regions, Cape Breton, Central, Halifax County and Southwestern, for Courts and Prosecutions was discussed in the *Report of the Nova Scotia Court Structure Task Force*, 1991, at 65. Cape Breton region is comprised of Cape Breton Island. The Central region is the Counties of Guysborough, Antigonish, Pictou, Colchester and Cumberland and the area served by the courthouse in Shubenacadie. The Halifax region is Halifax County. The Southwestern region is the Counties of Hants, Kings, Annapolis, Digby, Yarmouth, Shelburne, Queens and Lunenburg.

uniform. There are communities throughout Nova Scotia which differ significantly in their composition. Since jurors are usually taken from a specified geographical area reflecting the constraints imposed by travel to the Court, this may mean in jury trials that not only is an accused tried at a location further away from the place where the offence occurred but the jury is also unlikely to be drawn from that community. This again can have an effect on the degree to which the jury represents a fair cross-section of the community and, in particular, the extent to which it reflects the community in which the event occurred. All these factors mean that any reform is necessarily a combination of legal and system-wide administrative changes which take into account the way in which the jury selection process occurs.

## **2. The Jury Selection Process**

The jury selection process for both criminal and civil trials involves a number of steps. Up until the "in-court" procedures for selection of the jury the same process is used for both. The *Juries Act* contains the rules governing the pre-trial selection of potential jurors. The Province is responsible for seeking to ensure representativeness and impartiality in the initial array of Jury Panels. The "in-court" procedures for criminal trials are set out in the *Criminal Code*. The "in-court" procedures for selecting civil juries are similar to those for criminal trials but are set out in the *Judicature Act*. Both are described below although the Province does not have authority to alter the "in-court" procedures under the *Criminal Code*. It is important, however, to note that the Provincial selection procedures for criminal trials are subject to scrutiny under the *Criminal Code* in that the Panels can be challenged on a number of grounds. Increasingly, Jury Panels are being challenged where there is a concern that they are not properly representative of the community.<sup>19</sup>

### **a. "Out-of-Court" Selection Procedures**

#### **(i) The Source List**

Under the existing *Juries Act*, the Province is divided into eighteen jury districts, essentially corresponding to counties and Court locations. Each district is responsible for drawing up the Jury List for trials in the district for that year. This practice also seems to correspond to the *Criminal Code* provisions<sup>20</sup> for location of the trial "in or close to" the community in

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<sup>19</sup>For example, *R. v. Nahdee* (1993) 26 C.R. (4th) 109 where the failure to ensure that aboriginal residents and the districts were included on the source list made the process flawed "ab initio". In that case the Sheriff had attempted to obtain Band lists but the Council had a policy of not providing lists for jury service. The Court was of the view that the Sheriff should obtain names in another way if the Band Council refused to give a list of names.

<sup>20</sup>Under s. 536 of the *Criminal Code*, the accused can elect trial by judge and jury or by Judge alone depending on the offence. Under this section, whichever the option chosen, the accused will be required to appear before the Judge or Tribunal having jurisdiction "in the territorial

which the offence occurred, and where the jury is drawn from, unless the accused seeks a different venue or location for the trial. Each district has its own Jury Committee, which consists of the jury officer, a representative of each municipal unit in the district, and a representative of the Department of Justice.<sup>21</sup> The Jury Committee is responsible for drawing up the "Jury List" for the district each year, and presenting it to a Judge for approval. Under s. 7(5) of the *Juries Act*, the names of possible jurors for the year is to be taken from the election or voting lists or other available information.<sup>22</sup>

Section 7(5) of the *Juries Act* states:

"The jury committee shall prepare the jury list from any or all of the latest available lists of electors prepared in accordance with the *Municipal Elections Act*, the *Elections Act* or the *Canada Elections Act* but, if it is not practical to do so, may use assessment rolls and other available information respecting persons qualified to serve as jurors."

Under s.7(1) of the *Act*, the Jury Committee is to:

"...select by random choice, in the case of the Halifax Jury District, the names of twelve hundred persons and, in the case of each other jury district, the names of three hundred persons qualified and liable to serve as jurors."

Under s.7(3) of the *Juries Act*, once the names have been randomly selected from the voters' list, the Committee reviews each name to determine whether any person selected is not qualified or liable to serve as a juror or is a person exempted from service as a juror. The list of qualifications is found in s.4 and s.5(4) of the *Juries Act*. Under the current law, to be qualified, a juror must have attained the age of 18 years, be a Canadian Citizen and have resided in the jury district for 12 months. People convicted of a criminal offence punishable by 2 or more years in jail are also disqualified from juror service. In addition, although there is no language or comprehension requirement, people who cannot speak or understand the language of the trial (French or English), are usually excused if they indicate this fact to the Court or Court officials. In addition, it appears that often people with disabilities were

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division in which the offence is alleged to have been committed". Territorial division under s.2 of the *Criminal Code* can include cities, township, provinces, countries and other geopolitical units. In addition, where the accused feels he or she will not get fair trial he or she may apply for a change of venue or location of the trial, *Criminal Code* s.599.

<sup>21</sup>The provision governing the composition and procedures of the Committee are found in s.6 of the *Juries Act*. The reasons for municipal involvement is that currently municipalities pay the juror fees.

<sup>22</sup>Previously property tax lists were used but these excluded a large number of people who did not own or have property listed in their name.

excused from the List or Panels because the Court was not accessible for them.<sup>23</sup> There are also exemptions from jury duty under s.5 of the *Act* which are generally employment-related and are described as either an exemption from jury duty or "not liable". It appears that these people could serve if they so chose. In fact, this is not accurate because some of these exemptions are actually disqualifications in that the presence of some groups, such as Judges, on juries might appear contrary to the requirement of impartiality. The exemptions under s.5 of the current *Juries Act* are:

- 5(1) The following persons shall be exempt from serving as jurors:
- (a) the Lieutenant Governor of the Province;
  - (b) members of the Senate and the House of Commons of Canada;
  - (c) members of the House of Assembly and, while the House is in session, the officers thereof;
  - (d) judges of the Supreme court;
  - (e) officers and men of the Canadian Forces on active service;
  - (f) barristers and solicitors of the Supreme Court;
  - (g) officers of the Supreme court other than commissioners appointed under the *Notaries and Commissioners Act*;
  - (h) full-time salaried members of any police force in the Province;
  - (i) medical practitioners;
  - (j) dental practitioners;
  - (k) clergymen and ministers of the gospel;
  - (l) judges of the provincial court and judges of the Family Court; and
  - (m) members of a jury committee.
- 5(3) No person shall be liable to serve as a juror for more than one session in any three-year period.
- 5(5) Not more than one member of a family unit or member or employee of a firm shall be liable to serve as a juror at a session.

In addition, a Judge at a trial session or the Chief Justice may, on application by or on behalf of a person, exempt a person from juror service for the session(s) under s.5(2).

Other than providing for Judges to make rules, the *Act* does not describe the method of random selection, although increasingly in larger centres it is done using computers and numbers assigned to each person's name. The Jury List review and disqualification process of the Jury Committee is secret under the *Act* and the Committee is directed that no inclusions or exclusions are to occur except in accordance with the *Act* (s.7(4)). The *Act* does not, however, indicate how the Committee is to make the determination regarding

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<sup>23</sup>See comment above note 10.

occupation. To some extent the qualifications are taken care of by using the voting list since the *Elections Act* requires citizenship, age of majority and residency. If an occupational title is involved, however, reviewing the lists also easily screens out some exempt people. There is obviously some need for cross-checking and consolidation of information based on returns in previous years. In small communities, personal knowledge may also be used to disqualify people. Once the Jury List has been drawn up and certified correct by the Committee, then it is given to a Judge who, if he or she is satisfied that the list and process reflects proper procedure, may approve the list (or send it back and ask for another list if not satisfied). Under the *Juries Act*, s.21, there is a fine of \$500.00 for any person who, in preparing the Jury List, knowingly places the name of a disqualified person on the list or knowingly omits the name of a person who is likely to serve or wilfully fails to perform any duty imposed on him or her by the *Act*. Once this process is completed, this will be the Jury List for the district for the year.

Responses to a survey sent to Court officials as part of the research for this project were helpful in obtaining information as to how the system actually works. For example, the Jury List for each district must be quite large to accommodate large "drop-off" percentages at every stage. The number of potential jurors "in-court" at the start of a term must be sufficiently large that, after all challenges by the Crown Prosecutor and the defence, a jury of twelve can still be struck. In order to have that number of people present at the start of a session, there must have been enough notices sent out to allow for people who will successfully seek exemptions, for those whose notices will be returned in the mail, and for those who will simply fail to appear. Further, the initial list must provide Panels for every term where juries are required. Accordingly, a very large list is required. Despite the fact that the *Juries Act* calls for a Jury List of 1200 names to be drawn up in Halifax and 300 names in other districts, longer lists are routinely authorized. In districts such as Victoria, Guysborough, and Kings, lists of 300-600 people are drawn up. Sydney draws up a list of 2500 names while the list for Halifax has grown to 14,000 names. Another important fact to note is the amount paid in jury fees and expenses. For the most part, jury districts pay in the range of \$3,000-\$10,000 in fees annually, Kings county paid \$15,000-\$18,000 and Halifax paid just over \$70,000 in 1991. The major factor affecting the size of the list is the number of terms held; in some districts only two or three criminal terms are held each year while in Halifax, an average of two per month are held.<sup>24</sup> A variety of other factors affect how many names need to be on the Jury List relating primarily to the percentage of those summoned who will actually appear "in-court". This percentage is typically in the 40-60% range, though it goes as low as 36% in Halifax County and as high as 90% in Richmond county.<sup>25</sup>

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<sup>24</sup>In Halifax, criminal terms are not held in July and August, but occasionally, a third term is held in another month. According to statistics, in 1992 the number of criminal trials between 1989-1991 was 346 in the province.

<sup>25</sup>It is believed that there may be a significant change in these numbers, particularly with increasingly frequent adjournments. Because the juries administration is in the process of

## (ii) *The Jury Panels*

"Jury Panels" are selected from the Jury List at the start of each Supreme Court criminal term or session. Juror Summons or Notices are sent out to a random selection of names on the Jury List. These people must appear in Court to be available to be chosen for the Jury Panel unless they are excused in advance. The *Act* does not state how this random selection is to occur other than to provide that 15 days before the session begins, the Jury Officer gives the Jury List to a Judge or a Justice of the Peace, who, if it is a Judge, randomly selects a number of jurors to be called for the Panel or, if it is a Justice of the Peace, randomly selects whatever number is determined by the presiding Chief Justice. The *Act* provides that 10 days before the start of the session, the Summonses must be sent out to jurors who are to be the Panel. In practice, the Juries Officer tries to account for delays in responses by mailing the Summonses closer to 30 days ahead of time. The person who receives the Notice must return it to the Jury Officer within a stated number of days (in this case, 5 days). This is to confirm the accuracy of the information about the person which has been provided by the voting list. This process is dealt with in s. 9 of the *Juries Act*. The *Act*, under s. 9(7), requires secrecy regarding the names of the jurors until 8 days before the session date, although lists must be made available and posted for scrutiny by the people involved in the trial by four days before the trial at the latest.<sup>26</sup> Those called for a Panel can apply to be excused upon appearance in Court or, in some cases, in advance.

It was noted above that very large lists are required to provide the necessary numbers for Panels. One relevant factor in deciding on numbers is the return rate for Jury Notices which are undeliverable due to out-of-date addresses. This return rate varies, depending on how recently an election has been held, and therefore, how accurate the electoral list is. In some districts, the return rate is quite low. Richmond, Amherst and Victoria Counties estimate that only 2-3% of Jury Notices cannot be delivered. The rate climbs in other areas. Sydney has a 10% return rate, Halifax and Kings Counties have return rates of 15-20% and Pictou estimates a 25-30% return rate. Some allowance must also be made for the percentage of jurors summoned who will simply fail to appear, although this is not a major factor. In Halifax, approximately 7% of those summoned do not appear though more typically, the rate is in the 3-5% range. Under the *Juries Act*, anyone failing to appear when summoned is liable to a \$200.00 fine. In fact, although these jurors might be contacted by the Sheriff and

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computerization, current statistics are not available regarding the number of juries and/or jurors being called. The existing statistics are now several years old, however, as an example, in May 1992 in Halifax, 306 jurors were called, 174 were exempted (excused in advance) 96 jurors were available on the first day, 11 more were excused in court and 32 jurors' cards were not returned (figures from *Monthly Juror Statistics Analysis* based on the 1988 voters' list, statistics to September 1992).

<sup>26</sup>There is also a practical reason as often the potential juror has not indicated he or she cannot attend until that time so the list changes frequently before then.

asked for an explanation, it is highly unusual for any other action to be taken.<sup>27</sup> In addition, the number of jurors summoned for a Panel must be large enough to account for the number of persons who will seek exemptions, particularly in advance of the Court date. This factor is a significant one. Several districts report that between one-third and one-half of jurors seek advance exemptions and that most of those requests are granted.<sup>28</sup> In Richmond county, only 5% of summoned jurors seek exemptions in advance, a rate which probably reflects the policy in that district of granting virtually none of these requests. Account must also be taken of the number of jurors who will be exempted by the Judge at the start of the term. Typically, about 10-15% of those present receive exemptions, although the rate can reach 25% or more.<sup>29</sup> For the most part, exemptions are granted for work-related reasons.

Once the Panel is in Court and a roll call has taken place to ensure that all people summoned and not excused in advance, are in attendance, then the "in-court" selection procedures begin. These are set out in the *Criminal Code* in criminal trials and in the *Juries Act* for civil trials. Currently, people are paid a juror fee (\$15.00) for their appearance time for this roll call even if not selected to be a jury. Often this selection process can be quite lengthy,

inconvenient and confusing for many people even though Public Legal Education Booklets are made available to help people understand the process.

## **b. "In-Court" Selection of the Jury**

### **(i) *Criminal Trials***

The procedure from this point forward is governed by the *Criminal Code*. The Panel selection process is also governed by the *Criminal Code* to the extent that it recognizes the Provincial procedures (under s.626) and provides that the Panel as a whole may be challenged only on grounds of partiality, fraud or wilful misconduct on the part of the Sheriff or other Officers by whom the Panel was returned (s.629, s.630).<sup>30</sup> The procedures

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<sup>27</sup>Although in a recent case, 35 jurors were fined \$25.00 for failure to show up in Court: (J. Zatzman, "Supreme Court Judge Fines Jury No-Shows \$25.00" *The Mail Star* (21 May 1994) A28.

<sup>28</sup>Amherst reports a 33% advance exemption rate while the rate in Halifax is 36%. Digby and Pictou receive advance requests from 40% of those summoned, and Guysborough reports that 51% seek exemptions of which 40% are granted.

<sup>29</sup>Richmond County, as one might expect because it grants no advance exemptions, grants exemptions to 20-25% of those present in court. Kings County estimates the same rate and Guysborough estimates 28%.

<sup>30</sup>As noted above, *R. v. Nahdee*, note 20, increasingly Jury Panels are being challenged when the Panel does not appear to represent the community. This is considered partiality even if there



for empanelling the Jury are set out in s.631 of the *Criminal Code*. The process set out involves the Court Clerk selecting cards out of a box with the Jury Panel name(s) in it, or in the case of counties with multiple municipal units (because of the cost allocation) several boxes randomly. Each of these potential jurors is either accepted or challenged by the parties; excused by the Judge under s.632; or stood aside under s.633 for reasons of personal hardship until a jury of 12 is assembled. The Judge is allowed to excuse people from service under both the *Juries Act* and the *Criminal Code*. The *Criminal Code* provision allows a juror to be excused on the basis of:

- 632 (a) personal interest in the matter to be tried;
  - (b) relationship with the judge, prosecutor, accused, counsel for the accused or a prospective witness; or
  - (c) personal hardship or any other reasonable cause that, in the opinion of the judge, warrants that the juror be excused.
- 633 The judge may direct a juror whose name has been called pursuant to subsection 631(3) to stand by for reasons of personal hardship or any other reasonable cause.

A specified number of jurors can also be challenged peremptorily by either the accused or the prosecutor (s.634). This is sometimes seen as a subjective screening process in that no reason need be given for the challenge. In addition, the accused and the prosecutor can challenge any number of jurors "for cause" as set out in the *Criminal Code*. Section 638 contains a number of grounds related to or overlapping with qualifications and exemptions provided by the Provincial legislation. The "challenges for cause" under the *Criminal Code* are:

- 638(1) A prosecutor or an accused is entitled to any number of challenges on the ground that:
- (a) the name of a juror does not appear on the panel, but no misnomer or misdescription is a ground of challenge where it appears to the court that the description given on the panel sufficiently designates the person referred to;
  - (b) a juror is not indifferent between the Queen and the accused;
  - (c) a juror has been convicted of an offence for which he was sentenced to death or to a term of imprisonment exceeding twelve months;
  - (d) a juror is an alien;

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was no deliberate intent on the part of the Administrative Officer.

- (e) a juror is physically unable to perform properly the duties of a juror; or
- (f) a juror does not speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or both official languages of Canada, where the accused is required by reason of an order under section 530 to be tried before a judge and jury who speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or who speak both official languages of Canada, as the case may be.

638(2) No challenge for cause shall be allowed on a ground not mentioned in subsection (1).

Recent case law has, however, broadened these grounds in that the Supreme Court of Canada has refused to overturn a decision of a Court which allowed a challenge for cause based on a question to a juror recognizing that racism may influence his or her decision.<sup>31</sup> Subsequently, the Ontario Court of Appeal has allowed screening of prospective jurors for racial prejudice in any case where the accused is Black, including those where the victim is

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<sup>31</sup> *R. v. Parks* (1993) 24 C.R. (4th) 81. The Ontario Court of Appeal commented in that case:

"In deciding whether the post-jury selection safeguards against partiality provides a reliable antidote to racial bias, the nature of that bias must be emphasized. For some people, anti-black biases rest on unstated and unchallenged assumptions learned over a lifetime. Those assumptions shape the daily behaviour of individuals, often without any conscious reference to them. In my opinion, attitudes which are ingrained in an individual's subconscious, and reflected in both individual and institutional conduct within the community, will prove more resistant to judicial cleansing than will opinions based on yesterday's news and referable to a specific person or event...There are at least three benefits to allowing the question. Some potential jurors who would discriminate against a Black accused are eliminated. Prospective jurors who can arrive at an impartial verdict are sensitized from the outset of the proceedings to the need to confront potential racial bias and ensure that it does not impact on their verdict. In this regard, the challenge process would serve the same purpose as the trial judge's directions to the jury concerning the basis on which they must approach their task and reach their verdict. Lastly, permitting the question enhances the appearance of fairness in the mind of the accused. As indicated earlier, many Blacks perceive the criminal justice system as inherently racist. A refusal to allow a Black accused to even raise the possibility of racial discrimination with prospective jurors can only enhance that perception. By allowing the question, the court acknowledges that the accused's perception is worthy of consideration." (at 111)

also Black. The screening, under the challenge for cause provision on the ruling, appears to cover only Metro Toronto at present.<sup>32</sup> In addition, a recent case in Ontario has also permitted a question to jurors under the challenge for cause provisions as to whether they held views on sexual violence against women and children which would make them unable to judge the information fairly.<sup>33</sup>

The *Criminal Code* provisions govern other matters such as discharge of a jury, keeping the jury on for another case, secrecy of deliberations and issues relating to the decisionmaking process of the jury.

### **(ii) Civil Trials**

The process for jury selection in civil trials is governed by the *Juries Act*. Structurally, the procedure is similar to that for criminal trials. As with the *Criminal Code* procedure, a card with the name, number and address of each Panel member is put into a box, shaken up, then names are pulled randomly out of the box with each name being called and subject to 3 challenges by each side or being excused by the Judge from service, the jury is formed once 7 people have been selected. The rules governing their decisionmaking process, including the fact that deliberations are to be for four hours only and the verdict need only be the view of 5 out of 7 jurors, matters relating to illness, discharge or addition of jurors, as well as fee payment, are found in the *Juries Act*. The *Act* also provides, under s.19, that omissions regarding the directions in the *Act* for qualifying or exempting jurors, preparing the lists or selection of notification process, are not grounds for impeaching or quashing the verdict in a civil trial.

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<sup>32</sup>T. Claridge, "Court Orders Screening of Jurors for Prejudice" *Globe & Mail* (20 May 1991) A1.

<sup>33</sup>*R. v. M.(W.) Ontario General Division* (Murphy, J., 8 March 1994).

### III PRINCIPLES AND RECOMMENDATIONS FOR REFORM

#### 1. A New *Juries Act* and a Reformed Juries Selection System

Most of the Commission's recommendations are reflected in the draft *Juries Act* found at Part V of this Report. It was decided that, given the number of changes, as well as the need to reorganize and simplify the legislation, it would be easier to simply replace the existing *Act* with a new one. In some cases, the changes are fairly minor and where possible, existing legislation has been included in the *Act*. The changes that are made in the draft *Juries Act* reflect various policy decisions about how jury selection should be approached to ensure the twin objectives of jury representativeness and impartiality. The Provincial responsibility in the criminal justice system, in particular for achieving representativeness, is the foundation upon which the *Criminal Code* provisions, oriented to concerns about impartiality, are based. If the Provincially regulated juror selection process does not ensure a fair cross-section of the community,<sup>34</sup> then the Federally regulated procedures, which further narrow, in the interest of impartiality, the cross-section of the community involved, the jury system will not operate properly. This may lead to decisions which do not reflect the full range of values in society and also may lead to public perception that the system is not truly impartial. The consequences of this can lead to a lack of faith in the credibility of the justice system as a whole. As noted earlier, the Supreme Court of Canada commented that Provincial selection procedures seemed to be providing for the necessary cross-section of the community and concerns about exclusion were directed at the "in-court" procedures which also allows for exclusion of people on grounds which may reflect discriminatory attitudes. Although the existing *Juries Act* in Nova Scotia does not appear when first reading it to be excluding groups, other than people who are not Canadian citizens or who have prison records or who fit an occupational category that allows them to be excused from jury service, there has been concern expressed both in Nova Scotia and in the other Provinces about the fact that people who appeared in Court on Jury Panels as potential jurors do not reflect a fair cross-section of the community. In particular, the absence of Aboriginal and Black people on juries suggests that the system is not operating as well as it could. The areas of concern for Provincial law reform are focused on ensuring that the source list of jurors is comprehensive; ensuring that the Panel selection procedures are truly random; and that the administration of both of these does not in some way operate to screen out some people for discriminatory reasons.

Although there are differing opinions among the Commissioners and in society in general that the nature of jury duty, there is agreement that every effort should be made to ensure as many people as possible are called upon to act as jurors. Some people view jury service as a privilege or a right from which some sectors of society, such as women, people without property, people of colour and immigrants have been excluded. This has meant that although there are groups subject to the law, the system has not necessarily included the

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<sup>34</sup>See *R. v. Sherratt*, cited above note 7.

perspectives and values of the whole community. This means that any reform should be directed at ensuring that the system does not directly or indirectly exclude specific groups. Within this perspective, there are various opinions as to how to achieve inclusiveness in a way which also takes into account the need to ensure impartiality and fairness. Some Commissioners believe that inclusiveness can only really be achieved through a structured process ensuring that percentages of various groups are included.<sup>35</sup> Others believe that removing barriers to involvement and ensuring random selection process through removal of administrative points in which exclusion occurs, intentionally or unintentionally, is the appropriate approach which does not jeopardize the concern for impartiality.<sup>36</sup>

Some people believe that jury service is a responsibility which should be shared by all people benefitting from the justice system. The compensation for this involvement and service is, as with many other civic or public responsibilities, minimal but it is an obligation which is imposed by law and which is enforced by penalties. From this perspective very few people, if any, should be allowed to escape liability for jury service.<sup>37</sup> A good example of this approach to jury service is found in the *Report on Exemption From Jury Service*, Project No. 71 by the Law Reform of Western Australia, 1980 which was concerned with the number of people who were excused from liability and, in particular, the fact that women were entitled to "cancel their liability" for service on written notice to the Sheriff. The Commission commented:

"The Commission considers it as axiomatic that the obligation to serve as a juror should be spread as widely and fairly as practicable throughout the community. Jury service is an important civic responsibility and a person would not be freed from the obligation to serve, or denied the right to do so, except for a good reason. No one should be freed from jury service for the purpose of avoiding what might be seen as a tiresome duty, or to avoid some minor inconvenience to the person concerned". (at 13)

Whichever perspective is adopted the objective is the same and the concern is to ensure that people are not excused or excluded because of discriminatory attitudes. Reform designed to meet this objective requires more than simple removal of provisions excluding and including people, it also requires discussion and consideration of the implementation of administrative practice as well as recognition of the more hidden ways in which representativeness and impartiality can be affected by practices. For example, the need to make the jury system more efficient and cost-effective through centralization can positively address concerns of local discretion and accountability and ensure more truly random selection. However, the

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<sup>35</sup>This view is reflected in the dissenting opinion of Commissioners Ring and Johnson in Appendix A, Section (1).

<sup>36</sup> This is the majority opinion.

<sup>37</sup> This is the view of Commissioner Charles in his dissenting opinion in Appendix A, Section (2).

same process of centralization and efficiency in the changes in the Court structure in Nova Scotia must also be considered in light of their impact on representativeness of juries where the demography of the Province reflects the history of colonization and isolation of various groups. The centralization of Courts can mean that jurors will, in the interest of their convenience and also cost, not be drawn from the communities in which offences occur, but from the communities in which the trial takes place. While there has been much discussion about the nature of the community which is to judge behaviour and how this relates to the idea of the jury of one's peers, it seems clear in the *Criminal Code* that generally the accused is to be tried in the community in which the offence occurs, unless he or she seeks a different location. Where there are numerous Courts which are located near communities this seems relatively simple and has been addressed as a solution in some Provinces where legislation provides that the jurors must be drawn from a particular distance specified from the location of the trial.<sup>38</sup> In the case of Nova Scotia, there is no stated distance other than the fact that jurors are drawn from the 18 jury districts for trials in the district (county). This means the "county" is the "community". However, in an era in which centralization is occurring and the judicial districts are probably moving from 18 to 4, a provision using a distance from the trial Court will have the opposite effect. It may, however, as discussed below in the recommendations, be possible through computerization, centralized lists and other cost efficiencies to generate Jury Panel lists and Jury Panels which respond to this concern.

Some of the proposals in this Report are made in the form of recommendations rather than being put into the legislation directly. The reason for this is that in many cases, institutional and administrative practices are currently in the process of change and development. It is therefore more appropriate to put forward the principles to govern practices which can then accommodate developments in technology and other areas without the law being outdated by practice. Similarly, the Commission is making recommendations for greater public information about jury service to encourage more participation in the system. The result of this mix of administrative, institutional and legislative change means that the Commission is recommending that the Government adopt the recommendations in this Report, the draft *Juries Act* and the associated Juror Summons and Juror Information Forms, as well as recommendations for areas in which the Provincial Government could advocate changes to the Federal Minister of Justice.

**The Commission recommends that:**

**The Government of Nova Scotia adopt the draft *Juries Act*, the associated Forms and the Recommendations in this Report.**

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<sup>38</sup>This was noted in the *Report of the Aboriginal Justice Inquiry of Manitoba*, 1991 at 386, where the specific distance for juror residence in the Northwest Territories was noted as a solution. The Commission recommended 40 kilometres from where the trial was to occur.

## 2. The Principles of Representativeness, Impartiality and Administrative Efficiency in a Multicultural Society

As set out in the Juries Discussion Paper, in criminal law, a jury is a group of people who decide the guilt or innocence of a person after hearing the evidence presented in the case. The jury plays a similar role in civil trials although the jury decides not on guilt or innocence but rather which of the two parties in Court is correct in their view of the facts of a case. The idea of giving a significant role to the community in settling disputes is common to many cultures. Historically, Aboriginal people in Canada looked to community members to help decide disagreements.<sup>39</sup> Similarly, France makes use of juries in its judicial system. Since Canadian criminal law and, except for Quebec, civil law was inherited from England, the jury system in Canada reflects developments over the past several hundred years of English legal history.

Juries were first used in England to decide criminal cases in 1215, when a person's guilt was tested by an "ordeal" and survival testified to his or her innocence. When this was no longer used as a method for deciding guilt or innocence, some other method of decision-making was needed and local citizens were given this task. Although it is now generally assumed that people on juries must decide on the basis of facts given to them and not on private knowledge, originally juries were expected to decide using their own knowledge of the case; for that reason, jury members had to be drawn from the community in which the offence occurred. In effect, jurors were witnesses at the trial as well as decisionmakers. This gradually changed and by the fifteenth century, juries were being described as a "body of impartial men who came into Court with an open mind".<sup>40</sup>

From a very early stage, an accused person had the right to challenge the choice of some jurors. In the fourteenth century, an accused could "peremptorily challenge" (that is, prevent them from being placed on the jury without offering any reason) 35 people. It appears that

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<sup>39</sup> Although, as noted in the *Report of the Aboriginal Justice Inquiry of Manitoba, Ibid.:* "while serving on juries can be seen as the cornerstone of the Anglo-Canadian legal system, to an Aboriginal person it might well appear to be culturally irrelevant...the determination of guilt, the primary functions of the jury does not play a large role in the traditional Aboriginal concepts of justice. The Aboriginal approach was to take the measures necessary to restore the community to a state of peaceful coexistence".(at 379)

<sup>40</sup>J.B. Post, "Jury Lists and Juries in the Late Fourteenth Century", in J.S. Cockburn and Thomas A. Green (eds.) *Twelve Good Men and True - The Criminal Jury Trial in England, 1200 - 1800* (Princeton: Princeton University Press, 1988) quoting J. Fortescue, *De Laudibus Legum Anglie*, S.B. Chimes, ed., (Cambridge: 1949), chap. 25.

the accused also had the right to challenge potential jurors "for cause" (claim that the juror, for some particular reason, might not be impartial) from an early stage.

In late sixteenth century England, jury members were upper class, white male members of society. The notion of the jury of one's peers stemmed from a society in which people were distinguished on the basis of social class. In this case, it meant that men should be tried by men of the same social class, the "peers".<sup>41</sup> Changes to this situation were a long time coming. Women were not permitted to serve on juries in England until 1919. Until recently, ownership of property was also a requirement for serving on a jury, which also limited the number of people eligible to serve. All of these requirements and "qualifications", many of which were related to financial matters, had the effect of excluding or excusing large numbers of people from participating in shaping the values enshrined in the legal system. The people most excluded by these qualifications were people who were economically disadvantaged, the majority of whom were people of colour and women.

The situation in Nova Scotia reflects this same general development. *Juries Acts* appear among the laws of Nova Scotia at least as far back as 1851, although juries were in use well before that time.<sup>42</sup> A Nova Scotia law in 1851 set up a structure that is essentially the same as that used today. It provided for a committee to draw up a list of all potential jurors and some people were excluded from that list, primarily on the basis of occupation. Since that time, the list of people to be exempted or disqualified has varied - women now appear on juries,<sup>43</sup> and the requirement that jurors own property was removed in 1985, but the broad outline remains the same.

The important point in the evolution of the jury system and the idea of the jury is that it has altered throughout history. The jury has shifted from decisions in which the juror has some knowledge and in effect acted as a witness in the trial to a situation where the decisionmaker is from the community in which the event occurred although impartial in terms of a bias in favour of either side; it is this group of people that will be called upon to judge the behaviour

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<sup>41</sup>Peerage is the term used to describe titled nobility. Curiously, the titled nobility has the privilege in England of being exempt from jury service.

<sup>42</sup>In 1749, the year Halifax was founded, a jury was summoned to try a charge of murder; see Philip C. Stenning, *Appearing For The Crown* (Cowansville: Brown Legal Publications, 1986) at 38-39.

<sup>43</sup>There is no explicit acknowledgement in the *Acts* of when this change occurred. As the statutes typically state that "all persons...shall be qualified to serve", it seems likely that the change followed the 1930 Privy Council decision that women were persons: see *Edwards v. A.G. of Canada*, [1930] A.C. 124 (P.C.). The *Criminal Code* now expressly states:

s. 626(2) "Notwithstanding any law of a province...no person may be disqualified, exempt or excused from serving as a juror in criminal proceedings on the grounds of his or her sex."



of each other. It can be seen then that the notion of the jury reflects ambiguity in terms of decisionmakers' relationships to the participants in the trial. This tension continues to this day in our law. There is the idea that one should be judged by people who are similar or hold similar values to the accused or the people whose case is being tried while at the same time there is an idea that jurors should be impartial. This is combined with the idea that jurors should come from the community in which the incident occurred and on whom the incident may have had some impact. This perhaps reflects the idea that the law is designed to be flexible and to reflect the values of the society in which it is being implemented.

The notion of community has gradually become much more significant. For example, where the local community was a relatively similar group of people, then it was fairly safe to assume that the community was also composed of people who were equals or similar to the people being tried and would therefore hold similar values. This is, in fact, an unrealistic view in modern day Canada and Nova Scotia in which we have a large immigrant population as well as a large population of indigenous Black and Aboriginal people. This means that, in the Canadian context, there are many different perspectives and values which are being judged by one set of laws.

The fact that we also have a history in Canada of racial and other discrimination, which in turn has an effect on whether people are considered as part of the community, has not been explicitly taken into account in the organization of the jury selection system. The jury is intended as a means of allowing the current values of the community to be reflected in the justice system. This is part of the on-going process of the renewal of the law in that behaviour is judged according to the changing standards of the community. It is the view of the Commission that no matter who the defendant is and whether the trial is a criminal or a civil one, the justice system needs to ensure that everyone in the community is equally likely to serve as a juror to contribute their ideas about standards of behaviour to the legal system. This is the notion of representation.

The issue confronting the Commission was how best to ensure, in the context of Nova Scotia, that the area governed by Provincial responsibility reflects the ideas of representativeness, the notion that the jury should be impartial and that, as much as possible, the jury should reflect the community in which the offence has taken place. The reasons for the last conclusion was that it appeared to the Commission that this was considered within the *Criminal Code* and also it would most likely be that the local community would be as close in values or similar values as the people involved in the trial.

In order to carry forward the principle of representativeness, it is essential to ensure that the jury system does not arbitrarily exclude or excuse any groups from jury service. The provisions of the *Juries Act* and the way in which the system is administered must be examined and reformed to ensure that as wide a group as possible is involved.

**The Commission recommends that:**

**Reform of the jury system be based on principles of representativeness, impartiality and administrative efficiency for the participants and the Government in a multicultural society.**

### **3. Random Selection and Representativeness**

The Commission has taken the view that the principles of representativeness, impartiality and administrative efficiency, that is, ensuring that the system is not unduly inconvenient or expensive for the participants or the society, should be the basis of reform. The question that arises, then, is how to carry achieve these principles. In the context of juror selection and representativeness, there is a differing opinion in society and among the Commissioners as to how best to achieve representativeness in juror service. It has been noted that one area is to ensure that the source list for jurors is as representative and contains as few systemic biases as possible and that the procedures used to create this list and select from it should also be similarly neutral. This does not, however, address questions relating to the selection of Juror Panels and mechanisms to ensure broader representation on Jury Panels. In principle, if the source list is representative, the Panels should be similarly representative. However, as noted earlier, issues such as geographical disparity, centralization, as well as administrative and operational factors may give rise to barriers or impact on the representativeness of Panels. The problem is how best to take this into account. The Commission is in agreement that ensuring random selection should be the basis for institutional reform, however, there is a division of opinion which is reflected in the Majority Recommendation and in the Dissenting Opinion of Commissioners Ring and Johnson regarding the administration of random selection procedures.<sup>44</sup>

The majority of the Commission is of the view that random selection and ensuring that all systemic barriers are removed as much as possible, as well as removing all places in which there may be administrative discretion which could be exercised unfairly, is the fairest approach to achieving representativeness. This will avoid concerns about representation by particular groups who feel they may have to take a role as a representative of one of the participants thereby jeopardizing the interests of impartiality and fairness. The Dissenting Commissioners were of the view that a more affirmative approach to jury structuring is required to ensure greater representation in the Panels and in the jury itself. It is to be noted, however, that all Commissioners were of the view that representativeness and impartiality were central concerns as well as reducing inconvenience and cost.

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<sup>44</sup>The Dissenting Opinion is found in Appendix A, Section (1).

**The Majority of the Commission recommends that:**

**The principles of representativeness, impartiality and administrative efficiency in the context of the jury system should be achieved through random selection and removal of systemic and other discriminatory exclusions and exemptions rather than through selective representation.**

#### **4. Jury Availability in Civil and Criminal Trials**

As well as discussing how these principles of representativeness should be achieved, the Commission considered two related questions. Should there, in fact, be juries at all in Nova Scotia? Should jury trials only be available in criminal trials? The answer to the first is reasonably straightforward in the case of criminal trials because jury trials are constitutionally guaranteed in criminal law and, since they are governed by Federal law, the Province has no role in determining that juries would not be available. In many jurisdictions, however, the availability of civil juries is a matter that is under consideration and the question is also considered in the context of Nova Scotia.<sup>45</sup> In its *Discussion Paper* the Commission raised the question of whether we should continue to have civil juries available.

At present, anyone trying to determine the law relating to civil juries must look in three places. The existing *Juries Act* contains some of the rules, indicating how many jurors are on a civil jury, how they are to be chosen, how they render their verdicts, and so on. However, unlike other Provinces, the rules concerning when a jury is available in a civil matter are not in the *Juries Act*. Rather, those rules are found in the *Judicature Act* and in the case law that has developed interpreting those rules in Nova Scotia. Nova Scotia currently makes juries available for civil trials in a fairly broad way through the *Judicature Act*. People serving as jurors for a civil trial are selected under the same process as that set out in the *Juries Act* and are paid a similar amount. The distinguishing features are that the size of the jury is smaller and the length of deliberations is restricted and, finally, the decision need not be unanimous.

In some Provinces there is a view that juries in civil trials are not an appropriate expense for the state or for the citizen to incur. That is, the jury is seen as acting as a tribunal or decisionmaker for what is essentially a private dispute between two individuals and it is unfair to impose the cost, both in terms of personal inconvenience on people as well as the cost to the system, of giving this service. An alternative view is that juries in civil matters do add to the justice system determining the direction of law governing all matters other than criminal law and therefore are, in fact, providing a service to society. In this respect, it

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<sup>45</sup> See note 17 above.

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equally important that jurors be representative and that values relating to contract law, law of damages, tort law and so on, be equally representative.

Most Provinces adopt the position that juries are not available in civil matters except in particular types of cases. This means that parties to a dispute cannot have a jury unless the person wanting one can show why it should be available. The position in Nova Scotia is the opposite. In general, a person is entitled to have a jury unless the other side can show that a jury should not be used. The Commission sought the views of the public on whether civil juries should be less freely available than they are at present. There was no suggestion in the submissions, or in any other comments, that the substance of the current rules for availability are seen as creating a problem. In part, this result might be attributable to the fact that despite the easier availability in this Province, civil juries are not used very much. While there may be some cost implications regarding jury availability, it seemed to the Commission that without information indicating that the availability of civil juries in Nova Scotia was creating a problem for Nova Scotians or for the justice system generally, the current situation which allows civil juries should not be altered. The imposition of this obligation is justified on the basis that although the particular case involves two individuals, all Nova Scotians will be affected through the development of values in the case law that results from civil trials.

The Commission does, however, recommend that the rules should be consolidated and put into the *Juries Act* itself. The draft *Juries Act* takes the rules that are in the *Judicature Act* and moves them to this *Act*. In addition, it codifies the interpretations of the *Judicature Act* rules. Although no changes have been made to the substance of the civil jury procedures it may also be useful to consider, in light of current concerns about the misuse of peremptory challenges in criminal trials, whether these should be maintained in the context of civil juries.

**The Commission recommends that:**

- (1) Juries should continue to be available in Nova Scotia for criminal and civil matters.**
- (2) The rules governing the availability of juries for civil trials should not be changed, however, all the rules regarding civil juries in Nova Scotia should be consolidated in a new *Juries Act*. The continued availability of peremptory challenges should be considered.**

## **5. Achieving Representativeness**

Representativeness can be achieved through a combination of legislative and administrative changes. These changes should be oriented to recognizing the points at which historic or

systemic discrimination operates to exclude people from participating in the system or else excuse people from carrying out their social responsibility. Both concerns, while reflecting differing views on the role of jury duty, are concerned with examining distinctions made between people based on those stereotypes and other discriminatory attitudes. In addition, there are other places where the system can have a discriminatory effect in that it may impact against or exclude some groups of people more than others. For example, low juror fees has an effect on the degree of hardship experienced by people. In some cases, people simply cannot afford to be on a jury. To impose this obligation seems unfair. However, at the same time, where the person is employed it appears unfair to require employers to pay.

Aside from explicit changes in the *Juries Act* itself, changes are needed to the administrative process or the system itself, to remove discretion and make the process more open with records available to the public for examination regarding selection decisions. Achieving representativeness also involves recognition of the diverse demography of Nova Scotia and the imposition of the legal system in this context. Finally, the relationship between the jury system and the *Criminal Code* and *Charter* provisions which also permit the participants in criminal trials to exercise some role in determining the composition of the jury, at least in terms of issues relating to impartiality, must be considered.

There are two main areas to be examined, the creation and administration of the source list of jurors and the creation and administration of the list of Jury Panels.

#### **a. Ensuring Representativeness in the Source List of Jurors**

This involves two different areas of concern. First, the initial decision regarding the list and second, the removal of changes to the exclusion and inclusion on the Jury List through excuses and disqualifications. In addition to the Provincial qualifications, the provisions in the *Criminal Code of Canada* also affect juror qualifications by providing for challenges for cause which include concerns regarding criminal record, language, the status of individuals as aliens and the physical ability of individuals. These will be a basis for exclusion in criminal trials once the person is in Court on a Jury Panel.

The first issue then to be dealt with is examining the source list of jurors. As noted earlier, the main point in this context is to ensure that as broad a list as possible is generated and in criminal trials, to also take into account the need for openness and possibility for public review of lists so that any exclusions can be identified or accounted for.

##### ***(i) The voters' list should no longer be the only source for the Jury List***

Currently, the voters' list is the main jury source list used in Nova Scotia. The voters' list becomes more inaccurate the further one moves from an election. Those inaccuracies are most likely to concern tenants and other people who move frequently. To be more inclusive, a broader initial source than the voters' list must be used. Since no single list totally avoids similar problems and rather than designate the best of a group of flawed lists as the source

for the Jury List, the Commission recommends that the *Juries Act* instead recognize the principle that selection for the Jury List should be made from as comprehensive a source list as possible. This more open requirement not only recognizes the important principle, it is also more flexible. The Court Administrator should be able to respond to these changes in circumstance without the need for legislative change. The Medical Service Insurance (MSI) System is the most up to date and comprehensive list in the Province<sup>46</sup> and will be a more inclusive list to use than the voters' list. The MSI list now covers every resident in Nova Scotia currently eligible for medical service insurance and assigns each person a number<sup>47</sup> which does not change for the rest of his or her life. The list uses date of birth as identifying information which means that a list can be generated in any year which includes only people above the age of 18. It is scheduled for an update every four years to maintain the accuracy of the information.

The use of the MSI or health care numbers has been seen as a progressive step in other Provinces such as Manitoba and Saskatchewan, particularly in terms of ensuring inclusion of Aboriginal communities in the initial list. It appears that efforts have been made in Nova Scotia to encourage registration by Mi'kmaq people and, although people are not classified on ethno-cultural grounds in the list, it is believed that people in the Aboriginal Community have been registered. Since the majority of the Commission is recommending keeping Canadian citizenship as a qualification, the MSI list will, in fact, be too inclusive a list. Because of the administrative recommendation regarding self-disqualification by potential jurors, this should prove to be a fairly minor problem in terms of administrative burden and cost because a landed immigrant, called for a Jury Panel, will simply indicate he or she is not qualified on the Juror Information Form.

***(ii) Anyone who is concerned that his or her name might not be on any of the lists to be used should be able to register with the Court Administrator***

As pointed out above, part of the change in relation to Jury Lists is also to ensure a more open and public process. Therefore, it is recommended that the Jury List for the year for any

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<sup>46</sup> As of May 1994, it is estimated that out of a potential list of approximately 923,000 residents of Nova Scotia, 902,000 have been registered in the computerized system. It has been estimated that approximately 98% of the population is now registered including Mi'kmaq people. However, this list too will have some problems which means it cannot be used alone. For example, it excludes people who are not covered under the Provincial Medical Insurance System (MSI) )such as Armed Services Personnel and Royal Canadian Mounted Police. The use of the provincial medical list was also recommended in Saskatchewan; Law Reform Commission of Saskatchewan, *Tentative Proposals for Reform of the Jury Act*, 1979.

<sup>47</sup> Unlike the previous system which was based on Social Insurance Numbers and operated with codes for family units, the new number is not linked to the Social Insurance Number or the person's family situation.

district, and indeed for Nova Scotia as a whole, should be publicly available and any person should be able to ascertain whether his or her name is on the computerized list. If a list such as the Medical Services Insurance list is used, then in principle, this should not be a concern if a person is already listed as they would necessarily also be included on the Jury List. The only places in which some problems might arise will be instances where a person may have moved from one area to another during a year and where that change of address may not have been made to the computerized Jury List for the year. It is recommended that people be able to check for their inclusion and also register for service if they wish.

The Court Administrator could ensure that the name of a person who has voluntarily registered is included among the random selection for a Jury Panel. No one can specify with which trial they would like to be involved nor is there any guarantee they will be called for a Jury Panel at all. Further, the Court Administrator need not actually compile a separate list of names, provided he or she checks that the people who make this request are included accurately in lists which will otherwise be used.

**(iii) *The twelve month residency requirement in a jury district should be removed***

The requirement that a juror must have resided for 12 months within the jury district (that is, County) has been removed. That restriction eliminated people who moved around within the Province, but did not seem to protect any justice interest, although it did provide a linkage to Municipal payments for jurors.

**(iv) *Fewer categories of people should be disqualified or exempted from serving as jurors***

In addition to ensuring that the source list itself should be as representative as possible, it is important to take into account the express exclusion of some people from jury service either through disqualification or exemption or through excusing people from liability from jury service. Currently, people are disqualified or alternatively are exempted from jury service under section 5 of the *Juries Act* (this list is set out in the earlier part of this Report).

The basic principles underlining these disqualifications, exemptions and releases from liability appear to relate to a mix of concerns such as hardship for individuals or their families, concern for public perception regarding lack of impartiality and by a belief that for some occupations the service to the community by these people is more important than their service as jurors. The Commission, in its *Discussion Paper*, suggested that the existing *Juries Act* confuses a number of different principles for exempting people from service by not distinguishing between these categories. The Commission's proposal in its *Discussion Paper* was that people should be disqualified from jury service because they either did not have characteristics such as residence in Nova Scotia or alternatively, because they held an occupational position that would render it inappropriate that they be on juries. The main concern in the occupational context is that there may be a concern for impartiality if these people were on juries. Any other exemptions should be considered as "excuses", which for

the most most part are not automatic.

In its *Discussion Paper*, the Commission suggested that eligibility for jury service be extended to include landed immigrants. This proposal sparked a number of comments from the public. The majority of commentators, though not all, agreed with the suggestion. The central issue is whether a juror should have a commitment to and knowledge of the community where the trial is to occur. The majority of the Commissioners, after reflecting on the issue, decided that Canadian citizenship should remain as a qualification to be a juror in Nova Scotia. It should be noted that there is a Dissenting Opinion by Commissioner Charles on this point which is of the view that jury service is a duty and should be carried out by all residents in Nova Scotia.<sup>48</sup> Further there is a concern that, as noted in the *Discussion Paper*, exclusion of landed immigrants, may be contrary to the *Charter*. The different points of view on the Commission stem from differences in opinion as to whether jury duty is a privilege given to a group or a civic responsibility imposed by society. There is no clear answer to this question in that jury duty is an obligation in the sense that failure to act, if required, is subject to a penalty but it is also a privilege in that, historically, not every person in a society was qualified to serve as a juror. In addition, there appeared to be some concern that people who were not citizens may not have sufficient language skills to follow the trial or be aware of the values of the local society.

One proposal the Commission made in the *Discussion Paper* which is repeated here but cannot be included in the draft *Act* is that Civil Procedure Rule 34.03 should be repealed. That Rule entitles any pregnant woman to an automatic exclusion from a civil jury. The Commission suggests that although some pregnant women will ask to be (and should on request be) excused based on their individual circumstances, a blanket exemption is not appropriate. In addition, although there has been no challenge on this basis, it should be appreciated that this disqualification would appear to be contrary to the *Criminal Code* provision in s.626 which does not allow exclusion of people on the basis of their sex.

As will be discussed in the section dealing with Jury Panels, the draft *Juries Act* calls for disqualifications to be made after notices are sent to the jurors on a Panel rather than at the early stage of drawing up the Jury List.

In addition to providing for disqualifications, the draft *Act* also provides as the only other category for exclusion of people, a provision entitling the Court Administrator in advance of the trial or alternatively a Judge at trial, to excuse people from jury service. This process would add to the administrative convenience and would enable people to obtain either deferrals or be excused from jury service on application if called for a Jury Panel. The basis for excusing or deferring would remain the same as that currently used, that is, hardship, illness or inconvenience. The process and power regarding excuses as well as the

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<sup>48</sup> The Dissenting Opinion of Commissioner Charles, President, is found in Appendix A, Section (2).



recommendation that Jury Committees no longer exist are dealt with in more detail below in the discussion on Jury Panels.

Although technically an "automatic excuse" rather than a disqualification, the majority of the Commissioners were also of the view that medical practitioners in Nova Scotia should be automatically excused from jury service on the basis of public interest in their service to the community. The medical practitioner, on receiving a Juror Summons to be on a Panel, would indicate that he or she is a practitioner and on returning the Juror Information Form would be automatically excused from service. However, since a medical practitioner can be on the Jury Panel if he or she wishes, this operates as an excuse rather than a

disqualification. There is a Dissenting Opinion on this issue and on the disqualification of people with a law degree by Commissioner Charles.<sup>49</sup>

It is important to recognize, however, that irrespective of Provincial law, the *Criminal Code* also excludes some people on the basis of impartiality and the challenges for cause and peremptory challenge provisions. Although the *Criminal Code* procedures are intended to ensure a fair and impartial jury, they can be used to undercut Provincial efforts at achieving representativeness on juries. In general, the disqualifications and excuses recommended by the Commission will exclude fewer people than the current *Act* which reflects assumptions about different groups of people which also are no longer appropriate with the principles for reform.

**(v) *The Governments of Canada and Nova Scotia should examine access to justice issues involved in recognition of the language rights of the Mi'kmaq people in Nova Scotia***

One of the most troubling issues for the Commission involved the question of Aboriginal language rights. The issue in the case of Nova Scotia is whether there should be a provision which affirmatively states that people who speak only the Mi'kmaq language should be included as jurors irrespective of the ethnic origin of the accused person with an obligation on the state to provide for translation and interpretation. While there is no exclusion set out in the *Juries Act*, the administrative practice appears to be that if a person is unable to follow the language of the trial, he or she will be excused by the local Court Administrator or Court Juries Officer from having to attend at the trial date.

Although the Commission received no submissions on this particular point, it was still a matter of great concern to the Commission. It is also a matter of concern to other agencies working at law reform in considering the impact of the *Criminal Code* provisions which allow a challenge for cause on the basis of the juror's ability to comprehend or participate in understanding the language of the proceeding. This provision has also been considered in connection with concerns about excluding people who cannot see or hear or participate

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<sup>49</sup>*Ibid.*

orally in juries but who may be able to comprehend and follow the proceedings.<sup>50</sup> The matter is complicated by the fact that under the *Criminal Code* an accused has a right to have a trial in either of the official languages, English or French, which would also allow that person to have a juror who can understand either of those languages.

There have been provisions enacted in the Northwest Territories and in Quebec which, in the case of the Northwest Territories, enable people who speak only an Aboriginal language to take part in trials. In the Northwest Territories, however, there is a very large unilingual Aboriginal population. In the case of Quebec, the provision allows for the participation of Aboriginal people where the accused person speaks the Aboriginal language also. It is to be noted that currently an accused person is entitled to have translation when he or she does not speak the language of the trial.

The previous Law Advisory Committee for Nova Scotia in 1978 recommended that there be a provision included in the *Juries Act* which disqualified any person unable to comprehend or speak the language of the proceedings.<sup>51</sup> This was, however, not implemented. Inclusion of such a provision is used in some jurisdictions to respond to the concern that, in some cases, people who are landed immigrants, may not yet have achieved language skills sufficient to enable them to take part in the trial.

While there is concern to ensure greater involvement of more people in the jury system and, in particular, Mi'kmaq people in Nova Scotia, the Majority of the Commission felt that the matter was not one which could be resolved in isolation simply by a reform to the "out-of-court" selection procedures of the jury system but was a question which required more comprehensive changes involving the Federal, Provincial, Territorial and Aboriginal Governments determining the relationship between aboriginal rights and access to justice issues. For the moment, the Majority of the Commission recommends that the situation remain as it is, that is, with no rule requiring understanding of the language of trial. There is a dissenting opinion by Commissioner Ring which expresses the view that an affirmative provision regarding Aboriginal languages should be included in the *Juries Act*.<sup>52</sup>

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<sup>50</sup>Criminal and Social Policy Sector, Department of Justice, *Amendments to the Criminal Code and the Canada Evidence Act with Respect to Persons with Disabilities Consultation Paper*, May 1993.

<sup>51</sup> Report to the Attorney General of the Nova Scotia Law Reform Advisory Committee on the *Juries Act*, October 1978, Draft *Juries Act*, s.3(3).

<sup>52</sup>The Dissenting Opinion by Commissioner Ring on this point is in Appendix A, Section (3).

**The Commission recommends the following to achieve representativeness in the lists of people to serve on juries:**

- (1) The voters' list should no longer be the only source from which Jury Lists are chosen, rather a more comprehensive computerized list such as the medical service insurance list be used.**
- (2) Anyone who is concerned that his or her name might not be on any of the lists to be used should be able to register with the Court Administrator.**
- (3) The twelve month residency requirement in a jury district should be removed.**
- (4) Fewer categories of people should be disqualified or excused from serving as jurors. The Majority of the Commission recommends that Canadian citizenship remain a qualification and that medical practitioners be automatically excused from service. Civil Procedure Rule 34.03 automatically excluding a pregnant woman should be repealed.**
- (5) The Majority of the Commission recommends that the Governments of Canada and Nova Scotia should examine access to justice issues involved in recognition of the language rights of the Mi'kmaq people in Nova Scotia.**

**b. Ensuring Representativeness in the Jury Panel**

- (i) Jury Committees should be replaced by a centralized computer based system for drawing up the list of jurors for a session (the Jury Panel)*

The Commission, in its draft *Act*, has also proposed changes to the institutional arrangements for drawing up Jury Panels aimed at ensuring the representativeness of the process. One of these is that the task of drawing up the Jury List be given to the Court Administrator, rather than to a Jury Committee. This will mean that there is no longer a need for Jury Committees. The major part of the work of jury selection is already done through prothonotary offices. The role of the Jury Committee is limited to involvement one day per year, when the members select names from the voters' list to make up the Jury List for the upcoming year. That process is intended to be a random selection and indeed should be essentially mechanical. Accordingly, all that matters is that it be done by someone trustworthy, or otherwise in a way that makes it truly random. However, the current provisions in the *Juries Act* actually work against that goal of removing systemic barriers rather than in favour of it. The members of Jury Committees represent individual municipal units or towns in the County and are often municipal councillors. As a result, they tend to be from a relatively small area and to know a large number of the people in that area. Further, the *Juries Act* currently requires that disqualifications should be made at the time the Jury List is drawn up. As the voters' list does not include occupation or other personal

information, these disqualifications can only be made based on the personal knowledge of Jury Committee members. That is, the current system assigns the task of drawing up a Jury List to the people most likely to be personally familiar with the names on the List and asks those people to consider the personal circumstances of everyone whose name is chosen. That approach seems the opposite of a randomness. It is more appropriate that any selection process be carried out by someone unlikely to know the individuals concerned (or a computer) and done with no consideration of individual circumstances at that time. Accordingly, the draft *Juries Act* calls for the Court Administrator to draw up the list and for the process of disqualifying people to occur only at the stage of preparing an individual Jury Panel when jurors request disqualifications. Indeed, reference is made to the possibility of having Jury Lists drawn up by computer and having one central location draw up all the Jury Lists for the Province. This far more anonymous approach would be more consistent with random selection. In addition, by requiring in the *Act* that Juror Information Forms be used and with it a requirement that the Court Administrator determine why Forms have not been filled out and returned will assist in encouraging people to take part in jury service.<sup>53</sup> While these changes will have some impact on cost, this should be balanced by the greater efficiency in using a centralized list system and selection process as well as reduced Court time through use of some delegation of decisionmaking time. The increased travel costs may be accounted for by not paying potential jurors for the first day of service. By placing an obligation on jurors to provide information as to their qualifications and excuses it will also eliminate much time, cost, inconvenience and discretion that exists in the system.

The suggestion in the case of Juror Information Forms is that people would be entitled to set out a reason why they either cannot serve at all or cannot serve at that particular time on the proposed Juror Information Forms and that the Court Administrator would be able to make a determination of this in advance or alternatively, by the Judge at trial. The discretion of the Judge in this matter would be broader than that of the Court Administrator in that the Judge can excuse people on the basis of inconvenience as well as hardship and illness. Two other things should be noted about the power to excuse people from jury service. First, some guidance on the use of this power has been included in the draft *Act*. The guidance provided should make no difference to practice in that it simply codifies the current practice. The *Juries Act* as it now stands seems to give an unrestricted right to grant exemptions for any reason. The Supreme Court of Canada has said that this section must be interpreted to mean that exemptions can only be granted for reasons unrelated to the trial, that is, questions similar to hardship associated with attending in Court, rather than to bias about the particular case.<sup>54</sup> If this were not so, the section might be unconstitutional by reason of being outside the jurisdiction of the Province. The wording of the section has been adjusted in the draft

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<sup>53</sup>The idea of using such forms was also suggested by the Law Reform Commission of Saskatchewan in 1979, cited above note 48. The draft Forms attached to this Report are based on their suggestions and on Draft forms prepared, but not in use, in Nova Scotia.

<sup>54</sup> *Barrow v. The Queen*, [1987] 2 S.C.R. 694.

*Juries Act* to take account of the Supreme Court's decision.

The major difference between the power of the Judge and of the Court Administrator in the draft *Juries Act* lies in the ability to excuse people from service on grounds of "inconvenience". The criteria of "hardship, illness, or inconvenience" are drawn from the Supreme Court of Canada decision in *R. v. Barrow*, which held that the exemption power in the current Nova Scotia *Juries Act* must be interpreted to be limited to these types of grounds. The Commission feels that while administrative efficiency supports allowing the Court Administrator to excuse people, the power of the Court Administrator should be more circumscribed than that of a Judge. Accordingly, a Court Administrator's discretion is limited to grounds of hardship and illness, as these words imply more serious, and more easily identified, reasons to be excused.

Finally, it was suggested to the Commission that, in addition to the power to excuse someone from jury service completely, it should also be possible to postpone someone's jury service. Where an otherwise eligible juror will be out of town during the session for which he or she has been called, for example, the Judge or Court Administrator might prefer to place the juror on a later Jury Panel, rather than excuse him or her completely. This approach is also consistent with the goal of including as many people as possible in jury service. The draft *Juries Act* allows for this possibility.

This process, if adopted, will mean that the initial source list which should be as representative as possible, would be the annual Jury List for the district as well and would also be the list from which Panel members are drawn. Any exclusions or disqualifications must occur at the Panel selection stage and should be in writing to the Court Administrator at that point. This would assist in ensuring that, since the disqualification or excusing of people would occur through the initiation or the request of the people themselves sending in the Juror Information Form when summoned to trial, there would be no decisions prior to that point disqualifying, excusing or otherwise excluding any individual from jury service. This would assist in alleviating the administrative burden on the Court Administrators and where the process is centralized, would allow for that centralization to take place and reduce the overall workload.<sup>55</sup>

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<sup>55</sup>In fact, of necessity, that is the practice in many jury districts already. When these disqualifications are made after the fact, they are simply made as an administrative matter by the Prothonotary. At the same time, requests for exemptions which are not automatic are also taken to the Prothonotary after notices are mailed, but before the date for appearance in Court. The *Juries Act* currently only gives the power to grant these exemptions to "the Judge presiding at a session or the Chief Justice". In fact, in some cases, the Judge who will preside at a session authorizes the Prothonotary to grant exemptions that seem appropriate. Although this practice is not based on any provisions in the current *Act*, it seems to the Commission that it should be permitted. The more that these fairly routine excuses can be dealt with before Court, the

*(ii) Changes to take into account Court reform and demography*

In February, 1993, the process of Court reform began in Nova Scotia with the merger of the Supreme and County Courts.<sup>56</sup> Further changes in the Court system, and particularly changes in the administrative support for the Courts, are envisaged which will necessarily change the way the jury system works. Fortunately, most of the changes which are necessary for administrative reasons are also called for to better ensure the system is more inclusive and fair.

The most significant factor in Court reform affecting the jury system is the change from Municipal to Provincial responsibility for the administration of justice. In the past, individual municipalities have been responsible for costs of the justice system, including maintaining courthouses and paying jurors. Now the Province has decided to assume responsibility for the full costs of the administration of justice as part of municipal reform efforts.

The changes resulting from this shift to Provincial responsibility go beyond the question of who will pay. The merger of the Courts has meant that the Province has been re-organized into four judicial districts and that services will be arranged through them. At present, every county has a Courthouse and a prothonotary's office and the Supreme Court still sits in every county. However, that situation is expected to change over the next ten years. The number of administrative offices will be reduced and they will eventually cease to be called "prothonotary's offices". In addition, the Supreme Court may not sit in every county.

The current *Juries Act* makes every county a jury district. It requires that each county have its own Jury Committee, prepare its own Jury List and that records be kept allowing the costs related to jurors to be divided between municipalities. Even eligibility for jury service under the existing law depends on residence in the county, rather than in the Province as a whole. With a Provincial orientation to the *Act*, some of these provisions become unnecessary, while others become impractical.

As noted above, Jury Committees have been eliminated in the draft *Juries Act* on the basis of a need to ensure randomness and fairness in selection. Their elimination is also consistent with Court reform. At present, since the Supreme Court continues to sit in every county,

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quicker and more efficient the actual court proceedings will be. The draft *Juries Act* allows the Court Administrator to grant applications to be excused on the basis of hardship or illness. A refusal by the court administrator can still be taken to the Judge.

<sup>56</sup> *An Act to Reform the Courts of the Province*, S.N.S. 1992, c.16.

Jury Lists can still be drawn up on a county by county basis. In future, when Courts serve an area broader than a single county, redistribution will be necessary. The Province has already been divided into four judicial districts.

In addition to requirements regarding lists and jury districts, it should be noted that there are many other issues which are not expressly noted in the *Act* but are implicit in the draft *Juries Act* and in the Juror Information and Summons Forms attached to the draft *Act*. For example, it has been pointed out elsewhere<sup>57</sup> that there are also many other areas which can be responsible for non-inclusion of people, such as the fact that Jury Summonses are not followed up, or that people do not return them or return them late. These are also addressed in the *Act* and along with it is a recommendation that fines should be enforced and Court Administrators or officials in the districts should be required to account for every Summons. In line with this is a provision in the draft *Act* which requires people to return the Juror Information Form to the Court Administrator. This will provide a public record as to which people did or did not return Forms and provide a basis for investigation as to why a particular individual did not return a Form. This will provide information regarding matters mail delivery or lack of telephone service and a number of other concerns which often meant that the situation of people in rural areas was not being taken into account. It will also assist in addressing the lack of cross-section of people on Juror Panels.

Although there will be more than one Court administration office in each district and jury districts could readily be centred around them, it is proposed that as Court reform is phased in, there may be up to 12 Court offices. Some counties will therefore be served only by Courts and Court offices in other counties. If resources are devoted to producing a reliable database so that computerized selection is possible, it will be quite straightforward for a single office to produce all the Jury Lists for the Province. If this was to take place in each year, the Juries Coordinator and staff in a central office would make use of the relevant people from the Medical Services Insurance List for the year taking into account the age of individuals qualified to be jurors. This then would be the Jury List for the Province. Since it would also have data on postal codes, the Juries Coordinator would be able to draw up lists for each of the jury districts and send out the list of jurors for the year for that district. Further, if the system is set up as a completely centralized system, the Juries Coordinator would be able to receive the list of trials or needs for the Session and would, in fact, be able to draw up the Panel lists on the basis of computerized random selection. These lists for each Session would be sent out to the jury districts or to the relevant Court or trial locations listing who will be on the Jury Panel for that Session. This would mean the entire process would be computerized, centralized and relatively quick, given advances in electronic communication.

In order to take into account concerns about demography in the Province, it would be quite feasible for the Juries Coordinator, using postal codes, to define the community within the

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<sup>57</sup>*Report of the Aboriginal Justice Inquiry in Manitoba, 1991.*

jury district or Court district as the community in which the offence occurred and to simply draw a random list of jurors with postal codes from that area. The merit of this approach, while it might impose some costs in terms of travel time and travel or accommodation costs, would be that it would ensure a greater likelihood of more representation of people drawn from the community in which the offence occurred and a greater likelihood of representation of people who may be similar to the accused person in the case. This has been an approach that was recommended in Manitoba although it was dealt with on the basis of specified kilometres from the Court. In that case, the Inquiry investigating Aboriginal Justice suggested that, in the case of urban areas, a similar principal would apply and jurors would be drawn from a particular postal code near where the offence occurred or else be based on an equal division of people to be drawn from the residence of an accused person and a victim in the case of criminal trials.

The use of postal codes in the context of judicial districts and large geographic areas also has been discussed by an American Court.<sup>58</sup> In that case, the Court commented on trying to determine what the proper community was and also the question of the role of the state (Province) in determining what is to be deemed the community. For example, the Court noted that the entire State of Alaska could be considered the single community. However, as in the case of Nova Scotia, the State of Alaska had, in fact, designated four judicial districts as the outer community limits for jury duty.

The American case involved an offence in a community outside the location at which the trial was to occur and the concern was that the judicial district in the jury may not include a fair section of people from that community. The Court noted:

"[T]he traditional point for determining the community from which jurors are selected is the scene of the alleged offence. Hence, we feel that in determining whether the source from which a given jury is selected represents a fair cross-section of the community, we must adhere to a notion of community which at least encompasses the location of the alleged offence. It is the community in which the crime was committed that the jury must represent because of this focus...any narrowing of the area from which prospective jurors are drawn will have no effect on the impartiality of jury panels, so long as the narrow area of selection continues to include the scene of the crime, and so long as it remains sufficiently broad to allow for the empanelment of a jury which is not prejudiced by knowledge of the events of the specific crime charged. Where, on the other hand, prospective jurors are selected from an area which does not encompass the scene of the alleged crime, there will always be a danger that significant elements of the community in which the crime occurred will be excluded from representation on the jury panel, and that the panel will consequently fail to represent a fair cross-section of the community. In such cases, care must be taken to ensure that exclusion does not actually occur...".

A similar point was made recently in Ontario<sup>59</sup> where a jury district included several First Nations Reserves but no First Nations people were on the Jury Panel. The Court concluded that:

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<sup>58</sup>*Alvarado v. State of Alaska* 486 P.2d 891 (1971) (Alaska Sup. Ct.)

<sup>59</sup>*R. v. Nahdee*, see note 20 above p.117.



"The section in the *Juries Act* is designed to ensure the jury will be representative of the community in which the trial takes place. Section 6(8) [which required that the Sheriff obtain Band Council lists where the jury district included a Reserve] is specifically intended to ensure that representativeness of the jury extends to Indian bands. In consequence, the population segment which is the object of the section is not included."

In Nova Scotia, the "community" for the purpose of jury selection are the 18 counties or jury districts. With Court reform the "community" will possibly shift from 18 districts to 4. This means that reforms which achieve administrative convenience and service may impact on the jury system because there may be people who are excluded simply because of the travelling time to the particular trial. This may also mean that the jury is not drawn from a fair cross-section of the community in which the offence occurred. It is suggested that an approach using postal codes and computer selection to ensure representation from the community in which the offence occurred could be implemented as the administrative system becomes more computerized and centralized.

As noted earlier in this Report, the Commission is of the view that many of these changes should take the form of recommendations and statements of principle in the *Act* but are not necessarily useful to include in legislation which is difficult to alter and quickly becomes out-dated. Therefore, it is the recommendation of the Commission that the Court Administrator examine the impact of Court reform on the jury system, and in particular, seek to ensure that jurors are drawn in a random way from the community in which the offence occurred unless the accused has exercised his or her rights under the *Criminal Code* to change the location of the trial.

**The Commission recommends that the following changes be made to the Jury Panel in Nova Scotia to make the system more consistent with the principles of representativeness, impartiality and efficiency:**

- (1) The Jury Committee should be eliminated and the Jury Panel list should be prepared by the Court Administrator based on a centralized computer generated selection process.**
- (2) Disqualifications and excuses should occur at the time of Jury Panel selection and should be on the basis of a request by the Panelist recorded on the Juror Information Form.**
- (3) A Jury Panelist should be able to be excused in advance of a trial by a Court Administrator with broader supervisory power to be exercised by the Courts. Jurors should be able to defer service.**
- (4) The juries system and law should be reformed to ensure that its principles are implemented consistently with other Court structure and administration of justice reforms. In particular, the impact of Court reform in the context of the demography of the Province and the representativeness of Jury Panels should be considered.**

## **6. Other Changes Which Impact on the Representativeness of the Juries System**

There are a number of other issues which also have direct and indirect impact on people's involvement in juror service whether viewed as a privilege or a benefit. One of these, as noted above, is the recommendation that people should be entitled to defer their service on the basis of an application to the Court Administrator in advance or to the Judge at trial. Another is to encourage greater public interest and awareness through more public legal education, particularly in high schools and elementary schools, about the jury and its role in society. Further, there has been a great deal of concern expressed in Nova Scotia about the inconvenience and cost to individuals involved in the juries system. The Commission has a number of recommendations with respect to the issue of juror fees and also the question of administrative efficiency. A number of concerns about administrative efficiency have already been addressed in the delegation of some decisionmaking authority to Court Administrators and also the removal of some requirements such as roll call and other time-consuming procedures thereby saving time.

- a. The fees currently paid to jurors result in systemic economic discrimination and hardship and the basis for payment of juror fees must be changed**

The current rule for juror fees is that all persons called for a jury or Jury Panel receive \$15.00 per day, regardless of individual circumstances (although in some cases this has been altered by a Judge). The submissions received and other public commentary indicated that this is unsatisfactory. The inadequate compensation received, especially for those who serve on lengthy trials, means that Judges are inclined to excuse self-employed people or others who cannot afford to lose their income. This seems fair but it means that only people whose incomes are not affected by jury service can participate in the justice system as jurors. A further complication exists in that the rules currently governing unemployment insurance payment state that a person receiving payments cannot serve on a jury without loss of these payments.<sup>60</sup> The Provincial Government does not have control over this rule. Several people who responded to the *Discussion Paper* shared the Commission's concern about the current Unemployment Insurance rules regarding juror fees. As a result of these economic barriers, the make-up of juries is again skewed. The Commission in its *Discussion Paper* suggested that the Provincial Government should advocate that the Federal Department of Employment and Immigration change its policy in this regard. Although there is some debate as to whether it is appropriate to distinguish UIC recipients and others who may suffer economic hardship from jury service there has recently been changes proposed to the UIC legislation regarding jury service.<sup>61</sup> Better use can be made of the resources put towards compensation for jurors.

The draft *Juries Act* simply allows the Governor in Council to set the fees by regulation, but the Commission has several suggestions as to the form those regulations should take. The current rules call for \$15.00 per day to be paid to everyone called for a Jury Panel. The Commission suggested in its *Discussion Paper* that those rules should be changed and that fees should vary depending on the demands made on the juror's time. Public input has supported that view, although there is no consensus on exactly what arrangement should replace the current one. The use of variable fees, that is, fees which increase as the time demand is increased, is the trend in other Provinces.<sup>62</sup> Indeed, some Provinces are eliminating payment of jury fees altogether.<sup>63</sup>

The Commission proposes that the regulations should state that jurors called to be part of the

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<sup>60</sup> Anyone who serves on a jury for more than two days is considered unavailable for work and so is not eligible for Unemployment Insurance Benefits.

<sup>61</sup> Bill C-216, a private member's Bill, an *Act to Amend the Unemployment Insurance Act (Jury Service)*, 1st Sess., 35th Parl., 1994 (2nd reading 11 May 1994). The Amendment would enable UIC recipients to continue to receive payments while engaged in jury service.

<sup>62</sup> For example, British Columbia and Ontario.

<sup>63</sup> Such as Saskatchewan and Newfoundland.

Panel but not selected for the jury should not receive a fee aside from expenses for the day.<sup>64</sup> Except in unusual cases, the inconvenience of being called for a Panel should not be great and it is reasonable to ask members of the public to make that contribution without compensation (usually it is only part of one day). This is particularly so if the procedures for granting excuses are streamlined as proposed above.

**b. Employees whose salaries are paid while they are on jury duty should not receive a fee for their jury service**

The Commission proposed in the *Discussion Paper* that employers should be required to continue to pay jurors their regular wages and should be entitled to apply to the Government if that cost creates undue hardship. Based on negative public response and further research, the Commission is now of the view that this proposal is impractical. The requirement could work unfairly against some employers. Further, the mechanism for compensating employers is likely to be cumbersome and potentially expensive. Finally, that approach might mean that the justice system actually had to pay more by way of juror fees in order to compensate employers who are already continuing to pay their employees' wages at present. Instead, the Commission suggests that people who continue to be paid by their employer or some other source while on a jury should not receive any jury fee. Some members of unions, for example, will continue to be paid while on a jury, as are employees in some businesses, universities and the civil service.<sup>65</sup> The Commission suggests that anyone collecting a juror fee should be required to sign a declaration that they have not and will not receive his or her regular income while serving on the jury. This information is provided for on the draft Juror Information Form at the end of this Report.

With those savings, the juror fee could be raised to a more reasonable level for those people who will not have any other income during that time. In this way, the number of excuses that are granted because of the economic impact of jury service can be reduced, and the fees will be fairer to everyone concerned.

**c. Public Legal Education**

There should be greater public legal education and information provided to people, and particularly directed to people in the educational system regarding the roles of juries and jurors. This information should be translated into English, French, Mi'kmaq and other languages. Programs should be made available to, and part of, the school curriculum for young people. An understanding of the jury system will enhance a person's interest in

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<sup>64</sup>Those called for Jury Panels should continue to be reimbursed for expenses, such as parking.

<sup>65</sup>Although these juror fees are deducted from salaries; *Civil Service Regulations*, N.S. Reg. 78/87.

playing a role in it and also will assist in achieving the objective of greater representativeness and involvement from a diverse group of people. More information for people will indirectly assist in reducing administrative costs and inconvenience for people to the extent that when people are better informed, they will be able to fill out Juror Information Forms more easily and respond to the question of whether or not their names are on lists.

**d. Restructuring the *Juries Act***

A number of minor changes in the *Juries Act* should also be made in the process of rewriting it. Some of these are simply a matter of eliminating redundancies that have crept into the *Act*. What to do if not enough jurors appear on a Panel, for example, or how to deal with jurors who fail to appear, are matters that are dealt with twice in the current *Act* with no value to the repetition. A certain amount of "cleaning up" of the *Act* has been undertaken in the draft *Juries Act*. In addition, some specific suggestions were made to the Commission which seemed useful to include in a new *Act*.

At the moment, prothonotaries are required to determine which jurors are present by conducting a roll call. When only a jury, or even a normal-sized Jury Panel is present, a roll call is not especially inconvenient. However, several recent cases in Halifax have required unusually large Jury Panels - in some cases numbering in the thousands. In these types of situations, conducting a roll call is a time-consuming process, and in one recent case, took one and one-half hours. Some other method of determining who is present might be equally satisfactory and more efficient. Accordingly, the draft *Act* simply requires the Court Administrator to determine which jurors are present, without specifying a method. A roll call will still normally be an efficient way to proceed but it will no longer be mandatory. In addition, it is recommended that more informative Jury Summons and Juror Information Returns be adopted which will help people understand the jury system.

**The Commission recommends:**

- (1) The provisions concerning juror fees should be changed to use the resources more equitably and to ensure that systemic discrimination based on economic barriers is eliminated. In particular:**
  - (i) the fees paid for service should be higher although no one will be paid for appearing for selection from a Panel. The amount of the fee should be set out in Regulations rather than legislation.**
  - (ii) employers should not be required to continue to pay when employees serve however jurors who are paid should not get jury fees.**
- (2) There should be increased Public Legal Education regarding juries, particularly in schools.**
- (3) A new *Juries Act* should reorganize and update the provisions in the existing *Juries Act* which are no longer applicable to current practice, including simpler Juror Summons and Juror Information Forms.**

## IV CONCLUSION

The foregoing discussion has outlined some of the principles underlying the recommendations of the Commission regarding reform to the jury system. The main recommendation of the Commission is that the draft *Juries Act* and Forms which are a part of this Report be adopted by the Government of Nova Scotia and that the necessary changes be made to fully implement the principles of representativeness, impartiality and administrative efficiency.

### **The Commission Recommends:**

- (1) The Government of Nova Scotia adopt the draft *Juries Act*, the associated Forms and the Recommendations in this Report.
- (2) Reform of the jury system be based on principles of representativeness, impartiality and administrative efficiency for the participants and the Government in a multicultural society.
- (3) The principles of representativeness, impartiality and administrative efficiency in the context of the jury system should be achieved through random selection and removal of systemic and other discriminatory exclusions and exemptions rather than through selective representation.
- (4) Juries should continue to be available in Nova Scotia for criminal and civil matters.
- (5) The rules governing the availability of juries for civil trials should not be changed, however, all the rules regarding civil juries in Nova Scotia should be consolidated in a new *Juries Act*. The continued availability of peremptory challenges should be considered.
- (6) The voters' list should no longer be the only source from which Jury Lists are chosen, rather a more comprehensive computerized list such as the medical service insurance list be used.
- (7) Anyone who is concerned that his or her name might not be on any of the lists to be used should be able to register with the Court Administrator.
- (8) The twelve month residency requirement in a jury district should be removed.
- (9) Fewer categories of people should be disqualified or excused from serving as jurors.

- (10) The Majority of the Commission recommends that Canadian citizenship remain a qualification and that medical practitioners be automatically excused from service. Civil Procedure Rule 34.03 automatically excluding a pregnant woman should be repealed.
- (11) The Majority of the Commission recommends that the Governments of Canada and Nova Scotia should examine access to justice issues involved in recognition of the language rights of the Mi'kmaq people in Nova Scotia.
- (12) The Jury Committee should be eliminated and the Jury Panel list should be prepared by the Court Administrator based on a centralized computer generated selection process.
- (13) Disqualifications and excuses should occur at the time of Jury Panel selection and should be on the basis of a request by the Panelist recorded on the Juror Information Form.
- (14) A Jury Panelist should be able to be excused in advance of a trial by a Court Administrator with broader supervisory power to be exercised by the Courts. Jurors should be able to defer service.
- (15) The juries system and law should be reformed to ensure that its principles are implemented consistently with other Court structure and administration of justice reforms. In particular, the impact of Court reform in the context of the demography of the Province and the representativeness of Jury Panels should be considered.
- (16) The provisions concerning juror fees should be changed to use the resources more equitably and to ensure that systemic discrimination based on economic barriers is eliminated. In particular:
  - (i) The fees paid for service should be higher although no one will be paid for appearing for selection from a Panel. The amount of the fee should be set out in Regulations rather than legislation.
  - (ii) employers should not be required to continue to pay when employees serve however jurors who are paid should not get jury fees.
- (17) There should be increased Public Legal Education regarding juries, particularly in schools.
- (18) A new *Juries Act* should reorganize and update the provisions in the existing *Juries Act* which are no longer applicable to current practice, including simpler Juror Summons and Juror Information Forms.



## V DRAFT JURIES ACT (With Comments)

### Part I - Interpretation

1 This *Act* may be cited as the *Juries Act*.

2 The purpose of this *Act* is to provide for the random selection of jurors in civil and criminal trials, who are impartial and representative of the community and to reflect the provisions of the *Charter of Rights and Freedoms, Constitution Act, 1982*, regarding equality and the right to trial by jury.

#### Comment

**The purpose clause is new. It is included to provide guidance and direction to people interpreting and implementing provisions of this *Act*.**

3 In this *Act*,

- (a) "Chief Justice" means the Chief Justice of the Supreme Court of Nova Scotia, the Judge authorized to exercise the powers and perform the duties of the Chief Justice or a Judge designated by the Chief Justice;
- (b) "civil matter" means a cause, issue or matter, other than a criminal matter, that involves or might involve a jury and includes an assessment of damages;
- (c) "Court Administrator" means the chief official responsible for the administration of courts within a jury district, and includes the prothonotary for that district;
- (d) "criminal matter" means a prosecution or trial for an offence triable by a Judge and jury in accordance with the *Criminal Code*;
- (e) "Judge" means a Judge of the Supreme Court of Nova Scotia;
- (f) "juror" means a person serving on a jury, or called as part of a Panel of jurors;
- (g) "jury district" means a county [*or a district as designated under court reform*] of Nova Scotia;

- (h) "Jury List" means the list of names from which Jury Panels are selected, prepared in accordance with this *Act* and approved by a Judge;
- (i) "Jury Panel" means the group of jurors summoned to a session, from which the jury is selected;
- (j) "session" includes any convening of the Supreme Court of Nova Scotia for the purpose of hearing one or more civil matters or one or more criminal matters.

#### **Comment**

**Little in these definitions has been changed from the current *Act*. A new term "Court Administrator" has been added, which is to include prothonotaries. This language is intended to make the *Act* consistent with reforms to court structure which are underway. It may also be appropriate to eliminate or change the term "jury district", as this concept may alter. However, at this stage, it is not certain what would replace this designation to be able to include this change.**

## **Part II - Selection of Juries**

### **Qualifications and Excuses**

- 4** Every Canadian citizen in Nova Scotia who has attained the age of 18 years is eligible for jury service, unless disqualified under this *Act*.

#### **Comment**

**The noteworthy changes in this section are the removal of the requirement that a person have spent 12 months within a particular jury district. There is a dissenting opinion which would extend jury service to include landed immigrants.**

- 5** The following people are disqualified from serving as jurors:
- a) the Lieutenant Governor of the Province of Nova Scotia, a member of the House of Assembly, the House of Commons, or the Senate;
  - b) a Judge of the Court of Appeal, Supreme Court, Provincial Court, or Family Court in the province, or an officer of the Supreme Court or Court of Appeal;
  - c) people who hold a law degree;

- d) a full-time member of any police force in the province, a probation officer, or a warden or employee of a correctional institution.

### Comment

**This section is a change from the current *Act* which generally exempts a large range of people from service. This section has disqualifications based on occupation and a concern for public perception about people with these positions acting as jurors. This list of disqualifications has not been changed greatly in content or principle, although it has been arranged more concisely. Probation officers, wardens, and employees of correctional institutions have been disqualified and the provision regarding barristers and solicitors has been expanded to include any person holding a law degree. Although there was some negative comment from the public on the disqualification of people with legal training, the majority of the Commissioners were of the view that it was not appropriate for people with a law degree to sit on juries. In their view, the main basis for this exclusion is that anyone with a law degree might have an undue influence over other jury members and be inclined to second guess the Judge's directions as to law. There is a dissenting opinion on this matter. The current *Act* disqualifies some people with criminal records. The Commissioners feel that this disqualification is not appropriate and recommend its removal, although this is an exclusion which continues to exist in the *Criminal Code*.**

- 6 (1) A Court Administrator may, in advance of a trial, excuse a person who applies on the Juror Information Form from service or defer a person to a later Jury Panel where it is appropriate to excuse the person due to hardship or illness.
- (2) A Judge may at trial excuse a person from service or defer a person to a later Jury Panel where it is appropriate to excuse the person due to hardship, illness, or inconvenience.
- (3) A juror who is not excused by the Court Administrator in advance of the trial can seek to be excused by the Judge presiding at trial.

### Comment

**The current *Act* gives the power to excuse potential jurors only to the Judge at trial, but gives no guidance as to when jurors should be excused, although case law provides hardship, inconvenience and illness as the bases. The *Criminal Code* does, however, provide a power to excuse on the basis of partiality or hardship. It was decided that it would be appropriate to permit people to apply to be excused or have their service deferred if they apply to the Court Administrator using the Juror Information Form. This will provide a record for the request and the decision. It will also reduce some of the workload of the Court. This section formally extends a limited discretionary power to Court Administrators and defines when the power should be used (hardship or illness). The Judge's power to exercise his or her discretion is broader than the Administrator in that it includes "inconvenience". The Court**

**Administrator's decision can be appealed and changed by the Judge at the Summons date.**

- 7 Medical practitioners in Nova Scotia are automatically excused from juror service if they apply to be excused.

#### **Comment**

**This draft *Act* has disqualified some people and does not exempt any person from liability for service unless the person applies to be excused or have service deferred for reasons of hardship, illness or inconvenience under s.6. The one exception to this that was seen as appropriate by the majority of the Commission was medical practitioners. It was felt that their service to the community as medical practitioners was of greater importance than their service as jurors. A medical practitioner may serve on a jury but if he or she applies, will be automatically excused. There is a dissenting opinion on this issue.**

#### **Preparation of the Jury List**

- 8 (1) Before the end of August of each year, the Court Administrator shall create a list of names, called the "Jury List", from which people will be called for jury service for a [*district*] for the following year. The names on the Jury List shall be taken randomly from lists which, as far as possible, include the entire adult population of the province who reside in the jury district where the trial is to occur.
- (2) Any person may ask to review the Jury List and, if he or she is eligible, be placed on the Jury List if his or her name is not on the list at the Court Administrator's office.

#### **Comment**

**The major change in this section is to allow more flexibility regarding the number of lists to be used to draw up the Jury List rather than just the voters' list. It is recommended that the new MSI list and a computerized system be used. In addition, there is a right provided for a person to request inclusion on the Jury List for the district, although he or she cannot designate a trial and will not necessarily be randomly selected to be on a Panel.**

- (3) The Jury List for each [*district*] shall consist of, as far as possible, all residents in the [*district*].

#### **Comment**

**The present *Act* designates a number of names to be chosen for each jury district, but also allows the Attorney General to designate that a different number of names be chosen. It is routinely necessary in most districts to have a larger list than the legislation calls for. If a comprehensive computerized system is used, then the entire population of the district**

**will potentially be available to be called. Since there is no screening of people at the Jury List stage, the number of people on the list is not relevant.**

- (4) The Judges of the Supreme Court may make rules consistent with this *Act* respecting the procedures to be followed in preparing the Jury List. These rules may authorize the use of computers to make the random selection and may also, subject to applicable *Criminal Code* provisions, authorize the use of postal codes and other methods to ensure a fair cross-section of the community within which the offence occurred is included in a Jury Panel list.

#### **Comment**

**Procedures to use these various lists and achieve a random selection must be designed, but need not be set out in legislation. The current provision allowing the Judges of the Supreme Court to specify procedures has been retained. Specific reference is made to the possibility of using computers to make the selection. If the equipment and computerised source lists are available, this would be the best method of guaranteeing randomness in selection. The reference to postal codes and community where the offence occurred is part of an effort to take into account the demography of Nova Scotia, particularly as it applies to Aboriginal and Black people.**

- (5) When the Jury List is prepared, the Court Administrator shall certify it as follows:

I hereby certify that the foregoing Jury List for ... [jury district] was prepared in accordance with the *Juries Act* and that the names on this list represent a representative cross-section of the community.

- (6) The Court Administrator shall present the Jury List to a Judge who, if satisfied on information given by the Court Administrator that the Jury List is properly representative, shall approve the Jury List. If the Judge is not satisfied, the Judge shall order the Court Administrator to prepare a new Jury List under the direction of the Judge.

#### **Comment**

**The wording on this certificate is changed from the current *Act* to reflect the proposal that no disqualification or excuses are dealt with until the preparation of the Jury Panel. This should prove administratively simpler and ensure that all residents in the district are included. The current *Act* calls for the qualification of jurors to be checked at the stage of drawing up the Jury List and for the use of Jury Committees. That requirement has been removed. Despite the requirement in the current *Act*, it is not done in every jury district, and indeed it is not practical to try to check occupations at this stage. The voters' list which is currently used does not indicate occupation, so it is only where jury committee members have personal knowledge of the people from whom they are choosing, that disqualifications can be made at this early**

**stage. However, that kind of reliance on personal knowledge, is inconsistent with the goal of random selection. These exclusions will be made after jurors are randomly selected to be on a Panel - which is the current practice in many districts and, if the Juror Information Form is used, will be in response to information provided by the potential juror rather than another person.**

### **Calling the Jury Panel**

- 9 (1) At the beginning of each session, or whenever a jury is required, a Court Administrator shall randomly select the number of names designated by a Judge from the appropriate Jury List for the district.
- (2) Random selection shall be in accordance with the rules determined by the Court under Section 8(4) and shall take into account the principle of representativeness of the community within which the offence occurred.
- (3) The Jury Panel list randomly selected shall be approved by a Judge.
- (4) At least ten days before the Jurors are required to appear, the Court Administrator shall mail to each person listed on the Panel of jurors a Jurors Summons setting out the time and place to appear. The Court Administrator shall also send a Juror Information Form which describes the people who are disqualified or may be excused from the Jury service under s.6 of the *Juries Act*.
- (5) Every person who received a Juror Summons and Juror Information Form must complete and return the form to the Court Administrator.
- (6) The Court Administrator shall, on receiving the Juror Information Form, remove from the Jury Panel list the name of anyone who is disqualified from jury service, and may excuse jurors who apply in accordance with s. 5.
- (7) The Juror Information Forms, including the decision to excuse, must be retained each year, and may be reviewed annually by the Chief Justice.
- (8) If, in the opinion of the Chief Justice or the presiding Judge, a sufficient number of jurors will not attend for service at any session, the Chief Justice or presiding Judge may ask the Court Administrator to provide additional names from the Jury List of randomly selected names and require those persons to attend at such time as the Chief Justice or Judge directs. If additional jurors are selected in this way, the notice requirements in subsections (4) and (9) do not apply.
- (9) Not earlier than eight days nor later than four days before the time stated in the notice for appearance, the Court Administrator shall post a list of the names in

the office of the Court Administrator in the jury district where the trial is to occur and that list shall be available for inspection by any person until the time stated for appearance.

### **Comment**

**Subsections in the current *Act* dealing with secrecy and with forms have been moved to the more general Part of the draft *Act*. In addition, a subsection making it an offence not to appear has been moved to that Part. This section represents the only point at which narrowing or screening occurs. Since it is based on information and the request of a potential jury panel list, it leaves little room for discretionary decisions. The requirement regarding "community within which the offence occurs" is partly an effort to mitigate the impact of centralization of the courts on representativeness of jurors. The requirement that the Juror Information Forms be retained will make it possible to determine where representation is affected.**

### **Attendance and Organization of Jurors**

- 10**
- (1) The Court Administrator shall, on each day on which the Panel of jurors is required to attend, determine which jurors are present and make an entry of the fact if any juror is not present.
  - (2) The members of a Panel of jurors shall continue to attend until discharged by the presiding Judge.
  - (3) The presiding Judge may at any time excuse the jurors or any of them from attendance during any part of the session and may at any time discharge the jurors or any of them.

### **Comment**

**Subsection 1 is slightly changed from the current *Act* to give more flexibility to Court officials. At present, the Court is required to call the roll of jurors to determine who is present and absent. This new section still requires that the information be obtained, but it does not require that it be gathered through calling the roll. In normal cases, a roll call might still be the most efficient system, but in the cases where very large Panels are called (as has happened several times recently) some other system might be more practical.**

**In the current *Act*, these three subsections are divided between s. 12 and s. 16. They have been combined here into one section.**

### **Selection of Jurors**

- 11** (1) When a Panel of jurors for a session is before a Judge in a criminal matter, the jurors required shall be selected in the manner prescribed by the *Criminal Code*.
- (2) When a Panel of jurors for a session is before a Judge in a civil matter, the jurors shall be selected as set out in Part III, Civil Juries.

### **Comment**

**It will be recalled that criminal matters including juror selection are governed by Federal law while civil matters are governed by Provincial law. As noted in section 1 when the trial is a criminal matter, the process for juror selection is governed by the *Criminal Code*.**

## **Part III - Civil Juries**

### **Availability**

- 12** (1) In civil proceedings, findings of fact or the assessment of damages shall be decided by a jury in the following cases:
- (a) unless the parties agree otherwise, where the proceeding is an action for libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution, or false imprisonment;
  - (b) where either of the parties requests, by notice in writing to the Court Administration and the other party at least sixty days before the date set for trial, that the issues of fact be tried or the damages be assessed by a jury; or
  - (c) where the Judge directs that the issues of fact shall be tried or the damages assessed by a jury.
- (2) Notwithstanding subsection (1)(b), the matter will not be tried by a jury where either party applies to strike the jury notice, and where in the opinion of the Judge hearing the application:
- (a) the issue is exclusively a question of law; or,
  - (b) the issues of fact are not substantial and cannot be practically separated from the issues of law; or,
  - (c) the issues of fact are of too technical or complex a nature for



determination by a jury.

## Comment

**This section is new to the *Juries Act*, though the policy it reflects is not new. The *Judicature Act* currently sets out some of the rules for availability of civil juries, and the rest of the rules have been established in a series of decisions by the Supreme Court of Nova Scotia.<sup>1</sup> This section is not intended to change those rules. All this section has done is codify the common law, and move all the rules into the *Juries Act*.**

## Selection of Civil Jurors

- 13** (1) The jury shall be selected in the following way:
- (a) the name of each juror on the Panel of jurors, the juror's number on the Panel and name and address, shall be written on a separate card and all the cards shall, as far as possible, be of equal size;
  - (b) after any disqualifications have been made or excuses granted, the Court Administrator shall place the cards of the Jury Panel members who are present together in a box and thoroughly shake them together;
  - (c) the Court Administrator shall in open court draw out a card from the box and shall call out the name and number upon the card as it is drawn, until the number of persons is, in the opinion of the Judge, sufficient to provide a full jury;
  - (d) the Court Administrator shall continue to select jurors until a sufficient number of jurors are selected;
  - (e) the jury for the trial of a civil matter shall consist of seven persons, of whom five, after deliberating for at least four hours, may return a verdict;
  - (f) if the juror is not peremptorily challenged or successfully challenged for cause on the basis of partiality, the Court Administrator shall swear or permit to affirm that person as a member of the jury;

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<sup>1</sup> See, for example, *MacNeil v. Hill the Mover* (1961), 27 D.L.R. (2d) 734 (N.S.S.C.A.D.); *Isaac v. Harnacek* (1974), 13 N.S.R. (2d) 372 (S.C.T.D.); *Smith (A.D.) Lumber Ltd. v. General Home Systems* (1986), 72 N.S.R. (2d) 333 (S.C.T.D.); and *Maynard v. Irving Oil Ltd.* (1990), 96 N.S.R. (2d) 86 (S.C.T.D.).

- (g) subject to the Rules of the Supreme Court, in a civil matter the plaintiff or plaintiffs and the defendant or defendants may peremptorily challenge four jurors;
- (h) despite subsection (g) but subject to the rules of the Supreme Court, where there are defendants who are adverse in interest, the presiding Judge may permit each group of defendants who have a common interest to peremptorily challenge four jurors;
- (i) where a full jury cannot be provided even though there has been compliance with the provisions of this *Act*, the presiding Judge may order the sheriff or other officer to summon additional people randomly selected from the Jury List as the Judge directs for the purpose of providing a full jury;
- (j) jurors may be summoned under this section by word of mouth if necessary and brought before the Judge;
- (k) the names of the persons who are summoned under this Section shall be added to the Panel of jurors for the purpose for which the Panel was selected and the provisions of this *Act* shall apply as though the persons were named as members of the original Panel of jurors.

### Comment

**This section has been moved, so that it clearly only applies in the case of civil jury trials. In the case of criminal jury trials, the rules in the *Criminal Code* (which are effectively identical in any case) apply. This section has been rewritten in two ways. First, some of the language has been simplified. Second, the procedure for selecting a civil jury has been changed to reflect actual practice. The current *Act* requires that the name of every Jury Panel member be placed in the box, whether that juror is present or not. In fact, the current practice is to determine which jurors are present, deal with any requests to be excused, and then put the remaining names into the box for selection. This procedure is more efficient, and the legislation is changed accordingly. The *Juries Act* currently gives only three peremptory challenges, while the Rules of the Supreme Court give four. Subsection (g) removes the conflict between the two. It may be useful to consider eliminating peremptory challenges, although no recommendation is made in this *Act*.**

### Illness

- 14** If a juror becomes ill after being sworn, the presiding Judge may direct the trial to proceed without the juror, and the verdict of the remaining jurors shall be valid if at least

five of them concur.

#### **Part IV - General Provisions**

- 15** The Minister of Justice may appoint a [*jury officer*] for each district, who has the authority to perform any duty assigned to the Court Administrator under this *Act*.
- 16** A failure to observe the directions contained in this *Act*, or any of them, in respect of
- (a) the disqualification or excusing of jurors;
  - (b) the preparation, form or revision of the Jury List or the requirements in respect of the Jury List; or
  - (c) the selection, empanelling, notification, or summoning of jurors

shall not be a ground for impeaching or quashing the verdict in any civil matter.

#### **Juror Fees**

- 17** The Governor in Council may by regulation determine the fee for attendance by a juror and any allowance to be paid to a juror.

#### **Comment**

**This proposal removes from the *Act* any specific provisions about the amount of juror fees, and calls for them to be set by regulation. This regulation-making power already exists in the *Act*, but this proposal will require that it be used. In the Commission's view, these rules are better contained in regulations for two reasons. First, regulations can more easily be changed to respond to changes in circumstances. Second, the rules concerning juror fees can more easily be fine-tuned in regulations which can go into greater detail than is appropriate in a statute.**

- 18** If, during the trial of a civil matter or criminal matter, the jurors are not allowed to separate, the sheriff for the county in which the trial takes place may provide such lodging and refreshment as is necessary for them, and the cost thereof shall be paid by the Minister of Justice.

#### **Comment**

**The current *Act* gives this general power to the Minister of Justice, though most specific powers are given to the Chief Justice. This draft *Act* assigns the general power to the Chief Justice, since the selection of juries is a function more appropriate to the judiciary - the**

neutral decision-maker, than to the Attorney General - an advocate on one side.

- 19 Except where otherwise provided, the Chief Justice may prescribe forms for use under this *Act*.

#### Comment

**This section has been rephrased in a gender-neutral fashion, and the cost has been assigned to the Minister of Justice in keeping with the province taking over the costs of the administration of justice generally.**

#### Juror Information

- 20 Except as set out in this *Act*, the names and confirmation included on the Jury List or on a Jury Panel shall not be made public nor shall any information provided by a person on a Juror Information Form be available other than for review by the Chief Justice.
- 21 The Court Administrator or the Jury Officer must keep all Juror Summons and Juror Information Forms for 1 year in the event that they are to be reviewed by the Chief Justice.
- 22 The Court Administrator or jury officer for a [*District*] must provide a record of all Summons and Juror Information Forms sent and received, and must determine and record any reasons for failure to return a Juror Information Form.

#### Offences

- 23 Any person who:
- (a) improperly includes or fails to include the name of any person on the Jury List, or otherwise interferes with the representativeness of the Jury List or the random nature of the Jury Panel list, or
  - (b) wilfully fails to perform any duty imposed by this *Act*,
- is guilty of an offence and is liable on summary conviction to a penalty of not more than five hundred dollars.

#### Comment

**This section has been made more general. The current *Act* deals only with the Jury List, and only makes it an offence for the person drawing up the list to interfere. This provision applies to anyone, covers both the Jury List and the Jury Panel, and explicitly refers to randomness and representativeness as the feature(s) to be preserved.**

- 24 Every person who is required to attend at any place for service on a Jury or a Jury Panel and who fails to attend may be arrested and brought before a Judge on any day that the person is required to appear, and in addition shall be liable on summary conviction to a penalty of not more than two hundred dollars.

#### **Comment**

**The current *Act* contains two sections saying essentially the same thing: s. 9(8) which allows anyone not appearing for a Jury Panel to be arrested that day and fined \$200.00, and s. 22 which says the same thing, but also allows the person to be charged with a summary conviction offence. This provision preserves both the ability to bring the juror before the Judge on the day he or she was required to serve, and the ability to charge the person with an offence, but does so in only one section. In addition, the section makes clear that it is equally an offence to fail to appear as part of a Jury Panel as to fail to appear for jury service. It should be noted that alternatives to fines might also be considered e.g., community service options, since the amount of the fine has a differing impact depending on the economic situation of the juror. For some people, for example, it will be less expensive to pay a fine than to serve on the jury.**



**SCHEDULE  
FORM A**

***JUROR SUMMONS***

**NOTE: This Summons requires action by you immediately.**

**Name:** \_\_\_\_\_  
**Street:** \_\_\_\_\_  
**City:** \_\_\_\_\_  
**Postal Code:** \_\_\_\_\_

You have been randomly selected for jury service. Please read, fill out and return the attached Juror Information Form. If you are qualified to serve as a juror and are not excused from Jury Service, you are required to attend at the time and place set out below:

Date: \_\_\_\_\_ [or other relevant address in district of  
Time: \_\_\_\_\_ Court Administrator]  
Place: Supreme Court of Nova Scotia  
The Law Courts  
1815 Upper Water Street, Halifax, Nova Scotia  
Court Room \_\_\_\_, \_\_\_\_ Floor

**You are required to return the Juror Information Form within 5 days of receiving it.  
The date for return is \_\_\_\_\_.**

**If you have any questions you may call the Jury Coordinator [or Court Administrator].**

Jury Coordinator \_\_\_\_\_  
Heather Chandler [or relevant District  
Telephone: 424-2729 Administrator]

**Please note that the *Juries Act of Nova Scotia* requires that:**

**s.9(5) Every person who received a Juror Summons and Juror Information Form must complete and return the form to the Court Administrator.**

**s.24 Every person who is required to attend at any place for service on a jury or a jury panel and who fails to attend may be arrested and brought before a judge on any day that the person is required to appear, and in addition shall be liable on summary conviction to a penalty of not more than two hundred dollars (\$200.00).**

### **JUROR INFORMATION**

Although you will not receive a fee for appearing in Court on this date, you will receive a fee for your services as a juror if you are selected to be on a jury. The fee is [*as determined by Regulations*] plus expenses for travelling to be on a jury.

Except for purposes of the *Juries Act*, the names and confirmation included on the jury list or on a Jury Panel shall not be made public nor shall any information provided by a person on a Juror Information Form be available other than for review by the Chief Justice.

The Court Administrator or the Jury Officer must keep all Juror Summons and Juror Information Forms for 1 year in the event that they are to be reviewed by the Chief Justice.

The Court Administrator or jury officer for a [*District*] must provide a record of all Summons and Juror Information Forms sent and received, and must determine and record any reasons for failures to return a Juror Information Form.



## DISSENTING OPINIONS ON ISSUES IN THE REPORT

### **(1) Dissenting Opinion of Commissioner Dawna Ring and Commissioner Beverley Johnson on the Random Selection process.**

The tragedy of Donald Marshall Junior's experience with the Nova Scotia justice system is an illustration of what happens in a society where racism and discrimination are prevalent and when the Jury Panel does not represent the accused's cultural or racial group.

The Commission of Inquiry found that racism and discrimination exists in our justice system.

Having found that racism played a part in Donald Marshall's wrongful conviction and imprisonment, we believe it is important to ensure that our justice system will not-and cannot- be influenced by the colour of a person's skin. While we recognize that many of the causes of discrimination are rooted in institutions and social structures outside the criminal justice system, we believe there are specific steps that can- and should- be taken to reduce discrimination in the justice system itself. (Digest of Findings and Recommendations of the Royal Commission on the Donald Marshall, Jr., Prosecution p.10).

The Commission of Inquiry examined the justice system in relation to Black Nova Scotians. It reported the following:

These interviews and group discussions have provided a assessment of the conditions of Blacks in Nova Scotia, and more specifically in its criminal justice system....There was general agreement that Blacks face prejudice and discrimination in social, economic and political institutions, as well as the criminal justice system. Individual and group respondents surprisingly expressed more concerns regarding the Courts than with the behaviour of police. The most negative criticism of the Courts came from the lawyers interviewed. (Vol 4)

The primary purpose of a jury system in British law is that an accused be judged by one's peers. In a society where people are discriminated against by the colour of one's skin and cultural differences, one's peers must include people from the same racial and cultural group. This should be the goal of Nova Scotia's jury system. The question becomes how do we achieve this?

This Province has spent considerable funds to understand what happened to Donald Marshall Jr. and why. We must keep the findings of that extensive inquiry in mind as we determine the best way to achieve our goal.

At the time of the Inquiry not one native person had ever sat on a jury in Nova Scotia. The Commission of Inquiry stated the contradiction this created:

Clearly, this represents a contradiction of the principal of trial by one's peers, if it is accepted that there are significant social, economic, cultural and political differences between MicMacs and Euro-Canadians societies. (Vol. 3 p 48)

The Commission of Inquiry noted the benefits of having a representative from one's racial group on the Jury Panel.

The benefits to native representation on juries are several First there would be increased assurance that the accused would receive a fair hearing, untainted by racial prejudice. Second, the case of the accused would be heard by at least one jury member who had an understanding of the context of the alleged incident, the dynamics involved (particularly, if the offence occurred on the reserve). Similarly, at least one jury member may have an understanding of the support system "or lack thereof" available to the accused as an alternative to incarceration. Third, native involvement on juries will contribute to an increased understanding of the justice process by First Nations people and the conditions and concerns by other jury members and justice system personnel. (*Ibid.*)

In our opinion these comments are equally applicable to Black members of Nova Scotian Society.

The Commission of Inquiry commented on the views provided to them about how large the representative groups should be on the jury. The two extremes were that some members recommended one was sufficient, others stated the full Jury Panel should be from the same racial background as the accused. (Vol 3)

The solicitor representing the Attorney General at the Commission of Inquiry recommended that a study of proportional representation of visible minorities on juries should be done. The Commission of Inquiry endorsed this recommendation. (Digest *supra* p.12) This study has not been conducted by the Province of Nova Scotia.

We believe we must learn from the extensive work, findings, and recommendations of this inquiry into Nova Scotia's judicial system.

We must acknowledge that discrimination and racism are prevalent in our community. We advocated that a jury selection process which will ensure representations of visible minorities on Jury Panels is necessary to achieve the goal of an accused person being judged by one's peers.

We disagree with a majority of the Commissioners who propose that pure random selection is the goal. Random selection is a process. That process should be utilized to the extent that it

accomplishes the goal which we wish to achieve. If it will not accomplish the goal of ensuring judgment by one's peers, then its use must be altered or modified.

Random selection is a process by which the person making the selection does not have the ability to choose a particular or named individual of their choice. It is therefore described as a blind selection process. Random selection also ensures that each name within the pool or group of names has an equal chance of being selected.

We agree with the majority of the Commissioners that the process by which an individual is named to the jury should be done by a random selection process. What we disagree with is the method of creating the pool or group from which that selection should occur.

The majority of the Commissioners believe that there should be only one pool or box of jurors names from which all the potential jurors are chosen. That box of names will include all of the residents of a particular county.

The difficulty with choosing from only one pool of residents of a particular county is that the process will not ensure visible minority representation on the jury. There are two reasons for this. First, the majority of the population in each county is white. Second, the two main visible minority groups in Nova Scotia are indigenous Black and First Nations people. Both of these groups have historically been isolated into specific communities peripherally placed outside of major towns and cities and in some cases completely outside of a particular county.

For example, the Shubenacadie Reserve of First Nations people is located outside of the Halifax County. Selection of residents of Halifax County will not ensure that a representative from the Mi'kmaq nation will sit on a trial for persons from the Mi'kmaq nation.

In the current jury selection process for Halifax County, the Judge has four boxes of potential jurors names. There is a box representing each of the municipalities within the county being the City of Halifax, City of Dartmouth, Town of Bedford and the Municipality for the county of Halifax. The Judge picks names from each of these boxes.

The number of people picked from each of these boxes is different and is dependent upon the population density of the municipalities. For example, the city of Halifax has the largest population and therefore will have the most people chosen from its box of potential jurors.

This is a crude form of random selection. Most importantly, it is a form of proportional representation. Instead of a Judge having a box designated for each of the City of Halifax, City of Dartmouth, Town of Bedford and the County of Halifax the Judge would have three boxes. There would be a box for indigenous Black Nova Scotians, one for First Nations people, and one for all other residents.

This form of proportional representation exists to ensure each municipality pay for its share of the jurors' costs.

The Province of Nova Scotia will now be taking over the costs of Juries, consequently, the municipalities will no longer require proportional representation in order to ensure that they pay their proportional costs of the jury process. Now that this financial requirement is eliminated, we can look at the proportional representation being determined on the basis of race or cultural group rather than on municipal residency.

Because the majority of the Commission and the advisory group have made random selection their goal, we have not explored the necessary research and possible options available to determine how to ensure that a Black or Aboriginal person, if seeking trial by jury, will have persons from their same cultural/racial background on the jury. We will cite some of the questions and their possible solutions.

The first question which needs to be answered is what number of people should be on the Jury Panel for an individual who is accused and a member of one of the three major racial groups within the Province of Nova Scotia. Should the accused be entitled to a full jury composed of their racial/cultural group or one member only or some number in between? Further work needs to be done in this regard.

How do we identify people into groups of indigenous Black and First Nations people? There are three easy ways in which this could be accomplished. During the Marshall Inquiry a study was conducted of the views of Blacks in Nova Scotia. Their names were obtained from leaders in the Black communities. The majority of indigenous Black and Aboriginal people live in long established and identifiable communities throughout Nova Scotia. Leaders in both the Black and Mi'kmaq communities who agree to be included could provide the names of people in their communities.

Anyone not included on the list of names submitted from these two groups could apply to the clerk of the Court. This process provided for by the majority of the Commissioners as a way to obtain the names of residents who are not otherwise obtained. Under our proposal this process would be available for those who will identify themselves as being part of either group.

## **(2) The Dissenting Opinion of Commissioner William Charles, President, on Disqualification and Excuses for Jury Service.**

There are differing philosophies regarding the nature of the jury duty. Some people view it as a privilege for which people must qualify but, in my opinion, jury duty is an obligation or duty which society asks of its members. This is the rationale for the fact that it is obligatory and, in general, compensated at a token level.

There is the notion that each person owes this service to his or her community as part of their personal contribution to the legal system which provides a service to them. Consequently, to excuse or disqualify people can have two effects. First, it excludes some people from having a role in ensuring that the law receives the benefit of their perspective. For this reason, I do not

agree with the decision to retain the requirement that jurors must be Canadian Citizens. In my view, a person who is a landed immigrant is subject to our laws and should be under the same obligation as any other person receiving the benefit of the legal system. The other effect of disqualification lies in the fact that, if jury duty is an obligation, then the decision to disqualify releases some people from this obligation for specific reasons relating to other services given to the community. Historically, many of these disqualifications or exemptions reflected values around the importance of certain professions or elites.

While it is likely that medical and dental professionals will be able to be excused or defer their service to society because of the needs of the community which they serve, I do not think that it is appropriate to automatically privilege their work above that of other people, such as school teachers or civil servants, in terms of their contribution to society. The exclusion of lawyers has also been historically based on a belief that lawyers will necessarily impose their views and unduly influence the jury in finding facts. I believe that this too, reflects an assumption which, in some cases, may be accurate but it is not necessarily borne out in general. Many legal professionals do not work in the area of criminal law and their expertise or knowledge is not necessarily greater than that of any other person in society. According, I believe that, except for cases where a person cannot serve as a juror, either because of the need for his or her services to the community, or because it would not be in the interest of providing the accused with a fair trial, there should be few general exclusions of groups of people from jury duty.

### **(3) The Dissenting Opinion of Commissioner Dawna Ring regarding Juries and the Need for an Affirmative Aboriginal Language Provision in the *Juries Act***

I disagree with the majority of the Commissioners that the rule regarding language rights should remain unchanged.

At present, we do not have a rule. However, people who do not speak the language the trial is conducted in, usually English, are successfully challenged for cause. This is a process by which either lawyer for the defence or prosecution asks the Judge to refuse to allow the person to sit as a juror because they do not speak the language. At present Judges grant this request.

By not having a proactive rule which recognizes First Nation language rights, First Nations people are not able to be judged by members of their nation if those members or others have difficulty understanding a trial in English.

This is a further contradiction to this goal of our jury system of being judged by one's peers. For example, First Nations people regard Elders highly for their wisdom. A First Nations person on trial should be able to have the Elders of their nation on his/her Jury Panel. However, if the Elder does not speak or understand the language, they are precluded from sitting on the Panel.

It is inconceivable that on a trial of a First Nations person, the Court would have an interpreter in the Court room for the accused, but prohibit people from his/her nation to sit on the Jury Panel for lack of interpretative services.

Concern has been expressed about how to ensure interpreters do not disclose the content of jury deliberations. This is easily attained. We merely state that interpreters are prohibited from doing so. There is a current prohibition preventing jurors from discussing or disclosing jury deliberations.

There is a further important reason why a proactive rule must be made. It provides for a long overdue recognition of the rights of First Nations people.

The above discussion does not alter my opinion that First Nations people have a right to self-Government and a separate justice system based on values and a process First Nations people respect and create. However, as long as they appear in the non-native Courts of law, language rights of First Nations should be respected and interpreters should be provided to First Nations people who need them to enable them to sit on the jury.

I do not believe, however, that any First Nations person should be forced to sit on a jury. If they do not wish to participate in non-native law, they should not have to. Consequently, I would make this as part of the new *Juries Acts* as well.

The following Sections should be included in the new *Juries Act*.

- (1) No First Nations person should be forced to sit on a Jury Panel.
- (2) An interpreter shall be provided for any First Nations juror requesting the assistance of an interpreter.
- (3) Any interpreter provided for a juror is prohibited from disclosing in any manner any discussions or deliberations of the jury.

# DRAFT JURIES ACT

## Part I - Interpretation

- 1 This *Act* may be cited as the *Juries Act*.
- 2 The purpose of this *Act* is to provide for the random selection of jurors in civil and criminal trials, who are impartial and representative of the community and to reflect the provisions of the *Charter of Rights and Freedoms, Constitution Act, 1982*, regarding equality and the right to trial by jury.
- 3 In this *Act*,
- (a) "Chief Justice" means the Chief Justice of the Supreme Court of Nova Scotia, the Judge authorized to exercise the powers and perform the duties of the Chief Justice or a Judge designated by the Chief Justice;
  - (b) "civil matter" means a cause, issue or matter, other than a criminal matter, that involves or might involve a jury and includes an assessment of damages;
  - (c) "Court Administrator" means the chief official responsible for the administration of courts within a jury district, and includes the prothonotary for that district;
  - (d) "criminal matter" means a prosecution or trial for an offence triable by a Judge and jury in accordance with the *Criminal Code*;
  - (e) "Judge" means a Judge of the Supreme Court of Nova Scotia;
  - (f) "juror" means a person serving on a jury, or called as part of a Panel of jurors;
  - (g) "jury district" means a county [*or a district as designated under court reform*] of Nova Scotia;
  - (h) "Jury List" means the list of names from which Jury Panels are selected, prepared in accordance with this *Act* and approved by a Judge;
  - (i) "Jury Panel" means the group of jurors summoned to a session, from which the jury is selected;

- (j) "session" includes any convening of the Supreme Court of Nova Scotia for the purpose of hearing one or more civil matters or one or more criminal matters.

## **Part II - Selection of Juries**

### **Qualifications and Excuses**

- 4 Every Canadian citizen in Nova Scotia who has attained the age of 18 years is eligible for jury service, unless disqualified under this *Act*.
- 5 The following people are disqualified from serving as jurors:
  - a) the Lieutenant Governor of the Province of Nova Scotia, a member of the House of Assembly, the House of Commons, or the Senate;
  - b) a Judge of the Court of Appeal, Supreme Court, Provincial Court, or Family Court in the province, or an officer of the Supreme Court or Court of Appeal;
  - c) people who hold a law degree;
  - d) a full-time member of any police force in the province, a probation officer, or a warden or employee of a correctional institution.
- 6
  - (1) A Court Administrator may, in advance of a trial, excuse a person who applies on the Juror Information Form from service or defer a person to a later Jury Panel where it is appropriate to excuse the person due to hardship or illness.
  - (2) A Judge may at trial excuse a person from service or defer a person to a later Jury Panel where it is appropriate to excuse the person due to hardship, illness, or inconvenience.
  - (3) A juror who is not excused by the Court Administrator in advance of the trial can seek to be excused by the Judge presiding at trial.
- 7 Medical practitioners in Nova Scotia are automatically excused from juror service if they apply to be excused.



## Preparation of the Jury List

- 8
- (1) Before the end of August of each year, the Court Administrator shall create a list of names, called the "Jury List", from which people will be called for jury service for a [district] for the following year. The names on the Jury List shall be taken randomly from lists which, as far as possible, include the entire adult population of the province who reside in the jury district where the trial is to occur.
  - (2) Any person may ask to review the Jury List and, if he or she is eligible, be placed on the Jury List if his or her name is not on the list at the Court Administrator's office.
  - (3) The Jury List for each [district] shall consist of, as far as possible, all residents in the [district].
  - (4) The Judges of the Supreme Court may make rules consistent with this *Act* respecting the procedures to be followed in preparing the Jury List. These rules may authorize the use of computers to make the random selection and may also, subject to applicable *Criminal Code* provisions, authorize the use of postal codes and other methods to ensure a fair cross-section of the community within which the offence occurred is included in a Jury Panel list.
  - (5) When the Jury List is prepared, the Court Administrator shall certify it as follows:  
  
I hereby certify that the foregoing Jury List for ... [jury district] was prepared in accordance with the *Juries Act* and that the names on this list represent a representative cross-section of the community.
  - (6) The Court Administrator shall present the Jury List to a Judge who, if satisfied on information given by the Court Administrator that the Jury List is properly representative, shall approve the Jury List. If the Judge is not satisfied, the Judge shall order the Court Administrator to prepare a new Jury List under the direction of the Judge.

## Calling the Jury Panel

- 9
- (1) At the beginning of each session, or whenever a jury is required, a Court Administrator shall randomly select the number of names designated by a Judge from the appropriate Jury List for the district.
  - (2) Random selection shall be in accordance with the rules determined by the Court under Section 8(4) and shall take into account the principle of representativeness

of the community within which the offence occurred.

- (3) The Jury Panel list randomly selected shall be approved by a Judge.
- (4) At least ten days before the Jurors are required to appear, the Court Administrator shall mail to each person listed on the Panel of jurors a Jurors Summons setting out the time and place to appear. The Court Administrator shall also send a Juror Information Form which describes the people who are disqualified or may be excused from the Jury service under s.6 of the *Juries Act*.
- (5) Every person who received a Juror Summons and Juror Information Form must complete and return the form to the Court Administrator.
- (6) The Court Administrator shall, on receiving the Juror Information Form, remove from the Jury Panel list the name of anyone who is disqualified from jury service, and may excuse jurors who apply in accordance with s. 5.
- (7) The Juror Information Forms, including the decision to excuse, must be retained each year, and may be reviewed annually by the Chief Justice.
- (8) If, in the opinion of the Chief Justice or the presiding Judge, a sufficient number of jurors will not attend for service at any session, the Chief Justice or presiding Judge may ask the Court Administrator to provide additional names from the Jury List of randomly selected names and require those persons to attend at such time as the Chief Justice or Judge directs. If additional jurors are selected in this way, the notice requirements in subsections (4) and (9) do not apply.
- (9) Not earlier than eight days nor later than four days before the time stated in the notice for appearance, the Court Administrator shall post a list of the names in the office of the Court Administrator in the jury district where the trial is to occur and that list shall be available for inspection by any person until the time stated for appearance.

### **Attendance and Organization of Jurors**

- 10** (1) The Court Administrator shall, on each day on which the Panel of jurors is required to attend, determine which jurors are present and make an entry of the fact if any juror is not present.
- (2) The members of a Panel of jurors shall continue to attend until discharged by the presiding Judge.
- (3) The presiding Judge may at any time excuse the jurors or any of them from

attendance during any part of the session and may at any time discharge the jurors or any of them.

### **Selection of Jurors**

- 11 (1) When a Panel of jurors for a session is before a Judge in a criminal matter, the jurors required shall be selected in the manner prescribed by the *Criminal Code*.
- (2) When a Panel of jurors for a session is before a Judge in a civil matter, the jurors shall be selected as set out in Part III, Civil Juries.

## **Part III - Civil Juries**

### **Availability**

- 12 (1) In civil proceedings, findings of fact or the assessment of damages shall be decided by a jury in the following cases:
- (a) unless the parties agree otherwise, where the proceeding is an action for libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution, or false imprisonment;
  - (b) where either of the parties requests, by notice in writing to the Court Administration and the other party at least sixty days before the date set for trial, that the issues of fact be tried or the damages be assessed by a jury; or
  - (c) where the Judge directs that the issues of fact shall be tried or the damages assessed by a jury.
- (2) Notwithstanding subsection (1)(b), the matter will not be tried by a jury where either party applies to strike the jury notice, and where in the opinion of the Judge hearing the application:
- (a) the issue is exclusively a question of law; or,
  - (b) the issues of fact are not substantial and cannot be practically separated from the issues of law; or,
  - (c) the issues of fact are of too technical or complex a nature for

determination by a jury.

### **Selection of Civil Jurors**

- 13** (1) The jury shall be selected in the following way:
- (a) the name of each juror on the Panel of jurors, the juror's number on the Panel and name and address, shall be written on a separate card and all the cards shall, as far as possible, be of equal size;
  - (b) after any disqualifications have been made or excuses granted, the Court Administrator shall place the cards of the Jury Panel members who are present together in a box and thoroughly shake them together;
  - (c) the Court Administrator shall in open court draw out a card from the box and shall call out the name and number upon the card as it is drawn, until the number of persons is, in the opinion of the Judge, sufficient to provide a full jury;
  - (d) the Court Administrator shall continue to select jurors until a sufficient number of jurors are selected;
  - (e) the jury for the trial of a civil matter shall consist of seven persons, of whom five, after deliberating for at least four hours, may return a verdict;
  - (f) if the juror is not peremptorily challenged or successfully challenged for cause on the basis of partiality, the Court Administrator shall swear or permit to affirm that person as a member of the jury;
  - (g) subject to the Rules of the Supreme Court, in a civil matter the plaintiff or plaintiffs and the defendant or defendants may peremptorily challenge four jurors;
  - (h) despite subsection (g) but subject to the rules of the Supreme Court, where there are defendants who are adverse in interest, the presiding Judge may permit each group of defendants who have a common interest to peremptorily challenge four jurors.
  - (i) where a full jury cannot be provided even though there has been

compliance with the provisions of this *Act*, the presiding Judge may order the sheriff or other officer to summon additional people randomly selected from the Jury List as the Judge directs for the purpose of providing a full jury;

- (j) jurors may be summoned under this section by word of mouth if necessary and brought before the Judge;
- (k) the names of the persons who are summoned under this Section shall be added to the Panel of jurors for the purpose for which the Panel was selected and the provisions of this *Act* shall apply as though the persons were named as members of the original Panel of jurors.

### **Illness**

- 14 If a juror becomes ill after being sworn, the presiding Judge may direct the trial to proceed without the juror, and the verdict of the remaining jurors shall be valid if at least five of them concur.

## **Part IV - General Provisions**

- 15 The Minister of Justice may appoint a [*jury officer*] for each district, who has the authority to perform any duty assigned to the Court Administrator under this *Act*.
- 16 A failure to observe the directions contained in this *Act*, or any of them, in respect of
- (a) the disqualification or excusing of jurors;
  - (b) the preparation, form or revision of the Jury List or the requirements in respect of the Jury List; or
  - (c) the selection, empanelling, notification, or summoning of jurors shall not be a ground for impeaching or quashing the verdict in any civil matter.

### **Juror Fees**

- 17 The Governor in Council may by regulation determine the fee for attendance by a juror and any allowance to be paid to a juror.
- 18 If, during the trial of a civil matter or criminal matter, the jurors are not allowed to

separate, the sheriff for the county in which the trial takes place may provide such lodging and refreshment as is necessary for them, and the cost thereof shall be paid by the Minister of Justice.

- 19 Except where otherwise provided, the Chief Justice may prescribe forms for use under this *Act*.

### **Juror Information**

- 20 Except as set out in this *Act*, the names and confirmation included on the Jury List or on a Jury Panel shall not be made public nor shall any information provided by a person on a Juror Information Form be available other than for review by the Chief Justice.
- 21 The Court Administrator or the Jury Officer must keep all Juror Summons and Juror Information Forms for 1 year in the event that they are to be reviewed by the Chief Justice.
- 22 The Court Administrator or jury officer for a [*District*] must provide a record of all Summons and Juror Information Forms sent and received, and must determine and record any reasons for failure to return a Juror Information Form.

### **Offences**

- 23 Any person who:
- (a) improperly includes or fails to include the name of any person on the Jury List, or otherwise interferes with the representativeness of the Jury List or the random nature of the Jury Panel list, or
  - (b) wilfully fails to perform any duty imposed by this *Act*,

is guilty of an offence and is liable on summary conviction to a penalty of not more than five hundred dollars.

- 24 Every person who is required to attend at any place for service on a Jury or a Jury Panel and who fails to attend may be arrested and brought before a Judge on any day that the person is required to appear, and in addition shall be liable on summary conviction to a penalty of not more than two hundred dollars.

## Summary of Recommendations in Discussion Paper

1. Both the *Juries Act* and the operation of the jury system should be reformed to the extent that the province has constitutional authority over the operation of the system.
2. There should be changes to the *Juries Act* to ensure that jury selection procedures do not have the effect of arbitrarily excluding members of any group. The jury selection process should be evaluated to guarantee that it is as inclusive and as random as possible.
3. The *Juries Act* should be changed to say that "The Jury List will be chosen from source lists which, as far as possible, reflect the entire adult population of the province".
4. The Act should also be changed to allow for voluntary registration to ensure that people have had an opportunity to be placed on the Jury List.
5. The Jury selection process should be performed by computer where possible.
6. The *Juries Act* should be changed in the following ways:
  - (1) Landed immigrants should be eligible to serve on juries;
  - (2) Jurors should not have to have resided in the Jury District for twelve months;
  - (3) Armed forces personnel, doctors, dentists, and members of the clergy should not be automatically exempt from jury service;
  - (4) Wardens and employees of correctional institutions, and probation officers should be disqualified from jury service.
7. Civil Procedure Rule 34.03, which allows pregnant women to apply to be automatically exempt from a civil jury, should be removed.
8. The general power of courts to grant exemptions in the *Juries Act* should be more clearly defined, either through legislation or judicial guidelines.
9. The *Juries Act* should state that anyone who cannot understand the language of trial is disqualified from serving on a jury. The Commission seeks the views of the public on whether an exception to this rule should be made, to allow persons who speak only an Aboriginal language and can understand the proceedings to serve on juries where an Aboriginal person is on trial.

10. Juror fees in criminal matters should vary depending on the demands made on the juror's time. The Commission calls for public consultation and research to determine an appropriate compensation scheme for jurors.
11. Employers should be required to pay an employee's wages while that employee is a juror, but the employer should have an opportunity to apply to be refunded the costs if that creates undue hardship. An employer may not penalize in any way an employee who is selected as a juror.
12. The rules judges apply concerning the availability of civil juries should be set out in the *Juries Act*.
13. The Commission seeks the views of the public on whether automatic access to civil juries should be more restricted than at present.
14. Changes needed to make the *Juries Act* consistent with the recent reforms to court structure should be made.
15. Consideration should be given as to how jury districts can be redefined, to ensure that the 18 jury districts provided under the *Juries Act* are appropriate for the four newly created court districts.



## **List of People Who Responded to Discussion Paper**

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- J. Braunstein  
N.S. Department of Health
- Joint Submission of H. B. Holton, P. C. Stickney, K. A. Briand and  
F. DeMont  
Nova Scotia Legal Aid
- D. Pink  
Nova Scotia Barristers' Society
- R. Wallet  
Shelburne
- E. Cuddihy, Q.C.  
N.S. Department of Economic Development
- A. Davidson  
Canadian Bar Association

# (DRAFT) JURIES ACT - Annotated

## Part I - Interpretation

1 This *Act* may be cited as the *Juries Act*.

2 The purpose of this *Act* is to provide for the random selection of jurors in civil and criminal trials, who are impartial and representative of the community and to reflect the provisions of the *Charter of Rights and Freedoms, Constitution Act, 1982*, regarding equality and the right to trial by jury.

### Comment

**The purpose clause is new. It is included to provide guidance and direction to people interpreting and implementing provisions of this *Act*.**

3 In this *Act*,

- (a) "Chief Justice" means the Chief Justice of the Supreme Court of Nova Scotia, the Judge authorized to exercise the powers and perform the duties of the Chief Justice or a Judge designated by the Chief Justice;
- (b) "civil matter" means a cause, issue or matter, other than a criminal matter, that involves or might involve a jury and includes an assessment of damages;
- (c) "Court Administrator" means the chief official responsible for the administration of courts within a jury district, and includes the prothonotary for that district;
- (d) "criminal matter" means a prosecution or trial for an offence triable by a Judge and jury in accordance with the Criminal Code;
- (e) "Judge" means a Judge of the Supreme Court of Nova Scotia;
- (f) "juror" means a person serving on a jury, or called as part of a Panel of jurors;
- (g) "jury district" means a county [*or a district as designated under court reform*] of Nova Scotia;
- (h) "Jury List" means the list of names from which Jury Panels are selected, prepared in accordance with this *Act* and approved by a Judge;

- (i) "Jury Panel" means the group of jurors summoned to a session, from which the jury is selected;
- (j) "session" includes any convening of the Supreme Court of Nova Scotia for the purpose of hearing one or more civil matters or one or more criminal matters.

### **Comment**

**Little in these definitions has been changed from the current *Act*. A new term "Court Administrator" has been added, which is to include prothonotaries. This language is intended to make the *Act* consistent with reforms to court structure which are underway. It may also be appropriate to eliminate or change the term "jury district", as this concept may alter. However, at this stage, it is not certain what would replace this designation to be able to include this change.**

## **Part II - Selection of Juries**

### **Qualifications and Excuses**

- 4** Every Canadian citizen in Nova Scotia who has attained the age of 18 years is eligible for jury service, unless disqualified under this *Act*.

### **Comment**

**The noteworthy changes in this section are the removal of the requirement that a person have spent 12 months within a particular jury district. There is a dissenting opinion which would extend jury service to include landed immigrants.**

- 5** The following people are disqualified from serving as jurors:
- a) the Lieutenant Governor of the Province of Nova Scotia, a member of the House of Assembly, the House of Commons, or the Senate;
  - b) a Judge of the Court of Appeal, Supreme Court, Provincial Court, or Family Court in the province, or an officer of the Supreme Court or Court of Appeal;
  - c) people who hold a law degree;

- d) a full-time member of any police force in the province, a probation officer, or a warden or employee of a correctional institution.

### **Comment**

**This section is a change from the current *Act* which generally exempts a large range of people from service. This section has disqualifications based on occupation and a concern for public perception about people with these positions acting as jurors. This list of disqualifications has not been changed greatly in content or principle, although it has been arranged more concisely. Probation officers, wardens, and employees of correctional institutions have been disqualified and the provision regarding barristers and solicitors has been expanded to include any person holding a law degree. Although there was some negative comment from the public on the disqualification of people with legal training, the majority of the Commissioners were of the view that it was not appropriate for people with a law degree to sit on juries. In their view, the main basis for this exclusion is that anyone with a law degree might have an undue influence over the other jury members and be inclined to second guess the Judge's directions as to law. There is a dissenting opinion on this matter. The current *Act* disqualifies some people with criminal records. The Commissioners feel that this disqualification is not appropriate and recommend its removal, although this is an exclusion which continues to exist in the *Criminal Code*.**

- 6. (1) A Court Administrator may, in advance of a trial, excuse a person who applies on the Juror Information Form from service or defer a person to a later Jury Panel where it is appropriate to excuse the person due to hardship or illness.
- (2) A Judge may at trial excuse a person from service or defer a person to a later Jury Panel where it is appropriate to excuse the person due to hardship, illness, or inconvenience.
- (3) A juror who is not excused by the Court Administrator in advance of the trial can seek to be excused by the Judge presiding at trial.

### **Comment**

**The current *Act* gives the power to excuse potential jurors only to the Judge at trial, but gives no guidance as to when jurors should be excused, although case law provides hardship, inconvenience and illness as the bases. The *Criminal Code* does, however, provide a power to excuse on the basis of partiality or hardship. It was decided that it would be appropriate to permit people to apply to be excused or have their service deferred if they apply to the Court Administrator using the Juror Information Form. This will provide a record for the request and the decision. It will also reduce some of the workload of the court. This section formally extends a limited discretionary power to Court Administrators and defines when the power should be used (hardship or illness). The Judge's power to exercise his or her discretion is broader than the Administrator in that it includes "inconvenience". The Court Administrator's decision can be appealed and changed by the Judge at the Summons date.**

7. Medical practitioners in Nova Scotia are automatically excused from juror service if they apply to be excused.

### **Comment**

**This *Draft Act* has disqualified some people and does not exempt any person from liability for service unless the person applies to be excused or have service deferred for reasons of hardship, illness or inconvenience under s.6. The one exception to this that was seen as appropriate by the majority of the Commission was medical practitioners. It was felt that their service to the community as medical practitioners was of greater importance than their service as jurors. A medical practitioner may serve on a jury but if he or she applies, he or she will be automatically excused. There is a dissenting opinion on this issue.**

### **Preparation of the Jury List**

8. (1) Before the end of August of each year, the Court Administrator shall create a list of names, called the "Jury List", from which people will be called for jury service for a [*district*] for the following year. The names on the Jury List shall be taken randomly from lists which, as far as possible, include the entire adult population of the province who reside in the jury district where the trial is to occur.
- (2) Any person may ask to review the Jury List and, if he or she is eligible, be placed on the Jury List if his or her name is not on the list at the Court Administrator's office.

### **Comment**

**The major change in this section is to allow more flexibility regarding the number of lists to be used, rather than just the voters' list, to draw up the Jury List. It is recommended that the new MSI list and a computerized system be used. In addition, there is a right provided for a person to request inclusion on the Jury List for the district, although he or she cannot designate a trial and will not necessarily be randomly selected to be on a Panel.**

- (3) The Jury List for each [*district*] shall consist of, as far as possible, all residents in the [*district*].

### **Comment**

**The present *Act* designates a number of names to be chosen for each jury district, but also allows the Attorney General to designate that a different number of names be chosen. It is routinely necessary in most districts to have a larger list than the legislation calls for. If a comprehensive computerized system is used, then the entire population of the district**

**will potentially be available to be called. Since there is no screening of people at the Jury List**

stage, the number of people on the list is not relevant.

- (4) The Judges of the Supreme Court may make rules consistent with this *Act* respecting the procedures to be followed in preparing the Jury List. These rules may authorize the use of computers to make the random selection and may also, subject to applicable *Criminal Code* provisions, authorize the use of postal codes and other methods to ensure a fair cross-section of the community within which the offence occurred is included in a Jury Panel list.

#### Comment

**Procedures to use these various lists and achieve a random selection must be designed, but not need be set out in legislation. The current provision allowing the Judges of the Supreme Court to specify procedures has been retained. Specific reference is made to the possibility of using computers to make the selection. If the equipment and computerised source lists are available, this would be the best method of guaranteeing randomness in selection. The reference to postal codes and community where the offence occurred is part of an effort to take into account the demography of Nova Scotia particularly, as it applies to Aboriginal and Black people.**

- (5) When the Jury List is prepared, the Court Administrator shall certify it as follows:

I hereby certify that the foregoing Jury List for ..... [jury district] was prepared in accordance with the *Juries Act* and that the names on this list represent a representative cross-section of the community.

- (6) The Court Administrator shall present the Jury List to a Judge who, if satisfied on information given by the Court Administrator that the Jury List is properly representative, shall approve the Jury List. If the Judge is not satisfied, the Judge shall order the Court Administrator to prepare a new Jury List under the direction of the Judge.

#### Comment

**The wording on this certificate is changed from the current *Act* to reflect the proposal that no disqualification or excuses are dealt with until the preparation of the Jury Panel. This should prove administratively simpler and ensure that all residents in the district are included. The current *Act* calls for the qualification of jurors to be checked at the stage of drawing up the Jury List and for the use of Jury Committees. That requirement has been removed. Despite the requirement in the current *Act*, it is not done in every jury district, and indeed it is not practical to try to check occupations at this stage. The voters' list which is currently used does not indicate occupation, so it is only where jury committee members have personal knowledge of the people from whom they are choosing, that disqualifications can be made at this early stage. However, that kind of reliance on personal knowledge, is inconsistent with the goal of**

**random selection. These exclusions will be made after jurors are randomly selected to be on a Panel - which is the current practice in many districts and, if the Juror Information Form is used, will be in response to information provided by the potential juror rather than another person.**

### **Calling the Jury Panel**

9. (1) At the beginning of each session, or whenever a jury is required, a Court Administrator shall randomly select the number of names designated by a Judge from the appropriate Jury List for the district.
- (2) Random selection shall be in accordance with the rules determined by the Court under Section 8(4) and shall take into account the principle of representativeness of the community within which the offence occurred.
- (3) The Jury Panel list randomly selected shall be approved by a Judge.
- (4) At least ten days before the Jurors are required to appear, the Court Administrator shall mail to each person listed on the Panel of jurors a Jurors Summons setting out the time and place to appear. The Court Administrator shall also send a Juror Information Form which describes the people who are disqualified or may be excused from the Jury service under s.6 of the *Juries Act*.
- (5) Every person who received a Juror Summons and Juror Information Form must complete and return the form to the Court Administrator.
- (6) The Court Administrator shall, on receiving the Juror Information Form, remove from the Jury Panel list the name of anyone who is disqualified from jury service, and may excuse jurors who apply in accordance with s. 5.
- (7) The Juror Information Forms, including the decision to excuse, must be retained each year, and may be reviewed annually by the Chief Justice.
- (8) If, in the opinion of the Chief Justice or the presiding Judge, a sufficient number of jurors will not attend for service at any session, the Chief Justice or presiding Judge may ask the Court Administrator to provide additional names from the Jury List of randomly selected names and require those persons to attend at such time as the Chief Justice or Judge directs. If additional jurors are selected in this way, the notice requirements in subsections (4) and (9) do not apply.
- (9) Not earlier than eight days nor later than four days before the time stated in the

notice for appearance, the Court Administrator shall post a list of the names in the office of the Court Administrator in the jury district where the trial is to occur and that list shall be available for inspection by any person until the time stated for appearance.

### **Comment**

**Subsections in the current *Act* dealing with secrecy and with forms have been moved to the more general Part of the Draft *Act*. In addition, a subsection making it an offence not to appear has been moved to that Part. This section represents the only point at which narrowing or screening occurs. Since it is based on information and the request of a potential jury panel list, it leaves little room for discretionary decisions. The requirement regarding "community within which the offence occurs" is partly an effort to mitigate the impact of centralization of the courts on representativeness of jurors. The requirement that the Juror Information Forms be retained will make it possible to determine where representation is affected.**

### **Attendance and organization of Jurors**

- 10**
- (1) The Court Administrator shall, on each day on which the Panel of jurors is required to attend, determine which jurors are present, and shall make an entry of the fact if any juror is not present.
  - (2) The members of a Panel of jurors shall continue to attend until discharged by the presiding Judge.
  - (3) The presiding Judge may at any time excuse the jurors or any of them from attendance during any part of the session and may at any time discharge the jurors or any of them.

### **Comment**

**Subsection 1 is slightly changed from the current *Act* to give more flexibility to court officials. At present, the court is required to call the roll of jurors to determine who is present and absent. This new section still requires that the information be obtained, but it does not require that it be gathered through calling the roll. In normal cases, a roll call might still be the most efficient system, but in the cases where very large Panels are called (as has happened several times recently), some other system might be more practical.**

**In the current *Act*, these three subsections are divided between s. 12 and s. 16. They have been combined here into one section.**

### **Selection of Jurors**



- 11** (1) When a Panel of jurors for a session is before a Judge in a criminal matter, the jurors required shall be selected in the manner prescribed by the *Criminal Code*.
- (2) When a Panel of jurors for a session is before a Judge in a civil matter, the jurors shall be selected as set out in Part III, Civil Juries.

### **Comment**

**It will be recalled that criminal matters including juror selection are governed by federal law while civil matters are governed by provincial law. As noted in section 1 when the trial is a criminal matter, the process for juror selection is governed by the *Criminal Code of Canada*.**

## **Part III - Civil Juries**

### **Availability**

- 12** (1) In civil proceedings, findings of fact or the assessment of damages shall be decided by a jury in the following cases:
- (a) unless the parties agree otherwise, where the proceeding is an action for libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution, or false imprisonment;
  - (b) where either of the parties requests, by notice in writing to the Court Administration and the other party at least sixty days before the date set for trial, that the issues of fact be tried or the damages be assessed by a jury; or
  - (c) where the Judge directs that the issues of fact shall be tried or the damages assessed by a jury.
- (2) Notwithstanding subsection (1)(b), the matter will not be tried by a jury where either party applies to strike the jury notice, and where in the opinion of the Judge hearing the application:
- (a) the issue is exclusively a question of law; or,
  - (b) the issues of fact are not substantial and cannot be practically separated from the issues of law; or,

- (c) the issues of fact are of too technical or complex a nature for determination by a jury.

## Comment

**This section is new to the *Juries Act*, though the policy it reflects is not new. The *Judicature Act* currently sets out some of the rules for availability of juries, and the rest of the rules have been established in a series of decisions by the Supreme Court of Nova Scotia.<sup>2</sup> This section is not intended to change those rules. All this section has done is codify the common law, and move all the rules into the *Juries Act*.**

## Selection of Civil Jurors

- 13 (1) The jury shall be selected in the following way:
- (a) the name of each juror on the Panel of jurors, the juror's number on the Panel and name and address, shall be written on a separate card and all the cards shall, as far as possible, be of equal size;
  - (b) after any disqualifications have been made or excuses granted, the Court Administrator shall place the cards of the Jury Panel members who are present together in a box and thoroughly shake them together;
  - (c) the Court Administrator shall in open court draw out a card from the box and shall call out the name and number upon the card as it is drawn, until the number of persons is, in the opinion of the Judge, sufficient to provide a full jury;
  - (d) the Court Administrator shall continue to select jurors until a sufficient number of jurors are selected;
  - (e) the jury for the trial of a civil matter shall consist of seven persons, of whom five, after deliberating for at least four hours, may return a verdict;

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<sup>2</sup> See, for example, *MacNeil v. Hill the Mover* (1961), 27 D.L.R. (2d) 734 (N.S.S.C.A.D.); *Isaac v. Harnacek* (1974), 13 N.S.R. (372) (S.C.T.D.); *Smith (A.D.) Lumber Ltd. v. General Home Systems* (1986) 72 N.S.R. (2d) 333 (S.C.T.D.); and *Maynard v. Irving Oil Ltd.* (1990), 96 N.S.R. (2d) 86 (S.C.T.D.).

- (f) if the juror is not peremptorily challenged or successfully challenged for cause on the basis of partiality, the Court Administrator shall swear or permit to affirm that person as a member of the jury;
- (g) subject to the Rules of the Supreme Court, in a civil matter the plaintiff or plaintiffs and the defendant or defendants may peremptorily challenge four jurors;
- (h) despite subsection (g) but subject to the rules of the Supreme Court, where there are defendants who are adverse in interest, the presiding Judge may permit each group of defendants who have a common interest to peremptorily challenge four jurors;
- (i) where a full jury cannot be provided even though there has been compliance with the provisions of this *Act*, the presiding Judge may order the sheriff or other officer to summon additional people randomly selected from the Jury List as the Judge directs for the purpose of providing a full jury;
- (j) jurors may be summoned under this section by word of mouth if necessary and brought before the Judge;
- (k) the names of the persons who are summoned under this Section shall be added to the Panel of jurors for the purpose for which the Panel was selected and the provisions of this *Act* shall apply as though the persons were named as members of the original Panel of jurors.

### Comment

**This section has been moved, so that it clearly only applies in the case of civil jury trials. In the case of criminal jury trials, the rules in the *Criminal Code* (which are effectively identical in any case) apply. This section has been rewritten in two ways. First, some of the language has been simplified. Second, the procedure for selecting a civil jury has been changed to reflect actual practice. The current *Act* requires that the name of every Jury Panel member be placed in the box, whether that juror is present or not. In fact, the current practice is to determine which jurors are present, deal with any requests to be excused, and then put the remaining names into the box for selection. This procedure is more efficient, and the legislation is changed accordingly. The *Juries Act* currently gives only three peremptory challenges, while the Rules of the Supreme Court give four. Subsection (g) removes the conflict between the two. It may be useful to consider eliminating peremptory challenges, although no recommendation is made in this *Act*.**

## Illness

- 14 If a juror becomes ill after being sworn, the presiding Judge may direct the trial to proceed without the juror, and the verdict of the remaining jurors shall be valid if at least five of them concur.

## Part IV - General Provisions

- 15 The Minister of Justice may appoint a [*jury officer*] for each district, who has the authority to perform any duty assigned to the Court Administrator under this *Act*.
- 16 A failure to observe the directions contained in this *Act*, or any of them, in respect of
- (a) the disqualification or excusing of jurors;
  - (b) the preparation, form or revision of the Jury List or the requirements in respect of the Jury List; or
  - (c) the selection, empanelling, notification, or summoning of jurors

shall not be a ground for impeaching or quashing the verdict in any civil matter.

## Juror Fees

- 17 The Governor in Council may by regulation determine the fee for attendance by a juror and any allowance to be paid to a juror.

## Comment

**This proposal will remove from the *Act* any specific provisions about the amount of the juror fees, and call for them to be set by regulation. This regulation-making power already exists in the *Act*, but this proposal will require that it be used. In the Commission's view, these rules are better contained in regulations. First, regulations can more easily be changed to respond to changes in circumstances. Second, the rules concerning juror fees can more easily be fine-tuned in regulations which can go into greater detail than is appropriate in a statute.**

- 18 If, during the trial of a civil matter or criminal matter, the jurors are not allowed to separate, the sheriff for the county in which the trial takes place may provide such lodging and refreshment as is necessary for them, and the cost thereof shall be paid by the Minister of Justice.

## Comment

The current *Act* gives this general power to the Minister of Justice, though most specific powers are given to the Chief Justice. This draft *Act* assigns the general power to the Chief Justice, since the selection of juries is a function more appropriate to the judiciary - the neutral decision-maker, than to the Attorney General - an advocate on one side.

19 Except where otherwise provided, the Chief Justice may prescribe forms for use under this *Act*.

### Comment

This section has been rephrased in a gender-neutral fashion, and the cost has been assigned to the Minister of Justice in keeping with the province taking over the costs of the administration of justice generally.

### Juror Information

20 Except as set out in this *Act*, the names and confirmation included on the Jury List or on a Jury Panel shall not be made public nor shall any information provided by a person on a Juror Information Form be available other than for review by the Chief Justice.

21 The Court Administrator or the Jury Officer must keep all Juror Summons and Juror Information Forms for 1 year in the event that they are to be reviewed by the Chief Justice.

22 The Court Administrator or jury officer for a [*District*] must provide a record of all Summons and Juror Information Forms sent and received, and must determine and record any reasons for failure to return a Juror Information Form.

### Offences

23 Any person who:

- (a) improperly includes or fails to include the name of any person on the Jury List, or otherwise interferes with the representativeness of the Jury List or the random nature of the Jury Panel list, or
- (b) wilfully fails to perform any duty imposed by this *Act*,

is guilty of an offence and is liable on summary conviction to a penalty of not more than five hundred dollars.

### Comment

**This section has been made more general. The current *Act* deals only with the Jury List, and only makes it an offence for the person drawing up the list to interfere. This provision applies to anyone, covers both the Jury List and the Jury Panel, and explicitly refers to randomness and representativeness as the feature(s) to be preserved.**

**24** Every person who is required to attend at any place for service on a Jury or a Jury Panel and who fails to attend may be arrested and brought before a Judge on any day that the person is required to appear, and in addition shall be liable on summary conviction to a penalty of not more than two hundred dollars.

#### **Comment**

**The current *Act* contains two sections saying essentially the same thing: s. 9(8) which allows anyone not appearing for a Jury Panel to be arrested that day and fined \$200.00, and s. 22 which allows the same thing, but also allows the person to be charged with a summary conviction offence. This provision preserves both the ability to bring the juror before the Judge on the day he or she was required to serve, and the ability to charge the person with an offence, but does so in only one section. In addition, the section makes clear that it is equally an offence to fail to appear as part of a Jury Panel as to fail to appear for jury service. It should be noted that alternatives to fines might also be considered e.g., community service options since the amount of the fine has a differing impact depending on the economic situation of the juror. For example, for some people, it will be less expensive to pay a fine than to serve on the jury.**

# (DRAFT) JURIES ACT

## Part I - Interpretation

- 1 This *Act* may be cited as the *Juries Act*.
- 2 The purpose of this *Act* is to provide for the random selection of jurors in civil and criminal trials, who are impartial and representative of the community and to reflect the provisions of the *Charter of Rights and Freedoms, Constitution Act, 1982*, regarding equality and the right to trial by jury.
- 3 In this *Act*,
  - (a) "Chief Justice" means the Chief Justice of the Supreme Court of Nova Scotia, the Judge authorized to exercise the powers and perform the duties of the Chief Justice or a Judge designated by the Chief Justice;
  - (b) "civil matter" means a cause, issue or matter, other than a criminal matter, that involves or might involve a jury and includes an assessment of damages;
  - (c) "Court Administrator" means the chief official responsible for the administration of courts within a jury district, and includes the prothonotary for that district;
  - (d) "criminal matter" means a prosecution or trial for an offence triable by a Judge and jury in accordance with the Criminal Code;
  - (e) "Judge" means a Judge of the Supreme Court of Nova Scotia;
  - (f) "juror" means a person serving on a jury, or called as part of a Panel of jurors;
  - (g) "jury district" means a county [*or a district as designated under court reform*] of Nova Scotia;
  - (h) "Jury List" means the list of names from which Jury Panels are selected, prepared in accordance with this *Act* and approved by a Judge;
  - (i) "Jury Panel" means the group of jurors summoned to a session, from which the jury is selected;

- (j) "session" includes any convening of the Supreme Court of Nova Scotia for the purpose of hearing one or more civil matters or one or more criminal matters.

## **Part II - Selection of Juries**

### **Qualifications and Excuses**

- 4 Every Canadian citizen in Nova Scotia who has attained the age of 18 years is eligible for jury service, unless disqualified under this *Act*.
- 5 The following people are disqualified from serving as jurors:
  - a) the Lieutenant Governor of the Province of Nova Scotia, a member of the House of Assembly, the House of Commons, or the Senate;
  - b) a Judge of the Court of Appeal, Supreme Court, Provincial Court, or Family Court in the province, or an officer of the Supreme Court or Court of Appeal;
  - c) people who hold a law degree;
  - d) a full-time member of any police force in the province, a probation officer, or a warden or employee of a correctional institution.
- 6
  - (1) A Court Administrator may, in advance of a trial, excuse a person who applies on the Juror Information Form from service or defer a person to a later Jury Panel where it is appropriate to excuse the person due to hardship or illness.
  - (2) A Judge may at trial excuse a person from service or defer a person to a later Jury Panel where it is appropriate to excuse the person due to hardship, illness, or inconvenience.
  - (3) A juror who is not excused by the Court Administrator in advance of the trial can seek to be excused by the Judge presiding at trial.
- 7 Medical practitioners in Nova Scotia are automatically excused from juror service if they apply to be excused.



## Preparation of the Jury List

- 8
- (1) Before the end of August of each year, the Court Administrator shall create a list of names, called the "Jury List", from which people will be called for jury service for a [district] for the following year. The names on the Jury List shall be taken randomly from lists which, as far as possible, include the entire adult population of the province who reside in the jury district where the trial is to occur.
  - (2) Any person may ask to review the Jury List and, if he or she is eligible, be placed on the Jury List if his or her name is not on the list at the Court Administrator's office.
  - (3) The Jury List for each [district] shall consist of, as far as possible, all residents in the [district].
  - (4) The Judges of the Supreme Court may make rules consistent with this *Act* respecting the procedures to be followed in preparing the Jury List. These rules may authorize the use of computers to make the random selection and may also, subject to applicable *Criminal Code* provisions, authorize the use of postal codes and other methods to ensure a fair cross-section of the community within which the offence occurred is included in a Jury Panel list.
  - (5) When the Jury List is prepared, the Court Administrator shall certify it as follows:  
  
I hereby certify that the foregoing Jury List for ..... [jury district] was prepared in accordance with the *Juries Act* and that the names on this list represent a representative cross-section of the community.
  - (6) The Court Administrator shall present the Jury List to a Judge who, if satisfied on information given by the Court Administrator that the Jury List is properly representative, shall approve the Jury List. If the Judge is not satisfied, the Judge shall order the Court Administrator to prepare a new Jury List under the direction of the Judge.

## Calling the Jury Panel

- 9
- (1) At the beginning of each session, or whenever a jury is required, a Court Administrator shall randomly select the number of names designated by a Judge from the appropriate Jury List for the district.
  - (2) Random selection shall be in accordance with the rules determined by the Court under Section 8(4) and shall take into account the principle of representativeness of the community within which the offence occurred.
  - (3) The Jury Panel list randomly selected shall be approved by a Judge.

- (4) At least ten days before the Jurors are required to appear, the Court Administrator shall mail to each person listed on the Panel of jurors a Jurors Summons setting out the time and place to appear. The Court Administrator shall also send a Juror Information Form which describes the people who are disqualified or may be excused from the Jury service under s.6 of the *Juries Act*.
- (5) Every person who received a Juror Summons and Juror Information Form must complete and return the form to the Court Administrator.
- (6) The Court Administrator shall, on receiving the Juror Information Form, remove from the Jury Panel list the name of anyone who is disqualified from jury service, and may excuse jurors who apply in accordance with s. 5.
- (7) The Juror Information Forms, including the decision to excuse, must be retained each year, and may be reviewed annually by the Chief Justice.
- (8) If, in the opinion of the Chief Justice or the presiding Judge, a sufficient number of jurors will not attend for service at any session, the Chief Justice or presiding Judge may ask the Court Administrator to provide additional names from the Jury List of randomly selected names and require those persons to attend at such time as the Chief Justice or Judge directs. If additional jurors are selected in this way, the notice requirements in subsections (4) and (9) do not apply.
- (9) Not earlier than eight days nor later than four days before the time stated in the notice for appearance, the Court Administrator shall post a list of the names in the office of the Court Administrator in the jury district where the trial is to occur and that list shall be available for inspection by any person until the time stated for appearance.

#### **Attendance and organization of Jurors**

- 10 (1) The Court Administrator shall, on each day on which the Panel of jurors is required to attend, determine which jurors are present, and shall make an entry of the fact if any juror is not present.
- (2) The members of a Panel of jurors shall continue to attend until discharged by the presiding Judge.
- (3) The presiding Judge may at any time excuse the jurors or any of them from attendance during any part of the session and may at any time discharge the jurors or any of them.

## Selection of Jurors

- 11 (1) When a Panel of jurors for a session is before a Judge in a criminal matter, the jurors required shall be selected in the manner prescribed by the *Criminal Code*.
- (2) When a Panel of jurors for a session is before a Judge in a civil matter, the jurors shall be selected as set out in Part III, Civil Juries.

## Part III - Civil Juries

### Availability

- 12 (1) In civil proceedings, findings of fact or the assessment of damages shall be decided by a jury in the following cases:
- (a) unless the parties agree otherwise, where the proceeding is an action for libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution, or false imprisonment;
  - (b) where either of the parties requests, by notice in writing to the Court Administration and the other party at least sixty days before the date set for trial, that the issues of fact be tried or the damages be assessed by a jury; or
  - (c) where the Judge directs that the issues of fact shall be tried or the damages assessed by a jury.
- (2) Notwithstanding subsection (1)(b), the matter will not be tried by a jury where either party applies to strike the jury notice, and where in the opinion of the Judge hearing the application:
- (a) the issue is exclusively a question of law; or,
  - (b) the issues of fact are not substantial and cannot be practically separated from the issues of law; or,
  - (c) the issues of fact are of too technical or complex a nature for determination by a jury.

## Selection of Civil Jurors

- 13** (1) The jury shall be selected in the following way:
- (a) the name of each juror on the Panel of jurors, the juror's number on the Panel and name and address, shall be written on a separate card and all the cards shall, as far as possible, be of equal size;
  - (b) after any disqualifications have been made or excuses granted, the Court Administrator shall place the cards of the Jury Panel members who are present together in a box and thoroughly shake them together;
  - (c) the Court Administrator shall in open court draw out a card from the box and shall call out the name and number upon the card as it is drawn, until the number of persons is, in the opinion of the Judge, sufficient to provide a full jury;
  - (d) the Court Administrator shall continue to select jurors until a sufficient number of jurors are selected;
  - (e) the jury for the trial of a civil matter shall consist of seven persons, of whom five, after deliberating for at least four hours, may return a verdict;
  - (f) if the juror is not peremptorily challenged or successfully challenged for cause on the basis of partiality, the Court Administrator shall swear or permit to affirm that person as a member of the jury;
  - (g) subject to the Rules of the Supreme Court, in a civil matter the plaintiff or plaintiffs and the defendant or defendants may peremptorily challenge four jurors;
  - (h) despite subsection (g) but subject to the rules of the Supreme Court, where there are defendants who are adverse in interest, the presiding Judge may permit each group of defendants who have a common interest to peremptorily challenge four jurors.
  - (i) where a full jury cannot be provided even though there has been compliance with the provisions of this *Act*, the presiding Judge may order the sheriff or other officer to summon additional people randomly selected from the Jury List as the Judge directs for the purpose of providing a full jury;

- (j) jurors may be summoned under this section by word of mouth if necessary and brought before the Judge;
- (k) the names of the persons who are summoned under this Section shall be added to the Panel of jurors for the purpose for which the Panel was selected and the provisions of this *Act* shall apply as though the persons were named as members of the original Panel of jurors.

### **Illness**

- 14 If a juror becomes ill after being sworn, the presiding Judge may direct the trial to proceed without the juror, and the verdict of the remaining jurors shall be valid if at least five of them concur.

### **Part IV - General Provisions**

- 15 The Minister of Justice may appoint a [*jury officer*] for each district, who has the authority to perform any duty assigned to the Court Administrator under this *Act*.
- 16 A failure to observe the directions contained in this *Act*, or any of them, in respect of
- (a) the disqualification or excusing of jurors;
  - (b) the preparation, form or revision of the Jury List or the requirements in respect of the Jury List; or
  - (c) the selection, empanelling, notification, or summoning of jurors shall not be a ground for impeaching or quashing the verdict in any civil matter.

### **Juror Fees**

- 17 The Governor in Council may by regulation determine the fee for attendance by a juror and any allowance to be paid to a juror.
- 18 If, during the trial of a civil matter or criminal matter, the jurors are not allowed to separate, the sheriff for the county in which the trial takes place may provide such lodging and refreshment as is necessary for them, and the cost thereof shall be paid by the Minister of Justice.

- 19 Except where otherwise provided, the Chief Justice may prescribe forms for use under this *Act*.

### **Juror Information**

- 20 Except as set out in this *Act*, the names and confirmation included on the Jury List or on a Jury Panel shall not be made public nor shall any information provided by a person on a Juror Information Form be available other than for review by the Chief Justice.
- 21 The Court Administrator or the Jury Officer must keep all Juror Summons and Juror Information Forms for 1 year in the event that they are to be reviewed by the Chief Justice.
- 22 The Court Administrator or jury officer for a [*District*] must provide a record of all Summons and Juror Information Forms sent and received, and must determine and record any reasons for failure to return a Juror Information Form.

### **Offences**

- 23 Any person who:
- (a) improperly includes or fails to include the name of any person on the Jury List, or otherwise interferes with the representativeness of the Jury List or the random nature of the Jury Panel list, or
  - (b) wilfully fails to perform any duty imposed by this *Act*,

is guilty of an offence and is liable on summary conviction to a penalty of not more than five hundred dollars.

- 24 Every person who is required to attend at any place for service on a Jury or a Jury Panel and who fails to attend may be arrested and brought before a Judge on any day that the person is required to appear, and in addition shall be liable on summary conviction to a penalty of not more than two hundred dollars.