The Underrepresentation of Indigenous People on Juries

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Law 498: Indigenous People and the Criminal Justice System

INTRODUCTION

This project seeks to explore the underrepresentation of Indigenous people on juries in Saskatchewan and Canada. Judicial patterns report countless (unsuccessful) challenges to under-representative juries and prospective juror pools. Kent Roach draws attention to the fact that in *R v Cyr* (2014, SKQB), a former sheriff from the Regina district was quoted saying that he was **"unable to recall any trial where a First Nations person sat on the jury in circumstances where the accused was also First Nations."** Equal representation on juries and prospective juror pools is important because it may aid in correcting the overrepresentation of Indigenous people who are incarcerated.

CONTEXT

Historically, Indigenous people have not been treated as equals in the Canadian criminal justice system. This can be traced all the way back to the earliest instances of Canadian justice being served on the prairies. These hangings took place **less than 2km from where an all-white jury would later find Gerald Stanley not guilty of the killing of Colten Boushie, 133 years later.**

The 1885 Hangings at Fort Battleford

In 1885, eight Indigenous men were hung at Fort Battleford as a demonstration of colonial power. These eight Indigenous men had been part of a hostage situation gone wrong at Frog Lake.

The Conflict

While renowned Cree leader Big Bear had been away from his group on a solidary hunting trip, Wandering Spirit, his war chief, had made a plan to obtain much needed food and supplies. Wandering Spirit captured Thomas Quinn, who was a notorious Indian Agent who had been withholding food from the Indigenous people at Frog Lake. When Quinn refused to cooperate, Wandering Spirit killed him, inciting the other Indigenous men taking place in the hostage situation to kill the settlers they were holding. Nine settlers were killed that day in Frog Lake.

The Trials

During the trials, **none of the Indigenous accused were provided with legal counsel.** The trials took place **entirely in English.** The judge himself was **biased against Indigenous people.** Finally, **each man was convicted to hang by an all-white jury.**

The Hangings

As Ted McCoy states in his article, the hangings were "carefully planned as public spectacle" and PM John A. MacDonald himself stated that "the executions … ought to convice the Red Man that the White Man governs." Indigenous children from the Battleford Industrial School and surrounding reserves were forced to watch, and were told that is what happened if one disobeyed. The 1885 hangings are well known as the largest mass hanging in Canadian history.

THE CURRENT JURY SELECTION PROCESS

The current jury selection process in Canada is governed by both the provincial and federal governments. Provinces are responsible for getting the prospective jurors to court and the *Criminal Code* outlines which prospective jurors will form the jury.

The Jury Selection Process in Saskatchewan – Gathering Panel of Prospective Jurors

1. Inspector of Court Offices ("ICO") contacts the registrar of health cards in Saskatchewan "from time to time" and requests the amount of names and addresses that they anticipate will be required by the sheriffs from the various geographical locations to jury selection
2. When notified by the ICO, the registrar of health cards randomly selects names and addresses, and sends the requested amount back to the ICO
3. When a trial comes up that requires a jury, the sheriff from the area that the trial is sitting informs the ICO of the number of people required as prospective jurors eight weeks before the jury selection is to take place. ICO determines the geographical area, and randomly selects the requested number of names and addresses from the already random list, and forwards them to the sheriff
4. Sheriff serves each person with (a) a Juror Information Return and Summons (in duplicate), (b) an Application for Relief from Jury Service (in duplicate), and (c) an envelope addressed to the sheriff with prepaid postage
5. Upon receipt, a juror must complete and mail/deliver one copy to the sheriff within five days of receiving it, or within whatever time frame outlined by the sheriff
6. If a potential jury member wants to be relieved from jury service, they must complete and return the Application for Relief from Jury Service form at least 10 days before the court opens that they have been summoned for. Sheriff will relieve them if they believe a factor is met

The Jury Selection Process in Saskatchewan – Selecting the Jury

1. Prospective jurors who have not been excused arrive for jury duty. Each potential juror's name, address, and jury roll number is written on a card or piece of paper and put into a container from which cards will randomly be drawn by the court clerk
2. If the juror is not subject to any challenges or stand-asides, they are sworn as a member of the jury. This continues until all spots are filled

THE FAILURES OF THE CURRENT JURY SELECTION PROCESS: *R V STANLEY*

The failures of the current jury selection process came under national scrutiny after the verdict of the *R v Stanley* trial came out. The case consisted of Gerald Stanley, a white man who lived on a farm near Biggar, SK, being acquitted of second-degree murder and manslaughter by an all-white jury. The victim who was killed was Colten Boushie, a 22-year-old Cree man from Red Pheasant First Nation. There are three areas where the failures of the current jury selection process became clear in the *Stanley* trial:

Summoning of Potential Jury Members

Of the 178 jurors who showed up for jury selection, approximately 20 of them were Indigenous (11%). Approx. 30% of the population in the geographic judicial area are Indigenous. Factors that contributed to this are:

Too Large an Area

- Large portion of the Indigenous community from this geographic area live in the far north of SK
- Time and cost is a deterrent for anyone travelling 300 – 500 km

No Duty on Province to Assemble Representative Jury Pool

- *R v Kokopenace*: there is **no *Charter* violation as long as the Province makes "reasonable efforts" to compile the jury roll**

Challenge for Cause

Section 638(1) of the *Criminal Code* states that a prosecutor or accused is entitled to any number of challenges on various grounds. The most common ground of challenge for cause is that the "juror is not indifferent between the Queen and the accused." This section has been used to ask one or two questions of a juror to determine if the juror is biased. This was not done in the *Stanley* trial

No Requirement to Ask Jurors Questions Regarding Bias

- There was **no questioning regarding racial bias or pre-trial publicity**
- Had there been this sort of questioning, it could have led to prospective jurors having a challenge for cause used on them

Peremptory Challenges

In the *Stanley* trial, had the defence not been able to use peremptory challenges there likely would have been five visibly Indigenous jurors. Each side was entitled to 14 peremptory challenges. The defence used 13 and the prosecutor only used four. **Five of the defence's challenges were used on visibly Indigenous people**

A courtroom drawing of a white panel of jurors – used in an article regarding the *R v Stanley* trial

RECOMMENDATIONS

How can these problems begin to be addressed in order to make the jury selection process more representative?

- **Provincial Health Cards** – to ensure that each Indigenous individual has the chance to be selected as a potential juror, **every Indigenous person needs to have a provincial health card in the first place**
- **Remuneration** – it should be made clear what remuneration is available to individuals travelling great distances. If the amount of money offered is not sufficient for an individual travelling a far distance, the amount they should get reimbursed for should be bumped up. There should also be a mode of transportation available to those who have no way to get there
- **Circuit Court** – crimes should be tried where they took place to better facilitate Indigenous participation on juries that live in more remote communities. This would better suit the accused, as well as the potential jurors in that area
- **Duty on Province to Assemble Representative Jury Pool** – the dissent in *Kokopenace* found this to be a reasonable suggestion. This would mean that the **pool of potential jurors who arrive on jury selection day are representative of the community that they have been randomly drawn from**
- **Requirement to Question Regarding Bias** – when there is an Indigenous accused or victim, **there should be a requirement to question potential jurors about any racial bias they may hold.** The need to do so has been recognized by the SCC in *R v Williams*, though it has never been a requirement
- **Abolition of Peremptory Challenges** – since it has been hard to control the use of discriminatory peremptory challenges, it is better to be rid of them all together. The federal government had the same idea when drafting Bill C-75, which proposes to abolish peremptory challenges. **This bill is now through its second Senate reading**

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