

PRESS RELEASE

May 31, 1993

AN INVITATION TO COMMENT

The Law Reform Commission of Nova Scotia is pleased to announce the release of its Discussion Paper:

JURIES IN NOVA SCOTIA

This Discussion Paper proposes potential reforms which will help ensure that juries, which have a fundamental role in the justice system in Canada, operate fairly and efficiently for all Nova Scotians. According to Dr. McConnell, the Executive Director:

"The project arose out of a concern that the way in which juries were chosen had the effect of narrowing the range of jury members to particular groups. The Commission was also concerned that although the right to a jury is in many cases guaranteed under the Charter, and participation as a juror can provide an important avenue for people from all communities in Nova Scotia to participate in shaping the social and legal values of the society, many people were not taking this opportunity. The Commission's Discussion Paper considers some of the reasons why this might occur. These include issues such as financial barriers and lack of information, issues of inclusion, as well as the range of exclusions and exemptions. The jury system in criminal cases is regulated by both the federal and provincial governments, but the province has sole control over the initial selection process which provides the pool of people from which jury is finally drawn. The province has complete authority over juries in civil cases. Both of these are important areas of responsibility which, in criminal cases, can have a large impact on the final make-up of the jury. Reform of the jury system has recently been under extensive review in other provinces and territories and by the federal government."

Some of the questions raised in this Discussion Paper include:

Are jurors initially drawn from as wide a base as possible? Is the process as random as possible? Are the exclusions in the *Juries Act* - the list of groups of people who need not serve on juries - the appropriate ones? Should changes be made to the compensation paid to jurors? Should there be changes to the rules about juries in civil matters? For example, juries are available in many civil (non-criminal) cases in Nova Scotia. There have been questions raised in other provinces about the cost of providing this service to decide private disputes between citizens where the state is not directly involved.

The Law Reform Commission has concluded that 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. There should be changes to the *Juries Act* to try to ensure that the jury selection procedures do not have the effect of arbitrarily excluding members of any group. The jury selection process should be evaluated to ensure that it is as inclusive and as random as possible.

To help achieve this goal, the majority of Commissioners have developed a number of suggestions and are seeking advice from the public as to whether these are appropriate areas for change.

Attached to the Press Release is a summary of the Discussion Paper which outlines these specific suggestions. It is available also in the French and Mi'kmaq languages.

Copies of the Discussion Paper are available free of charge and can be ordered by telephone from the Law Reform Commission of Nova Scotia at 423-2633.

The Law Reform Commission of Nova Scotia is an independent Commission and receives support for its work from the Law Foundation of Nova Scotia and the Nova Scotia Department of Justice.

For more information please call either:

**Dr. M.L. McConnell, Executive Director
or A. Jackman, Legal Research Officer
Law Reform Commission of Nova Scotia
8th Floor, Garrison Place
1526 Dresden Row
Halifax, Nova Scotia
B2V 2C5
Telephone: 423-2633
Fax: 423-0222**

A DISCUSSION PAPER

JURIES

in Nova Scotia

Law Reform Commission of Nova Scotia
May 1993

The Law Reform Commission of Nova Scotia was established by the Government of Nova Scotia under the *Law Reform Commission Act*, in February 1991.

The Commissioners are:

William Charles, Q.C., President
Ronald Culley, Q.C.
Justice John Davison
Beverley Johnson, M.S.W.
Dawna Ring, LL.B.

Dr. Moira McConnell is Executive Director to the Commission.

Anne Jackman, LL.B., is Legal Research Officer to the Commission. Dr. Stephen Coughlan, Associate Director, Health Law Institute, Dalhousie University is the legal research consultant for the project on the reform of the jury system in Nova Scotia.

The Commission offices are located at 8th Floor, Garrison Place, 1526 Dresden Row, Halifax, Nova Scotia, B3J 2K2. The telephone number is 423-2633 and the Fax Number is 423-0222.

The Law Reform Commission receives funding from the Government of Nova Scotia and the Law Foundation of Nova Scotia. The Commission gratefully acknowledges this financial support in carrying out its research projects.

Canadian Cataloguing in Publication Data:

Law Reform Commission of Nova Scotia
Discussion Paper on Juries in Nova Scotia, May 1993

JURIES IN NOVA SCOTIA

A DISCUSSION PAPER

Invitation to Comment

Consistent with other projects undertaken by the Law Reform Commission of Nova Scotia, the Commission is releasing this Discussion Paper on Juries in Nova Scotia with the objective of inviting comment and criticism regarding the suggestions and views of the Commission thus far. This Discussion Paper is not a Final Report nor does it represent the final views of the Commission. This Discussion Paper is designed to promote discussion and public participation in the work of the Commission. With this Discussion Paper, the Commission has attempted, as much as possible, to describe the legal system and laws in a way that can be understood by the larger non-legal Nova Scotian community. Criticism and comment from Nova Scotians will assist the Commission in preparing a Final Report to the Minister of Justice on how the law regarding the operation of juries in Nova Scotia can be reformed to ensure that the justice system operates fairly and efficiently for all Nova Scotians. In order to be considered prior to the development of the Final Report, written submissions should be received by July 30th, 1993.

Juries Project
Law Reform Commission of Nova Scotia
8th Floor, Garrison Place
1526 Dresden Row
Halifax, Nova Scotia
B3J 2K2

Telephone: 423-2633
Fax: 423-0222

TABLE OF CONTENTS

	<i>Page</i>
English Summary	
French Summary	
Mi'kmaw Summary	
I. Introduction	1
II. The Jury System	2
1. What is a Jury?	2
2. The Jury in Nova Scotia	3
i) Federal and Provincial Governments	3
ii) The Operation of the Jury System in Nova Scotia Today	5
3. Chart on How a Jury is Selected	6
III. Suggestions For Reform	7
1. Should the <i>Juries Act</i> and system as it operates in Nova Scotia be reformed?	7
2. How should the concern that criminal juries are not representative of all Nova Scotians be dealt with?	7
3. What sources should be used to assemble the Jury List?	10
4. How can Jury selection procedures be made more random?	11
5. The <i>Juries Act</i> currently excludes some people from Jury service. Should those exclusions be changed in any way?	12
6. Should there be any change to the fees paid to Jurors?	16
7. Should Juries continue to be available in civil cases in Nova Scotia, and if so, on what basis?	18
8. Should there be changes to the <i>Juries Act</i> to reflect the changes made to the court structure in Nova Scotia?	19
IV. Conclusions	20
V. Summary of Proposed Recommendations	21

LAW REFORM COMMISSION OF NOVA SCOTIA
DISCUSSION PAPER ON JURIES IN NOVA SCOTIA

SUMMARY

In 1992 the Law Reform Commission decided to examine the way the jury system operates in Nova Scotia to see what changes were needed to ensure that it operated in a way that was fair and efficient. The Commission was responding to a concern expressed by judges and other people in the community that the way that juries were chosen was narrowing the range of jury members to particular groups. There was a concern that members of disadvantaged, socially isolated and lower-income groups (groups which have a high number of people of colour or immigrant community members) might not be on juries as often as they should. This meant that, intentionally or not, the system excludes some people in the community from participation in the legal system. The low level of fees paid to jurors for their time can contribute to this problem since many people simply cannot afford to be on a jury because of the loss of wages for the time spent on the jury. Overall, it means that not all groups are able to participate in setting the values of the justice system by serving as jurors. Since the right to be tried by a jury in many criminal cases is a constitutional right in Canada this result is undesirable.

A number of areas are worth looking at in the jury selection process. Are jurors initially drawn from as wide a base as possible? Is the process as random as possible? Are the exclusions in the *Juries Act* - the list of groups of people who need not serve on juries - the appropriate ones? Should changes be made to the compensation paid to jurors? Should there be changes to the rules about juries in civil matters? For example, juries are available in many civil (non-criminal) cases in Nova Scotia. There have been questions raised in other provinces about the cost of providing this service to decide private disputes between citizens where the state is not directly involved.

Reform of the jury system has recently been under extensive review in other provinces and territories and by the federal government. The jury system is a matter for which both the provincial, territorial and federal governments have responsibility. The provinces and territories have authority over the initial selection process for juries in criminal cases and complete authority over juries in civil cases. Both of these are important areas of responsibility which, in criminal cases, can have a large impact on the final make-up of the jury.

The Commission believes that 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. There should be changes to the *Juries Act* to try to ensure that the jury selection procedures do not have the effect of arbitrarily excluding members of any group. The jury selection process should be evaluated to ensure that it is as inclusive and as random as possible.

To achieve this goal, the majority of Commissioners have developed the following suggestions:

- * A law should be passed that the Jury List will be chosen from source lists which, as far as possible, reflect the entire adult population of the province. This approach, rather than relying on only one source such as the electoral list, will help ensure that everyone is initially included in the random selection process.
- * A law should be passed which allows people to register as volunteers for jury service. In order to avoid biased juries, it will be necessary to make sure that people cannot volunteer for a specific case, but, everyone should have the right to be sure that their name is included at the start of the process.
- * The jury selection procedures should be performed by computer as much as possible. This step will help ensure that the procedures are truly random.

Once the Jury List is chosen from these broad and inclusive sources, some people should be excluded from the list. Most of these exclusions will be based on occupation, although other exclusions will also be used. For example:

- * A law should be passed which makes a few additional exclusions. Wardens and employees of correctional institutions, and probation officers should be disqualified from jury service.
- * Some of the exclusions that now exist should be removed.
- * Landed immigrants should be eligible to serve on juries.
- * Jurors should not have to have resided in the jury district for twelve months.
- * Armed forces personnel, doctors, dentists and members of the clergy should not be automatically exempt from jury service.
- * The Civil Procedure Rules should no longer single out pregnant women for exemptions.
- * The general power of the court to grant exemptions should be more clearly defined, either through the law itself or through

guidelines to the judges.

- * The *Juries Act* does not say that a juror must be able to understand the language in which the trial will take place. A law stating this should be included. However, the Commission seeks the views of the public on whether an exception should be made for Aboriginal people, so that people who speak only an Aboriginal language should be allowed to serve on juries where an Aboriginal person is on trial and the juror is able to understand the proceedings.
- * There should be changes to the juror fee system. The current practice is to give everyone summoned for jury service, whether they are selected or not, \$15.00 a day.
- * The fees paid in criminal cases should vary with the demands made on the juror's time. The Commission calls for public consultation and research to determine an appropriate compensation scheme for jurors, which would involve determining how many jurors continue to be paid while on a jury. The majority of the Commission suggests that employers should be required to pay an employee's wages while that employee is a juror, but should have an opportunity to apply to be re-compensated if that creates undue hardship. An employer should not be able to penalize an employee who is selected as a juror.
- * There should be changes regarding juries for civil cases. For example, the rules for when a jury is available are made by judges but should be made part of the *Juries Act*. Writing the rules will not change the current practice, but it will make the rules easier to find. In addition, the Commission seeks the views of the public on whether automatic access to civil juries should be more restricted.
- * Changes are needed to make the *Juries Act* consistent with recent reforms to court structure. In particular, we need to consider 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.

COMMISSION DE RÉFORME DU DROIT DE LA NOUVELLE-ÉCOSSE
DOCUMENT DE RÉFLEXION SUR LES JURYS EN NOUVELLE-ÉCOSSE

SOMMAIRE

En 1992, la Commission de réforme du droit entreprit d'étudier le système de jurys en Nouvelle-Écosse et les changements qui devraient y être apportés afin de s'assurer qu'il fonctionne de façon équitable et efficace. La Commission réagissait ainsi aux inquiétudes de juges et autres membres de la communauté à l'effet que la façon dont les jurys étaient constitués limitait le choix des jurés(ées) à des groupes particuliers. Il semble, en effet, que les membres de groupes défavorisés, socialement tenus à l'écart et à faible revenu (ces groupes sont formés d'un nombre disproportionné de personnes de couleur et d'immigrants(es)) ne se retrouvent pas sur le banc des jurés(ées) aussi souvent qu'ils devraient l'être. De façon intentionnelle ou non, le processus de sélection des jurés(ées) empêche donc certains membres de la communauté de participer au processus judiciaire. La rémunération minimale payée aux jurés(ées) pour leur temps, contribue à ce problème puisqu'un grand nombre de personnes ne peuvent simplement pas se permettre la perte de salaire découlant de l'exercice de leur devoir de juré(e). Bref, les différents groupes composant le tissu social n'ont pas tous la chance de participer, à titre de juré(ée), à l'élaboration des valeurs qui sous-tendent le système légal. Cette situation est intolérable puisque dans plusieurs cas, en matière criminelle, le droit d'être jugé par un jury est un droit garanti par la Charte canadienne des droits et libertés.

Certains aspects du processus de sélection des membres du jury revêtent une importance particulière. Les jurés(ées) sont-ils(elles) choisis(ies) à partir de la catégorie la plus étendue possible? Les jurés(ées) sont-ils(elles) choisis(ies) au hasard? Les exemptions prévues à la Loi sur les jurys (la liste des catégories de personnes n'ayant pas à servir de juré(ée)) sont-elles appropriées? La rémunération des jurés(ées) devrait-elle être modifiée? Des changements devraient-ils être apportés aux règles concernant les jurys en matière civile? Par exemple, les procès par jury sont permis en Nouvelle-Écosse en matière civile (non criminelle). Dans d'autres provinces, la question des coûts associés à l'octroi de ce service pour des litiges de nature purement privée entre individus et dans lesquels l'Etat n'est nullement impliqué, a fait l'objet de débats.

¹Traduit de l'anglais par Me Nathalie Bernard, LL.B (Université Laval), LL.M (Dalhousie University).

La réforme des procès par jury a récemment été l'objet de sérieuses études dans d'autres provinces et territoires de même que par le gouvernement fédéral. Les gouvernements provinciaux, les territoires, de même que le gouvernement fédéral ont tous compétence en ce qui a trait au système des procès par jury. La compétence des provinces et des territoires porte sur le processus initial de sélection des jurés(ées) en matière criminelle alors qu'en matière civile, leur compétence est totale. Ces champs de compétence s'avèrent très importants, surtout en matière criminelle, puisqu'ils peuvent influencer considérablement la composition finale des jurys.

La Commission croit que tant la Loi sur les jurys que l'application du processus des procès par jury devraient être modifiés tout en tenant compte des limites constitutionnelles à la compétence de la province. Ainsi, des modifications devraient être apportées à la Loi sur les jurys afin d'éliminer la possibilité que le processus de sélection des jurés(ées) exclut de façon arbitraire des personnes appartenant à certains groupes. Ce processus de sélection devrait faire l'objet d'un examen minutieux afin de s'assurer que la sélection se fasse réellement au hasard et englobe tous les différents groupes.

Dans le but d'atteindre cet objectif, la majorité des Commissaires ont élaboré les suggestions énumérées ci-dessous:

- * Une loi devrait être adoptée qui déclarerait que la liste des membres composant le jury sera dressée à partir de listes ressources reflétant le plus possible la totalité de la population adulte de la province.
- * Une loi permettant aux citoyens de se porter volontaire à titre de juré(ée) devrait être adoptée. Afin d'éliminer tout risque de partialité, il faudrait faire en sorte qu'une personne ne puisse pas se porter volontaire pour un dossier en particulier. Bref, chaque personne devrait avoir le droit d'être incluse dans la liste des jurés(ées) potentiels(les) dès le tout début du processus.
- * Le processus de sélection du jury devrait se faire le plus possible par ordinateur. Ceci contribuera à garantir que la procédure est réellement basée sur le hasard.

Une fois la liste des jurés(ées) potentiels(les) dressée, à partir de ces sources des plus vastes et complètes, certaines personnes devront être exclues de cette liste. La plupart de ces exemptions sont basées sur le métier ou la profession de la personne. Néanmoins, d'autres types d'exemptions existent et sont énumérées ci-dessous:

- * Une loi ajoutant des catégories d'exemptions, devrait être adoptée. Ainsi, les directeurs(trices) et les employés(ées) de centres correctionnels de même que les agents de probation devraient être disqualifiés.

- * Certaines des exemptions qui existent présentement devraient être abrogées.
- * Les immigrants ayant obtenu le droit d'établissement devraient pouvoir servir à titre de juré(ée).
- * Une période de résidence minimale de douze mois dans le district du jury ne devrait pas être un pré-requis.
- * Les membres des Forces Armées, les médecins, les dentistes et les membres du clergé ne devraient pas être automatiquement exempts.
- * Le Code de procédure civile ne devrait plus prévoir d'exemption spécifique pour les femmes enceintes.
- * Le pouvoir des tribunaux d'octroyer ces exemptions devrait être défini plus clairement, soit par le biais d'une loi, soit par le biais de directives à l'intention des juges.
- * La Loi sur les jurys ne prévoit pas qu'un(e) juré(ée) doive pouvoir comprendre la langue dans laquelle le procès se déroulera. Une disposition à cette effet devrait être incluse. Néanmoins, la Commission invite le public à lui faire part de son opinion quant à une exception qui pourrait être faite pour les membres des peuples autochtones. En effet, les personnes qui ne parlent qu'une langue autochtone devraient pouvoir servir à titre de juré(ée) dans le cas où la personne jugée est un(e) autre autochtone et que le ou la juré(ée) comprend la langue dans laquelle le procès se déroulera.
- * Le système de rémunération des jurés(ées) devrait être modifié. La pratique courante est de payer des frais de \$15.00 par jour à toute personne assignée à comparaître à titre de juré(ée) potentiel(le), même si cette personne n'est pas choisie.
- * Les frais payés en matière criminelle devraient varier en fonction du temps que le ou la juré(ée) aura dû consacrer au dossier. La Commission propose le recours à des consultations publiques de même qu'à des études afin de déterminer la rémunération appropriée des jurés(ées). Ceci impliquerait la détermination du nombre de jurés(ées) qui continueront à être payés(ées) alors qu'ils(elles) servent à titre de juré(ée). La majorité des Commissaires suggère que les employeurs soient obligés de payer le salaire d'un(e) employé(ée) qui sert à titre de juré(ée). L'employeur pourrait néanmoins faire une demande de remboursement dans le cas où cela lui causerait un fardeau financier

considérable. De plus, un employeur ne devrait pas pouvoir pénaliser un(e) employé(ée) qui a été choisi(e) comme juré(ée).

- * Des changements devraient être apportés relativement à l'utilisation des jurys en matière civile. Par exemple, les règles concernant les cas donnant ouverture à l'utilisation des jurys établies par les juges devraient être incorporées à la Loi sur les jurys. Consacrer ces règles par écrit ne modifiera pas la pratique actuelle mais rendra ces règles plus faciles à trouver. En outre, la Commission invite le public à lui faire part de son opinion sur la question de restreindre l'accès automatique aux procès par jury en matière civile.

- * La Loi sur les jurys devra être amendée afin de s'harmoniser avec les récentes réformes touchant la structure des tribunaux. Plus particulièrement, les districts de jurys devront être définis à nouveau afin de s'assurer que les dix-huit districts de jurys prévus par la Loi sur les jurys sont compatibles avec la création de quatre nouveaux districts judiciaires.

LAW REFORM KMISM WJIT NOPA SKO'SIA

ULA WI'KATIKN WESKU'TK JU'RI'L WJIT NOPA SKO'SIA

1992EK Law Reform Kmisnaq kisita'sultipnik ankaptmnew ju'ri sistm ta'n tel-pmiaq Nopa Sko'sia aq ta'n koqoey nuta'q kiwa'ska'tasin kulaman koqqaja'teketew aq wl-pmiatew. Kmisnaq kekinua'takwi'tipni jaja aq ktiki mimajuinu' mu weltenukw pasik mkniknk mimajuinu'k meknujuk ju'ri naspultinew. Tlita'suaqtip eule'juanu'k mimajuinu'k tepkiso'ltijik aq eul-kisitu'tijik aq pikwelkik ta'n piluakutmu'tijik jiptuk ma' naspulti'kw ju'ri tetuji-kaqi'sk aq ta'n tel-nuta'q naspultinew. Na na u't stage teluekel eykik mimajuinu'k ta'n mu asite'lmajik apoqnmattmnew teplutaqney ta'n tli-wl-pmiass. Tela'tekek elt euli-apankitujik ju'ri aq togo pikwelk mimajuinu' suliewey weji-n'toq ta'n teli pkit-naspjij ju'ri. Teluemk na nike' mu e'tasiw piluakutmu'tijik kisi wli-apoqnmattmi'tikw menaqa teplutaqney ta'n tli-apoqnmattmi'tiss kis-naspulti'tij ju'ri. Teli-pkije'k teltek teplutaqn kisi klutmn wen ju'ri ilsumkun wjit milamu'kl o'pla'taqnn mu weli ankamkutnukw nike' kiskuk ta'n tela'sik koqoey.

Pikwelji'jk nuta'q ankaptasin ta'n teli-mknasik ju'ri. Ju'ri aq msit tami weji-mknujuk kiwkt'o'qiw? Teltek kapaqsi-mknuksinew? Ta'n tel-wikasik "Juries Act" teluek tepkiseyute'wk mimajuinu'k mu nuta'nukw naspultinew ju'ri - tetpaqtek? Nuta'q kiwa'ska'tasin ta'n tel-apankituj ju'ri aq. Nuta'q kiwa'ska'tasin ta'n teli-mknuj ju'ri aq sivil ma'trr wesku'tasik. Stage nike' ju'ri'l kiskattekl wjit sivil ke'sl Nopa Sko'sia. Ktikl pra'vnsl mu awsam-wlte'tmi'tikw ta'n teli-ksika'tuek na nekmowey wjit pasik mimajuinu'k o'pla'matijik togo mu ke'sl ta'n pra'vnsl naspitl.

Ktikl pra'vnsl, teriori'l aq ma'w fetrl kapmnt nike' kejikawike'l atel poqji ma'muni-ankaptmi'tij ta'n tli-iljo'qwa'tasiss ju'ri sistm. Wtlukwaqnuow na nekmow lukwatmnew kulaman wl-lukwetew. Pravnsal aq teritori'l alsusuti kekunmi'tij tmk ta'n tujiw meknasik ju'ri aq wajui-alsusuti kekunmi'tij wjit sivil ke'sl. Kitk u't kepme'kl lukwaqnn aq, krimnl ke'siktuk ela'tekemk, kisa'tuss ta'n tliktitew aq ta'n wen naspitew ju'ri.

Kmisnaq teli-ktlamsitmi'tij kitk "Juries Act" aq ta'n tel-pmiaq ju'ri sistm nuta'q lukwasin kulaman pra'vns alsuttew ta'n tel-pmiaq teplutaqney. Nuta'q elt il-wi'kasin "Juries Act" kulaman ma' asite'tasinukw pasik mkniknk e'uksinew togo ktikik mimajuinu'k tepkiseyüksinew. Nuta'q menaga iloqaptasin ta'n ju'riag teli-mknuj kulaman msit wen kisi wiaqi-naspitew aq ma' keknue'nukw ta'n teli-mknuj.

We'kayiw kis-tla'sik u't suel msit kmisnraq kisutmi'titl ula pem-wikasikl:

- * Nuta'q teplutaqn sapa'tasin teluek ju'riag ewikasultijik ta'n tepipuna'tijik msit tami wtitagne'wasultinew ula pra'vns. Na tla'sik ma' pasik lita'suatmumikl wisunn ta'n ewikasikl wi'katikniktuk wjit pasik voteultite'wk katu msit wen ta'n tepipuna't tetew wtuisunm ta'n kisi wji-mknaten wjit ju'ri naspin.
- * Nuta'q teplutaqn sapa'tasin ta'n asite'lmaji mimajuinu' wi'kmnew wtuisnmual ktu'-naspulti'tij ju'ri kulaman koqqwaja'laten pemi-ilsumute'wk. Nuta'tew mu asite'lmuksinew mimajuinu'k nas-wi'kusultinew wjit keknue'kl ke'sl katu me' ki'kajiw tltetew asite'lmuksin ta'n pasik wen wtuisunm kisi wi'kmn ta'n tujiw atel poqjiaq koqoey.
- * Ta'n tett kisi e'ut kampiu'tr na e'waten wjit ta'n teli-mknaji ju'ria. Na tla'sik koqoey na kotlewe'tew kapaqsi-mknuksinew ju'riag.

Ne'wt list kisitasik wisunn ewikasikl msit tami wejita'ql ta'n kitu'-naspultijik ju'ri, we'kayiw kaqisi-milakutmu'tijik mimajuinu'k na miamuj i'taqq mn-wi'katen listiktuk. Wji-mn-wi'katen wen wjit ta'n telamu'k wtlukwaqn, katu i'tal ktikl me' koqoe'l weji mn-wi'kut wen. Stage nike':

- * Nuta'q teplutaqn sapa'tasin teluek me' atelkn ta'n koqoe'l ta'n wjit wji-mn-wi'katen wen. Wartnaq aq mimajuinu'k ta'n etl-lukuti'titl laplusunn aq prope'sn a'ffiraq nuta'tew mn-wi'kuksinew listiktuk wjit ju'riag.

- * Ta'n nike' ewikasikl wji-mn-wi'kaness wen, aunaqa kas-wikasin.
- * Atel pisk-wi'kute'wk mimajuinu'k Kanata asite'lmuksinew wtuisnmual kisi nasten listiktuk wjit ju'riag.
- * Ju'riag mu nuta'n wen miamuj ki's newtipunqek wikin kikjiw ta'n etliag ke's.
- * Sma'kniseutiag, mal'pale'wijik, nuji-mnapito'taqatijik, pa'tlia'sk, ministlaq kisna aniapsuinu'k tlten mu skmtuk kisi mn-wi'kusin ju'ri naspin.
- * Mu tepkiseyuksinew eskmaqtma'tijik e'pijik stage teltek "civil procedure rulesiktuk" skmtuk mn-wi'kuksinew.
- * Nuta'tew me' naji wl-wikasin ta'n kort teli-alsutk iknmatmn mn-wi'kusuti -- l'pa teplutaqniktuk wikasin kisna pasik tepkis-wikasin ta'n jajaq majulkwattaq.
- * "Juries Act" mu teluenukw ketloqo jurir miamuj nsitmn ta'n teken tli'suti wekasitew wjit trial. Miamuj wiaqi-wikasik na teplutaqn teluek. Katu a, kmisnaq kitu'-nutua'tiji mimajuinu' tllite'tmnew tepkisa'tasin net nekmowey wjit l'nu'k kulaman mimajuinu'k ta'n nestmu'tijik pasik l'nuiktuk asite'lmaten naspultinew ju'ri ta'n l'nu kitu' tli-ilsumut aq ketloqo nsitmn ta'n koqoey teliaq.
- * Miamuj kiwa'sk-wikasik ta'n teli apankituj ju'riag. Ta'n teltek nike' ta'n wen wikumut at-naspin ju'ri ketloqo mknuj kisna moqwe apankitut newtiskekaikl jel na'n newtikiskik.
- * Nuta'q pilui-apankituksinew wjit krimnl ke'sl ta'n kaqi'sikiskik wesua'tuaj ju'rial. Kmisnaq kwilutmi'tij mimajuinu'k kinua'tuksinew aq pipanimuksinew ta'n tli-tetpaqi apankituaness ju'riag aq miamuj wji-kjijituten ta'n te'sijik ju'riag siawi-apankituaten teli pkit-naspultijik ju'ri. Suel msit kmisnaq telite'tmi'tij alsusitaq miamuj apankituanew elukowkwi'tiji ke'sk naspulti'tij ju'ri katu iknmuksinew kne'ke'l kisi apaji kwilutmnew sulieweimuow ta'n teli-ksika'takwi'tip apankitua'tijek elukowkwi'tiji awsami-mtua'lukwi'tij. Nuta'q tlten alsusit wen mu wji-askaiwan mimajuinu'l elukowtl wjit ta'n teli-mknuksilitl ju'ri naspilin.

- * Nuta'q kiwa'sk-wikasin koqoey wjit ju'riag wjit sivil ke'sl. Stage nika' jajaq alsutmi'tij ta'n tujiw ju'riag miamuj kiskatpultijik lukutineu katu aunaqa nuta'q wiaqi wikasin "Juries Actiktuk". Ma' istu'-pmianukw koqoey tlia' wikasik l'pa ru'lsi katu naji-nqamasiatal we'jitumk. Jel app mejit, kmisnaq kwilutmi'tij apogmasuti elita'suala'tiji mimajuinu' me' kijka' aji sekkittqa'tasin ta'n teli-nqamasi-msnik wen sivil ju'ri.

- * Kiwa'sk-wikasikl nuta'ten kulaman "Juries Act" lati'titew ta'n kejikawike'l kisi ila'tasikip ta'n teli miltaqne'wasik kort. Mejit app, miamuj ilite'tmu'kw ta'n tli-ili-niktua'tuness ta'n ju'riag i' wji-mknuj kulaman 18 te'sikl kjikanji'jl ewikasikl "Juries Actiktuk" tetpaqi-niktua'tuten miso'qo pasik newkl districtl i'k.

Translation provided by Bernie Francis, Sydney, Nova Scotia

I. Introduction

In Canada, the right of a person charged with a serious criminal offence to have their guilt decided by other people in the community is regarded as so fundamental to our system of justice that it is guaranteed in the *Canadian Constitution*.² The name given to this group of people who are called upon to judge another's behaviour as part of their contribution to the life of the community is a "jury". A jury is asked to make decisions based on their assessment of the facts of the case after the law is explained to them by a judge. Most juries are used for criminal cases, but the right to have a case decided by a jury is also available in non-criminal, or "civil" cases in Nova Scotia. This Discussion Paper is concerned primarily with the use of juries in criminal matters, since they are far more common, but will also deal with civil juries.

The right to a jury and many aspects of the jury system are controlled under the *Constitution* of Canada by the federal government, as part of its power over criminal law. However, the provinces and territories of Canada have responsibility for the administration of justice, which means that they also have responsibility for regulating the jury system. In Nova Scotia, the *Juries Act*³ is the law which deals with this responsibility. According to this law, the Province of Nova Scotia is responsible for collecting a list of names of people who can be required to serve on a jury, and also for ensuring that jurors are paid, in part, for their time.

As the courts have become busier and as people have had less time to play a role in the justice system by acting as jurors, the jury system has become time consuming for the courts and expensive for government and taxpayers. More importantly, it appears that many people no longer regard jury duty as a privilege, but regard it as an obligation which is costly, inconvenient, and to be avoided. (This attitude is particularly unfortunate, because surveys have regularly shown that jurors found the experience interesting and worthwhile, and were pleased to have been involved.)⁴ In addition, many people feel that the juries are not representative of the entire community but rather reflect only a small segment of the people who make up Nova Scotia. This has given rise to a concern that the values, morals

² s. 11 Any person charged with an offence has the right
(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(*Charter of Rights, Constitution Act, 1982*)

s. 471 Except where otherwise expressly provided by law, every accused who is charged with an offence shall be tried by a court composed of a judge and jury.

(*Criminal Code of Canada*).

³ R.S.N.S. 1989, c. 242.

⁴ See Law Reform Commission of Canada, *Studies on the Jury*, (Ottawa: L.R.C.C., 1979); New South Wales Law Reform Commission, *The Jury in a Criminal Trial: Empirical Studies*, (New South Wales: The Commission, 1986); Ministry of Attorney General, Province of British Columbia, *Jury Selection: A Right, A Duty, & A Privilege*, (Vancouver: Ministry of the Attorney General, 1992).

and attitudes of only a small group of people are shaping the way in which justice is provided in Nova Scotia. It can also create the impression that some people in Nova Scotia, particularly people from ethnic communities, have no role in setting the standards for what is just and fair in society by serving as jurors. Costs and delays in the jury system as well as the belief that the jury system may not be completely fair all undermine the credibility of the legal system.

II. The Jury System

1. What is a Jury?

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 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. 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 their 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 some 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. This view is not uniformly held, however, and some feel that "self-informing juries" may have been the theory, but not the practice. Whatever the original theory might have been, as early as the fifteenth century juries were being described as "a body of impartial men who came into court with an open mind".⁵

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 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

⁵ J.B. Post, "Jury Lists and Juries in the Late Fourteenth Century", in J.S. Cockburn and Thomas A. Green (ed.) *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*, ed. S.B. Chimes (Cambridge, 1949), chap. 25.

society. 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 large numbers of people from participating in shaping the values enshrined in the legal system. The people most excluded 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.⁶ 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 excluded or disqualified has varied - women now appear on juries⁷, and the requirement that the juror own property was removed in 1985 - but the broad outline remains the same.

It can be seen from this brief outline that "the jury" can take a number of forms. It has been suggested that "its invention by a lawgiver is inconceivable. We are used to it and know that it works; if we were not, we should say that it embodies a ridiculous and impractical idea".⁸ From a body that was intended to have special knowledge of the facts, it has evolved to one where special knowledge is a disqualification. Initially of quite restricted membership, it now tries to include virtually everyone. What should matter in any assessment of the jury system, therefore, is the question of what role is most useful today in Nova Scotia. The key idea is that individuals in a community should take an active role in applying the law to others in their community.

2. The Jury in Nova Scotia

i) Federal and Provincial Governments

Constitutional power over the jury system is divided between the federal and provincial governments. Provincial governments have complete authority concerning juries in civil (non-criminal) cases but juries in criminal cases are governed by both levels of government. This Discussion Paper will deal mainly with juries in criminal law cases, since they are by far the most common, but there is relatively little difference between the two procedures.

⁶ 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 pp. 38-39.

⁷ 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.).

⁸ Lord Devlin, *Trial By Jury* (London: Sweet & Maxwell, Limited, 1988), p. 4.

Broadly speaking, the dividing line between federal and provincial responsibility is the point at which the jury panel is in the court at the start of a criminal term. The process by which the jury panel is assembled is a matter of provincial jurisdiction. The *Juries Act*, a provincial law, specifies that the list of people to be considered for jury duty will be selected from federal, provincial, and municipal electoral lists, and determines the size of the jury list in each judicial district. Grounds for disqualification and exemption - that is, people who should be left off or removed from the jury list - are set out in the *Juries Act*. The *Criminal Code*, a federal law, also attaches some restrictions to the grounds for jury service, although these are used to challenge a juror in court. These grounds are not qualifications, because the juror could still serve if not challenged. Although the process by which the panel is assembled is governed by provincial law, the *Code* provides that the panel can be challenged on the ground of "partiality, fraud or wilful misconduct on the part of the sheriff or other officer by whom the panel was returned".⁹ The *Juries Act* also sets out the compensation to be paid to those who appear for jury duty and creates a \$200.00 fine for persons who fail to appear.

The jury selection process involves a number of steps. Every jury district - that is, county - conducts its own separate jury selection process. First, the jury pool or "jury list" is assembled - from electoral rolls, a large list of people qualified to serve on juries is drawn up. From that jury list, "jury panels" are selected at the start of each Supreme Court criminal term: notices are sent to a random collection of people on the jury list, who must appear in court for jury selection. Those called for a panel can apply to be excused, in some cases in advance, in others to the judge upon appearance in court. In court, the court clerk selects names randomly from the panel, and each of those potential jurors is either accepted or challenged by the parties, until a jury of twelve is assembled. A challenge can be made either peremptorily or for cause.

Once the panel is assembled in court, matters largely fall within federal jurisdiction in criminal cases. Under recent legislation made necessary when the Supreme Court of Canada overturned the old jury selection law, the Crown and the defence now have an equal number of peremptory challenges. They take turns being the first to indicate whether they wish to challenge a particular juror. Each side has 12 peremptory challenges but can make any number of challenges for cause. This process goes on until a jury of 12 people has been chosen. Federal law also governs procedures for discharging a juror and for the secrecy of jury deliberations.

In civil cases (private disputes between individuals or companies) a jury need only consist of seven jurors. Also, although a criminal jury must be unanimous, a civil jury need not be and after four hours, five members can give a decision. The *Juries Act* gives parties only three

⁹ *Criminal Code*, s. 629.

peremptory challenges in civil matters.¹⁰

This Discussion Paper is only concerned with areas of the jury system within provincial control: that is, with who should serve on juries, how jury panels should be assembled, what fees jurors should be paid, and when civil juries should be available.

ii) The Operation of the Jury System in Nova Scotia Today

The jury list for each district must be quite large to accommodate "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 attorney and the defence, a jury of twelve can still be created in a criminal case. To have that number of people present at the start of a session, enough notices must have been sent to allow for the people who will successfully seek exemptions, those whose notices cannot be delivered because they have moved, those who will simply fail to appear, and those who will be challenged in court. Further, the initial list must provide panels for every term where juries are required. All of this means that a large list of potential jurors is required.

According to the *Juries Act*, a jury list of 1200 names is to be drawn up in Halifax, and 300 names in other districts, though the Minister of Justice can authorise a longer list if necessary. Because of all the factors listed above, longer lists are routinely necessary. The most extreme case is Halifax, which currently draws up a list of 14,000 names annually. One of the major factors 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.

A variety of other factors affect how many names need to be on the jury list, primarily relating to the percentage of those summoned who will actually appear in court. One relevant factor is the return rate on 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. Further, some people called for a jury panel will seek exemptions in advance: in some districts between one-third and one-half of jurors ask to be excused. A few people simply fail to appear in court,¹¹ and somewhere between 10% and 25% of those appearing will seek exemptions from the judge. Depending on the district, it can be necessary to send notices to more than twice as many people as are actually needed in court to be sure that enough people are present for the jury selection process to take place.

¹⁰ The Civil Procedure Rules say that parties have four challenges. This inconsistency should be resolved by amending either the *Act* or the Rules.

¹¹ In the past, failures to appear have been investigated by the Sheriff's office but fines have not been imposed very often. The Commission's understanding is that judges are issuing fines more frequently now which seems to be a good course of action.

3.

HOW A JURY IS SELECTED

The People	The Process	The Questions to Ask
<p>■◇□□△■□◇◇■□■◇□□△■ □◇◇■□△□△◇■◇□□△■□◇ ◇■□□△■△□◇□△◇■◇□□△ □△■△□◇□△◇■◇□□△■□◇ ◇■□△□△◇■◇□□△■□◇◇■ □△◇□△◇◇■◇□□△■□◇◇■□ △□△◇■□△■□◇◇■□□△■△ □◇□△◇■◇□□△■□◇◇■□△ □△◇■◇□□△■□◇◇■□△◇□ △◇■◇□□△■□◇◇■□△□△◇</p>	<p>The entire popu- lation of Nova Scotia</p>	<p>Is the initial list inclusive enough? Is there a better way to ensure that everyone is included? Are groups systemically excluded?</p>
<p>Jury List ■□◇◇■□△□△◇■□△□△◇■ ◇□□△■□◇◇■□■◇□□△■□ ◇◇■□△□△◇■◇□□△■□◇◇ ■□□△■△□◇□△◇■◇□□△■ □◇◇■□△◇■◇□□△■□◇◇■ □△◇□△◇■◇□□△■□◇◇■□</p>	<p>The Jury List or "Pool" - an annual list for each county, randomly chosen - in Halifax, 14,000 names in 1992</p>	<p>Are selection procedures random?</p>
<p>Jury List (after exemptions) △□△◇■◇□□△■□◇◇■□◇■ □□△■△□◇□△◇■◇□□△■□ ◇◇■□△□△◇■◇□□△■□◇◇ ■□△◇□△◇■◇□□△■□◇◇■ □△□△◇■◇□□△■□◇◇■□■ ◇□□△■□◇◇</p>	<p>The Jury List after the exemptions and disqualifications in the Act are made</p>	<p>Are the right exemptions and disqualifications made in the Act?</p>
<p>Jury Panel ■□△□△◇■◇□□△■□◇◇■□ □△■△□◇□△◇■◇□□△■□◇ ◇■□△□△◇</p>	<p>A Jury Panel or "venire" - about 80-100 people from the jury list, called to court for jury selection when needed</p>	<p>Should the fees paid to jurors be changed?</p>
<p>Jury ■◇□□△■□◇◇■□△</p>	<p>A Jury - twelve people chosen from the Panel for a criminal case, or seven people for a civil dispute</p>	<p>In-court selection procedures are controlled by the Federal government, and are not addressed in this Discussion Paper.</p>

III. Suggestions For Reform

1. Should the *Juries Act* and system as it operates in Nova Scotia be reformed?

The Commission suggests some changes to the jury system. While the current situation is not a crisis, there is room for improvement.

Most importantly, the Commission believes that the question of which people in Nova Scotia are appearing as jurors must be reviewed. Juries are intended to serve everyone equally well but there are concerns that some members of the province are not receiving the benefits of a representative jury system. The Commission is concerned about the sources from which jury panels are initially gathered. Further, the list of people disqualified from jury service should be considered to see whether changes, in particular changes to exclude fewer people, can be made. Finally, the issues of the fees paid to jurors and the availability of juries in civil matters both deserve attention.

The Commission suggests:

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. How should the concern that criminal juries are not representative of all Nova Scotians be dealt with?

One of the more challenging issues in any discussion of the jury system involves the question of how to interpret in practice the idea that the person is to be tried by a jury of his or her "peers" in the community and that the jury is representative of the community as a whole. Both views involve very old notions. In the homogenous society in which they arose, there was very little difference between the two, but our society today is much more multicultural. Juries should be representative, but who should they represent - the accused or the community which is to judge the behaviour?

This concern relates especially to members of cultural, racial and ethnic groups. It is felt by some that a jury none of whose members share the racial or ethnic background of an accused, may be less able to fairly judge that person's behaviour: a notion consistent with the idea that a person should be tried by his or her peers. It may be difficult, for example, for a jury to decide how provoked a defendant in a criminal trial could have been by a racial slur, if none of those jury members share the race or ethnic background of the accused and have never been subject to this form of hatred. The concept of "how a reasonable person would behave in the circumstances", which matters in many criminal and

civil cases, is at least in part culturally-based. Unless juries are somehow able to take other viewpoints into account, members of certain ethnic and racial groups may be at a disadvantage.

It is far from obvious how to make sure that other viewpoints are represented and that all members of society are equally likely to be treated fairly. For example, do we mean by "a representative jury" that an Aboriginal defendant should be entitled to a jury exclusively of Aboriginal persons? Or do we mean that the participation of some Aboriginal persons on the jury should be guaranteed? Should every jury reflect, on a percentage basis, the population of the province, so that the presence of jurors from minority communities is guaranteed on every jury and not just on those where a member of a minority is on trial?

The problem becomes more difficult if the role of the jury is considered. It is understandable that people are concerned when no members of the jury share the race or ethnic origin of the accused. At the same time, however, people can be equally concerned if the jury members are all of the same race as the accused: where a white police officer is on trial for having shot a black youth, for example, and all the jurors are white. In either case there is a problem because it is not clear whether the jury is supposed to satisfy the accused or to satisfy the community. Similarly, in a case of a sexual assault by a man on a woman, where the issue of consent arises, it could be argued that a jury should be divided on gender lines. The jury is supposed to do both, but sometimes it does not seem to be possible to achieve these goals at the same time.

There seems to be two major approaches to trying to satisfy both goals in a multicultural society where the same legal system applies to all people:

1. There could be an attempt to ensure representative juries by using some type of quota system or other selection procedure that guarantees the presence of jurors from a variety of ethnic or other groups. In this case, there would have to be a decision as to whether every jury was structured in this way or whether particular steps would only be taken if the accused (or perhaps the victim) were from a minority group;
2. Another way to try to ensure a more representative jury is to try to make certain that the jury selection procedures are as random as possible, and that any systemic exclusions of particular groups are removed. ("systemic" describes cases where the way something has been organized has the *effect* of discriminating, whether it was intended or not.)

These two approaches, although they differ, are not inconsistent with each other. For example, if a "quota" or an affirmative action approach to increasing members of ethnic groups in the jury system was adopted it would be preferable to target the jury panels rather than juries themselves. If persons are placed on a jury because they share the ethnic background of the accused or the victim there is a very real danger that those jurors will be

perceived, both by themselves and by the community at large, as the representative of one side or the other. But the greatest merit of a jury is that it is a group of people all of whom are intended to be impartial and able to decide the case in as impartial a way as possible. Further, there is the difficult question of what groups should be entitled to benefit from any quota system. Should it be only racial and ethnic members of the communities? Indeed, should it even be all racial or ethnic groups? Should other characteristics such as income level, age, or gender or sexual orientation be taken into account?¹² Clearly these are difficult questions and while answers could be given, it is likely that any decision would in some way be arbitrary, or seen to be unfair in some circumstances.

These concerns, especially that of jury members being impartial, could be met to some extent if, instead of ensuring that members of under-represented groups were present on juries, it were made more certain that members of all groups were present on the jury panels from which the people who make up the jury are taken. In that event, using random selection techniques, it should be as possible for members of a variety of groups to be chosen for the jury as anyone else.

At present, it is doubtful that jury panels are as representative of the community as they should be. The *Marshall Inquiry* found that no Aboriginal person had, as of that time, ever served on a jury in Nova Scotia.¹³ No studies appear to have been done but responses indicate that some court officials believe that black Nova Scotians are also under-represented on jury panels. It is also thought by some people involved in the system that relatively few lower-income people are called for juries. The reasons that some groups are under-represented are not known, although it seems likely that it is related in large part to the list, from which juries are selected.

It is clear that some rules can have the unintended effect of excluding particular groups of people. Until 1985, for example, Nova Scotia juries were selected from the property assessment roll - that is, from the list of home-owners. That rule meant that about 85% of jurors were men,¹⁴ since most home-owners were men. Now that the voters' list has been substituted for the assessment roll, juries are approximately equally composed of men and women. This same change should also have increased the number of jurors from diverse groups, who were less likely to own homes: the use of the assessment roll would have excluded a very high percentage of Aboriginal persons, for example. Even so, the use of the

¹² The Ontario Court of Appeal has found that a jury selection procedure which intentionally excluded members of one sex from the jury was a violation of the *Charter*: see *R. v. Pizzacalla* (1991), 7 C.R. (4th) 294 (Ont.C.A.).

¹³ See S. Clark, *The Mi'kmaq and Criminal Justice in Nova Scotia* (Halifax: The Royal Commission of Inquiry into the Donald Marshall, Jr. Prosecution, 1989), p. 48.

¹⁴ See Law Reform Commission of Canada, *The Jury (Criminal Law Series Study Paper)* (Ottawa: L.R.C.C., 1979) at pp. 80-81.

electoral list can still have similar discriminatory effects which are considered in the discussion below regarding lists of juries.

Systemic exclusion of some people could also still exist within the jury system in other ways. Accordingly, to ensure that various groups are not under-represented on juries and jury panels, it is necessary to ensure that the selection process is as inclusive as possible. If the system is examined, and any potential sources of systemic exclusion of some groups are eliminated, then jury panels should become more representative of the community as a whole. As a result, members of minority groups will be more involved not just in judging members of their own community, but in judging all members of society. In addition to providing a sense of more fairness, this result will also send a message to society that all people in Nova Scotia are taking part in determining the values of the justice system.¹⁵

The Commission suggests:

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. What sources should be used to assemble the Jury List?

The jury "pool" (the list from which annual jury lists are chosen) should be as broad as possible. Ideally, it would contain the name of every person, or at least of every adult, in the jury district. Until 1985, the jury pool was the assessment roll, but in that year the electoral roll was substituted.

The electoral roll is not satisfactory as a jury pool because it becomes out of date as time passes. Further, the inaccuracies are not random. People who move frequently are less likely to be accurately listed, and so juries become more heavily-weighted toward homeowners: tenants and lower-income Nova Scotians are less likely to be summoned. Further, the electoral roll might not be complete to start with: although Nova Scotians do not have

¹⁵ Recently there has been an attempt in Nova Scotia to gather a French-speaking jury. That case will be the first French-language jury trial in Nova Scotia, and is due to provisions of the *Criminal Code*, now in force across Canada, which allow anyone charged with a crime to request that their trial take place either in either Official Language of Canada. In part, those provisions are a reflection of constitutional guarantees that every person is entitled to speak either official language in any court. Special jury selection procedures based on language, quite apart from existing statutory and constitutional guarantees, are not exactly the same as the situation of people in ethnic or racial minorities. This special jury is being struck on the single ground that if the trial is to take place in French, then the jurors must be able to comprehend French. There is no requirement, for example, that the jurors must be of French descent or have French as a first language - merely that they understand the language.

the primary responsibility to have themselves placed on voters' lists, enumerations are never complete and some people must take the initiative to have themselves included. It seems likely that those who feel less powerful, or feel that they have less of a stake in the province, may be less inclined to bother. Once again, this can mean that the jury list systematically excludes some groups.

Other source lists rather than the electoral roll all have drawbacks. Motor vehicle registration lists, telephone directories, and even the MSI list are all inaccurate or incomplete.

The appropriate course of action, therefore, is not to attempt to find a single comprehensive list to serve as the jury pool. Rather, the *Juries Act* should direct jury committees to choose the jury pool from lists which, as far as practicable, reflect the entire adult population of the province. The electoral roll would no doubt be one of those sources but it is the principle of choosing from all adult Nova Scotians which is important, and which should be in the *Juries Act*.

In addition, it should be possible for individuals to confirm that their name is among those from which the jury pool is chosen. An individual should not, of course, be able to volunteer for a particular jury or jury panel, or even for the jury list itself. However, where an individual's name is not included in the very large list (or pool) from which the jury pool will be randomly selected, he or she should have an opportunity to be placed on that list.

The Commission suggests:

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".

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.

4. How can Jury selection procedures be made more random?

Another way to guarantee that no systemic exclusions are made from the jury list, and therefore from jury panels, is to guarantee that once an inclusive jury list is created, jury panels are chosen in as random a way as possible. The goal should be to eliminate discretion and exclusion.

The production of jury lists is a task well-suited to computerization. This observation has already been made in a study of ways to expand the Justice Oriented Information System (JOIS) which found that one of the major requirements for automation was a way to deal

with "the extremely labour intensive Jury Management process".¹⁶ In Halifax, for example, a new list of 14,000 names must be typed each year, taking a month of one person's time. In addition, "it is common that a list of 300 names must be re-typed 5 or 6 times for a single court session".¹⁷ Finding a way to computerize the management of jury lists was ranked first in importance by the Prothonotary's Office, and by three of four Workshops looking at ways to apply computerization.¹⁸

In addition to these practical reasons, there are other advantages to computerizing the process. The Jury Committee, in choosing a smaller jury panel from the larger jury list, is supposed to "select by random choice" the names. Although the selection process is better served if the jury panel is chosen completely randomly, the word "choice" has sometimes been interpreted to give the jury committee members some discretion. In smaller districts the committee members are familiar with many of the names they are choosing from. Indeed, they are supposed to leave some names - those of lawyers, police officers, and others - off the list. As a result, jury committee members are in effect asked to use their personal knowledge to draw up jury lists, but are also asked to draw the lists up randomly. This is unfair to them, and also allows incorrect exclusions to be made unfairly or accidentally. Computerizing the process removes any scope for discretion, and so should be fairer.

The Commission suggests:

The Jury selection process should be performed by computer where possible.

5. The *Juries Act* currently excludes some people from Jury service. Should those exclusions be changed in any way?

Although the jury list should be as inclusive as possible, some people will still need to be excluded from jury duty. However, no exclusion should be made unless there is a strong argument in favour of it. Further, exclusions which might have a greater impact on members of one group should be especially closely examined. The current list of exclusions in the *Juries Act* should be looked at carefully.

The *Juries Act* requires that a juror must be a Canadian citizen, at least eighteen years old,

¹⁶ Civil and Criminal Proceedings in the Supreme and County Courts Project Steering Committee, *Business and Requirements Definition Document*, (December 13, 1991), p. 2.

¹⁷ Ibid at page 20.

¹⁸ Ibid at page 48 and Appendix, p.34.

and have resided in the jury district for 12 months. In addition to these qualifications, the *Act* excludes some people from juries.¹⁹ These exclusions or exemptions cover people involved in making or enforcing laws such as:

The Lieutenant Governor of the Province; members of the Senate and the House of Commons of Canada; members of the House of Assembly and, while the House is in session, the officers thereof; judges of the Supreme and county courts; barristers and solicitors of the Supreme Court; officers of the Supreme and any county court other than commissioners appointed under the Notaries and Commissioners Act; full-time salaried members of any police force in the Province; judges of the provincial court and judges of the Family Court; and members of a jury committee) as well as people in several other occupations (officers and men of the Canadian Forces on active service; medical practitioners; dental practitioners; clergymen and ministers of the gospel).

The *Juries Act* says that no more than one member of a family or firm is required to serve at one time, and no person has to serve more than once within three years. The *Act* also disqualifies any person "who has been convicted of any criminal offence for which the punishment included death or for which he was sentenced to a term of imprisonment of two years or more". In addition, a judge may decide to grant any person an exemption if the person or someone on their behalf applies: no criteria when a judge will grant this exemption is set out in the law.

Finally, in addition to the exemptions in the *Juries Act*, the Civil Procedure Rules expressly state that a pregnant woman may apply and will be automatically be excluded from a civil jury.

It is commonly accepted that some people should be excluded from jury service, for one of two reasons:

1. Some people should be disqualified because they may be biased, might be too involved in the administration of justice, or for some other reason should not be allowed to serve on a jury;

¹⁹ The *Juries Act* says that these people "shall be exempt from serving as jurors". This is unclear because it does not make clear whether the people listed are "disqualified" (that is, cannot be jurors) or whether they have a choice and may, if they wish, act as a jurors. The second meaning would be a more natural interpretation of "exempt", but it seems clear that at least some of the people on the list should not be placed on juries even if they consent.

2. Other people should be excused because they have a good reason for not being on a jury—usually that they must do something else which is more important either to society or to them.

Excuses are of two types: some people should be excused if they apply and can show why they should not have to serve on that particular jury; while other people should be excused automatically from any jury and so should not have to make an application.

The Commission suggests that some changes to the current exclusions are appropriate. The *Act*, for example, requires that anyone called for jury service must have resided in the jury district for 12 months. But the jury selection process is likely to draw only jurors from the district where the trial will take place, and so no legal provision to this effect is necessary. Further, the requirement that the juror have lived in the district 12 months excludes, for no good reason, people who move around within the province.

Jurors are also required to be Canadian citizens. Presumably this exclusion is intended to ensure that jurors have a real connection with the community - that they feel committed to the community, or are familiar with local standards. However, the Commission does not believe that the citizenship requirement actually achieves these goals. People who have chosen to come to Canada, even if they have not become a citizen (or perhaps have not yet been present long enough to be a citizen) might in some cases feel a greater commitment to this country than people who are citizens because they happened to be born here. Similarly, a non-citizen might have lived in a community for many years and be far more familiar with local customs than someone who, though a citizen of Canada, has recently moved from another province. Connection to the community might be a valuable goal, but requiring that jurors be Canadian citizens is not an effective way to achieve it.²⁰ The Commission recommends that the citizenship requirement should be removed and that landed immigrants should also be allowed to serve on juries.

Armed forces personnel, doctors, dentists, and members of the clergy are at present automatically excluded from jury service, and pregnant women are excluded from civil juries. The majority of the Commission believes that armed forces personnel and clergy need not be excluded by statute – in particular cases they can apply to be exempt, but there should not be an automatic rule that they will always be exempt. Similarly, although some pregnant women might reasonably wish to be excluded, there is no need for pregnant women always to be excluded. The same argument applies to doctors and dentists. There are far more doctors and dentists available now than there were when these automatic exclusions were put into the *Act*. Further, our health care system has changed significantly, and it is no longer true that every doctor, at every moment, provides an essential service that no one else can provide. In many cases doctors or dentists will be excluded on application,

²⁰ In a similar context (allowing a person to practice law in a province) the Supreme Court of Canada has specifically rejected a citizenship requirement - see *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 14. Accordingly, this restriction in *Juries Act* might be subject to challenge under the *Charter*.

but the Commission recommends that the automatic exclusion should be removed from the *Juries Act*.

The rules for exemptions by application should also be reconsidered. At present, the *Act* appears to give an unrestricted right to a judge to grant exemptions for any reason whatsoever. In fact, the Supreme Court of Canada has noted that every other province defines the power of exemption more clearly, and has stated that the Nova Scotia *Juries Act* should be interpreted to be more limited than the wording suggests.²¹ Currently the standard practice for granting exemptions appears to be whether serious hardship will be caused to the juror or some other person. However, the application of that standard can vary from court to court and depends on individual circumstances, and some way of trying to achieve consistency is desirable. This could be achieved through legislation, or perhaps through judicial guidelines.

Additions should be made to the exclusions already in the *Juries Act*. People connected to the justice system, such as police officers, lawyers, and judges, are already excluded: for the same reason, wardens, employees of correctional institutions, and probation officers should also be excluded.

In addition, it seems clear that a person who does not understand the language in which the trial will take place should not be on a jury, and it is worth noting this exclusion in the *Juries Act*.²² Nonetheless, one possible exception to this rule is worth considering. The Northwest Territories recently amended its law on juries to allow Aboriginal people who do not speak either English or French to serve on juries. It did this particularly to make it easier for Aboriginal Elders, many of whom speak only an Aboriginal language, to serve on juries. Quebec has a similar rule for parts of that province. The *Marshall Inquiry* found that no Mi'kmaq person had ever served on a jury in Nova Scotia, though whether language difficulties are one of the causes of that under-representation is not established. The Commission would like to know the views of the public regarding whether steps to allow

²¹ See *R. v. Barrow* (1987), 61 C.R. (3d) 305 at 318-319, where former Chief Justice Dickson commented:

No other jurisdiction has a provision similar to s. 4(2), with its unqualified reference to "exemptions". In every other jurisdiction but Nova Scotia, the legislature provides that exemptions are available only if the applicants meet certain criteria. These criteria range from the laconic "for a good cause" in the Territories, to "hardship" in some provinces, to more detailed criteria of hardship, age, religious belief or similar factors in some provinces. Every other jurisdiction recognizes that its authority over the jury pool is limited to eligibility and personal matters unconnected with the criminal case to be tried. In spite of its apparently broad phrasing, the Nova Scotia provision should be interpreted as similarly limited, to maintain its constitutional integrity.

²² This ground is already included as a basis on which a juror can be challenged for cause in a criminal matter: see *Criminal Code*, s. 638(1)(f). Proposed changes to the jury system in Nova Scotia in 1978 would have included this disqualification: see *Report to the Attorney General of the Nova Scotia Law Reform Advisory Commission on the Juries Act*, 1978.

those who speak only an Aboriginal language and are able to understand the procedures to serve on juries, especially when the accused is an Aboriginal person, should be taken.

The majority of the Commission suggests:

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.**
- 5) Civil Procedure Rule 34.03, which allows pregnant women to apply to be automatically exempt from a civil jury, should be removed.**
- 6) The general power to grant exemptions in the *Juries Act* should be more clearly defined, either through legislation or judicial guidelines.**
- 7) 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.**

6. Should there be any change to the fees paid to Jurors?

The fees which are paid to people on juries are important not just as a way of being fair to those chosen for juries, but also as a way of ensuring that a wide range of people are represented on juries. The most common in-court reason for excusing potential jurors from service is that they will suffer financial hardship. At present, the *Juries Act* calls for jurors to receive a fee of \$15.00 per day, plus a travel allowance.

There are two different views about the appropriate way to handle juror fees. On the one hand, it could be argued that jury service is a public service that is reasonably imposed on

people and that no compensation is necessary. On the other hand, it could equally be argued that since jury service is compulsory, and people might lose income as a result, they should be adequately compensated.

At present, the *Juries Act* compromises between these two positions by compensating everyone but compensating them with only a small amount. Everyone appearing for jury service, whether they are actually chosen for a jury or not, receives \$15.00 per day. This fee, which is only a token amount to most individual jurors, is nonetheless a significant expense for municipalities: Halifax, for example, paid juror fees and expenses of \$70,000 in 1991.

The Commission feels that this money can be better used by distinguishing between the type of duties that individuals are asked to perform. For example, where people are called as part of a jury panel, but are not chosen for a jury, they will only have been inconvenienced for an hour or two - a much smaller demand than that imposed on the people actually selected for a jury. Paying juror fees only to those people actually selected for a jury would mean immediate savings of between \$16,500 and \$33,000 per year in Halifax alone.

Other provisions could be made with regard to compensating jurors. Some jurors continue to be paid by their employers while on jury duty, in which case they do not need to receive a fee. Unemployed persons who serve two days or less will still receive unemployment insurance benefits - though after two days, they will be considered unavailable for work, and will not be eligible for benefits. Some provinces have considered making fees available only on application, where the juror can show a real financial loss. Some provinces change the daily fee, depending on how long the trial goes on. Other provinces set a "standard" fee, but allow a judge to order that the fee be increased, either because of hardship to the juror or because of the length of the trial. Another approach is to require all employers to continue to pay employees (perhaps up to a daily maximum) who are called for jury service. However, it is important that some means exist for the employer to apply to be compensated where this cost creates a real hardship.

The majority of the Commission suggests:

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.

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 re-funded the costs if that creates undue hardship. An employer may not penalize in any way an employee who is selected as a juror.

7. Should Juries continue to be available in civil cases in Nova Scotia, and if so, on what basis?

The merits of juries in civil cases (usually cases between individuals, eg., a disagreement over a contract) is a matter of dispute. Some people feel that juries produce verdicts or awards that are hard to predict, and are not in line with established cases. This unpredictability can mean that it is in a party's interest to set a weak case in front of a jury, as a tactical ploy. In this event, there is a greater risk of unfairness and the unpredictability makes it more difficult for cases to be settled. Some people also argue that civil juries have less experience deciding who should be believed. Given that a trial with a jury is more expensive for the justice system than a trial with just a judge and more inconvenient for the jurors, one can argue that the simpler, less expensive procedures should be used.

Other people argue that juries are in fact the ideal mechanism for deciding who should be believed, or issues such as how a reasonable person would behave. Given that civil juries also promote the involvement of a variety of views in the justice system and help lead to greater understanding of courts by the general public, many people feel that civil juries are very valuable.

The current rules in Nova Scotia, unlike most provinces, make juries easily available in civil cases. Although the *Judicature Act*²³, allows a jury in any civil case, courts have decided that juries should not be used where the case is mainly about questions of law rather than fact, or where the issues of fact are too technical or scientific. Nonetheless, the initial presumption is that a jury is available and the party who does not want a jury must persuade the judge that one should not be used.

²³R.S.N.S. 1989, c.24.

Despite this easy availability, civil juries are in fact very uncommon. Many jury districts have not had a single civil jury trial and even the larger districts typically have only one or two per year. However, even the few cases that do make use of civil juries impose an additional burden on the legal system.

The Commission is of the view that the rules limiting access to civil juries, which have been developed in a series of court decisions, should be put into legislation. That approach will make the law more easily accessible to anyone trying to find it. In addition, the rules concerning when civil juries are available should be taken out of the *Judicature Act*, and included with the other jury provisions in the *Juries Act*.

Beyond that, the Commission seeks the public's views as to whether access to civil juries should be more restricted. Most provinces do not adopt Nova Scotia's approach of assuming that a civil jury should be available whenever a person wants one. Some provinces restrict the use of civil juries to matters involving someone's character, such as libel actions. Others restrict juries to cases where an award above a certain dollar figure is in issue, or require the person requesting the jury to apply for one. These approaches are intended to restrict the use of juries to cases where they are appropriate, thereby preventing them from being used merely as a tactical ploy.

The Commission suggests:

The rules judges apply concerning the availability of civil juries should be set out in the *Juries Act*.

The Commission seeks the views of the public on whether automatic access to civil juries should be more restricted than at present.

8. Should there be changes to the *Juries Act* to reflect the changes made to the court structure in Nova Scotia?

In 1993, the County Court and the Trial Division of the Supreme Court of Nova Scotia were merged to create one court in Nova Scotia. This has given rise to a number of practical difficulties in the way the courts must apply the *Juries Act* as it currently exists. Some of the difficulties only require technical wording changes: for example, references to the County Court or to County Court judges are no longer necessary, as that court no longer exists.

Other changes require more fundamental restructuring of the administration of the jury system. In the past, courts have held hearings in every jury district and jurors were drawn from the district where the trial took place. Now, the court will no longer sit in every jury district: instead, four new court districts have been created. This change will have an effect on the "community" by which an accused person is tried. If an offence occurs in a county

where the court no longer sits, where should the jury members be drawn from - the county where the trial occurs, the county where the offence occurred, or from the several counties all served by the court? There will be additional expense and inconvenience in drawing jury members from counties other than that of the trial, but it might be unfair, both to jurors and to accused persons, to ask the members of one county to act as jurors for all trials in that and surrounding counties.

In addition, there are still further changes which have been proposed to restructure the courts in Nova Scotia. Any reforms to the *Juries Act* should take these changes into account to ensure that the jury system operates as efficiently as possible with the new court system.

The Commission suggests:

Any changes needed to make the *Juries Act* consistent with recent reforms to court structure should be made.

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.

IV. Conclusions

The Law Reform Commission believes that a jury system which provides for a more representative, speedier and less costly jury system will enhance the administration of justice in Nova Scotia. It will also ensure that more people are able to play a role in determining community values and law. The Law Reform Commission of Nova Scotia invites suggestions and comments from all interested people in Nova Scotia on the best way to reform the jury system.

VI. SUMMARY OF PROPOSED RECOMMENDATIONS

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.**