MANITOBA

LAW REFORM COMMISSION
COMMISSION DE RÉFORME DU DROIT

REPORT

ON

THE ADMINISTRATION OF JUSTICE IN MANITOBA

PART II

A REVIEW OF THE JURY SYSTEM

Report #19

February 11, 1975

The Manitoba Law Reform Commission was established by *"The Law Reform Commission Act"* in 1970 and began functioning in 1971.

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I. INTRODUCTION

This report is intended as a review of "*The Jury Act*" of Manitoba. Such a review was anticipated when, in 1972, amendments to "*The Jury Act*" were suggested by us. Such amendments related among other things to including Indian Bands in the jury system, increasing jurors' fees and to equalizing the position of women in the operation of the Act. All of these recommendations were translated into statutory enactment.[1]

Four major areas of concern appeared during the course of this study. However, each section of the Act was considered and suggestions for reform made when thought appropriate. The four important areas in question are dealt with at length.

1. Selection Procedures

In this review a basic philosophy regarding jury selection is employed throughout. This is, that it is desirable that selection be on a totally random basis and that modern methods to produce this result be utilized whenever practicable. Evidence collected by our research staff indicated that at present large numbers of purely subjective criteria are employed in jury selection by officials at the local level. Recommendations are made to eradicate these practices and to place selection within the parameters of the philosophy of random selection.

2. Disqualifications and Exemptions

The present Jury Act sets down a lengthy list of those who are exempt from jury service. We believe that a change in emphasis is required. It is intended that the category of those disqualified be increased and that those categories of persons presently held exempt be abolished. Further, we think that any person, other than those disqualified, who wishes to claim exemption should, in future, do so under the mechanism provided in the present Section 63. This means that factors involving "the public interest" or "undue hardship" must be successfully pleaded before exemption could be granted. Additionally, questions relating to the upper age limit at which a person may qualify as a juror; whether a person charged or committed of an indictable offence can serve; whether knowledge and understanding of the language in which court proceedings are conducted be necessary, are all dealt with in determining the basis for qualifying as a potential juror. Moreover, questions of citizenship and residency as necessary qualifications are considered.

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[1] S.M. 1971, c. 32, s. 4; S.M. 1972, c. 56, ss. 5 and 6.

3. Civil Juries

While not in use at all in the Province of Manitoba at the moment, the civil jury system has much merit, in our opinion. The Osgoode Hall study as well as the Ontario Law Reform Commission's recommendations on the workings of civil juries were mooted, together with the jurisprudence emanating in Manitoba. A scheme is recommended, on a trial basis, for developing the use of the civil jury in Manitoba.

Although a dissent by one Commissioner to our recommendations in 'Part VII — Civil Juries' is recorded, it is pertinent to note that favourable opinions have been expressed by the Bar of Manitoba. At its general meeting held at Minaki in June 1974 the Manitoba Bar Association, after discussion and division, passed a resolution favouring the restoration of civil jury trials in Manitoba. The Manitoba Civil Justice Subsection of the Canadian Bar Association has been studying our recommendations over several meetings during the past many months. The Subsection has not yet reported its deliberations to the Manitoba Council of the C.B.A. and so its conclusions cannot be taken as those of the Manitoba Council. The Subsection has, however, enjoyed a full and quite representative attendance of members during its several meetings devoted to this subject. When its work will be completed, the Subsection may be seen to differ with the Commission's detailed recommendations on some aspects of the proposed legislation, but not on the main principle. A salient feature of these meetings is that at each and every one, and almost always unanimously, the Civil Justice Subsection has affirmed its support for specific legislative measures to restore civil jury trials in Manitoba during an assessment period of 5 to 7 years.

4. *"The Jury Act"* in relation to *"The County Courts Act"*

A number of discrepancies in the operation of *"The Jury Act"* and *"The County Courts Act"* was discovered. Because no apparent reasons were found for these anomalies, positive recommendations are made so that the two statutes will work in concert.

Apart from those four major areas, other significant issues are dealt with. It is recommended that special juries be abolished and a specific provision is made for mixed juries. Post-selection procedures are looked at and the concept of the Juror Information Form introduced. The use of electoral registers in providing names of prospective jurors is discussed and the problems of selection in "unorganized territories" laid bare. There also appear the inevitable general housekeeping sections relating to payment of juror fees, mileage rates, questioning of jurors at the courthouse, and liability for infringement of the statute's terms. These provisions are dealt with in the hope that they be made current and effective.

II. SELECTION PROCEDURES

A. SELECTION UNDER *"THE JURY ACT"*

(i) Initial Selection

Under Section 7 of *"The Jury Act"* the mayor or reeve, and the clerk of each municipality are to make a selection of jurors for submission to the board of selectors who make the final selection. In the case of Indians on an Indian reserve, the chief of the band and the band manager act as first selectors. By Section 10, selection is to be made from the list of electors produced at the selectors meeting by the clerk of the municipality or the equivalent. From the list, the selectors are to choose a number of names approximating to one-twentieth of the total number of names appearing on the list up to a maximum of 500 names. Those selected must of course be liable to serve as jurors or, as Section 12 states, be "considered qualified under the Act". In the City of Winnipeg, selectors are to select not less than two thousand names from the list of electors (research indicates that this procedure has not changed since the advent of Unicity and that the former municipalities, now within Unicity, still employ their former procedures).

In making selections, selectors shall select (by majority decision, if necessary) those persons who in the opinion of the selectors "from the integrity of their character, the soundness of their judgment, and the extent of their information" are "the most discreet and competent for the performance of the duties of jurors" (Sec. 13). Where there is equality of voting among selectors regarding the inclusion of a particular name, that name shall be passed over. The selected names are then sent before November in each year to the prothonotary or deputy clerk of the Crown and pleas and to the County Court judge of the judicial district in which the municipality is situated. In the case of the Eastern Judicial District, the list is sent to the senior County Court judge.

(ii) Final Selection

The board of final selection in the Eastern Judicial District consists of the senior County Court judge and in other judicial districts, the judge of the County Court. Sitting with the judge (or his substitute as specified under the Act) will be the sheriff of the judicial district together with the prothonotary or deputy clerk as the case may be. The board meets in December and is presided over by the judge. Where a deficiency exists in the number of names submitted by a municipality or Indian band, the judge may make up the deficiency from the list of electors of the particular municipality involved. But the failure of a municipality or Indian band to send in a list does not invalidate the board's final selection.

In making final selection, a number is placed next to each name and ballots are prepared for each name. The ballots are placed in a container which is shaken to mix the ballots and a draw is then made by a board member. One thousand names are drawn in the Eastern Judicial District. In other judicial districts four hundred names are chosen. In addition, in the

Eastern Judicial District, an additional two hundred names are drawn from the list received from "The City of Winnipeg" for service as jurors in civil cases. In all cases, the total number selected must be chosen for their "integrity of character, the soundness of their judgment, and the extent of their information", as "the most discreet and competent for the performance of the duties of jurors, and who have not been summoned and attended as such during the current or previous year". Failure to select the required number of names does not invalidate the selection.

B. SELECTION IN PRACTICE

Selection under the Act is thus a two stage process.

(i) Stage 1 – Initial Selection

Research indicates that there is no uniformity in selection processes on the municipal level. Indeed, in a number of cases, municipal officials felt that selection was a "chore" or "another task for the over-burdened Secretary-Treasurer", or a situation that should be dealt with by the Province. The following salient points appear from the research done:

1. In most cases, the selection is made by the mayor or reeve and clerk. However in some cases there was delegation to an "employee of the department" with later confirmation by the mayor. Again the clerk alone might draw up the list, the mayor/reeve signing as a selector but playing no part in the selection. In some instances Council selected jurors or the list of chosen names was presented to Council for approval.

   The City of Winnipeg hires additional staff e.g. "two girls with office training". "Although the chief clerk is in charge, the girls do the actual sorting of the voters list, city directory, and the jury lists for the two preceding years." Mr. Ferguson, Chief Clerk, City of Winnipeg reported that there had been no change in procedure for selection of jurors since the advent of Unicity.

   One town reported "Mayor or Reeve and myself have been rather negligent in selecting a list of jurors, and most years it never gets done. . . ." Present selection procedures in the case of Indian bands indicates that, at least in the Northern Judicial District, the local sheriff and the court communicator consult with the Chief of the Indian Band on the reserve.

2. "*The Jury Act*" states that selection should be made from the "list of electors" prepared and certified to be used at a municipal election in Manitoba. The most current voters list was being used in most cases.

   In one instance the clerk said that the list was drawn from "a field sheet of the census". This list was used because the voters list did not include occupations. The clerk however

felt that caution should be exercised as judges did not like the use of the census standards. Another Secretary-Treasurer stated by letter that the voters list was primarily used in selection. In a telephone interview with a research assistant, she stated that the rate-payers and voters lists were used as guides for names.

3. In some cases the selected list was sent to the "police department", "chief constable" or "R.C.M.P." for scrutiny. This was primarily to ensure that no one on the list had been convicted of an indictable offence. In other cases it was said that the initial selectors had no way of telling whether a person on the list had been so convicted.

   This was certainly a source of concern for some municipalities. Some small communities saw no problem since "in these small communities, information of this kind becomes common knowledge."

   Other municipalities felt that a check would come at a stage later than initial selection. Some said they relied on the courts to challenge the juror.

   One town felt that scrutiny of this nature should be left to the next selection committee.

   Apart from the problem of determining the criminal record of the potential juror, or the lack of it, there is also the question of determining whether the selected person is infirm. This might be difficult for the average Secretary-Treasurer.

   Section 33 of "*The Jury Act*" at least gives power to the Board of Final Selectors to ensure that no juror be selected who "has been summoned and attended for service in the current or last previous year".

4. Many municipalities expressed concern with the provision in Section 12(1) whereby the selectors are to choose for jury duty approximately one-twentieth of the total number of names found on the voters list. Apart from the diverse criteria presently employed (discussed later), which confines those eligible for selection, some communities found it difficult to send in any list conforming with Section 12(1). This was especially true in small municipalities made up predominantly of those practising the Mennonite faith. It was also pointed out that because of rural depopulation, some municipalities had an aging population with a great number of people over 65 years.

5. The most remarkable evidence collected was that relating to the criteria employed for selection of jurors. It would seem that those selected are generally middle class persons known to the initial selectors. The initial selectors are, of course, to

be guided by Section 13 which stipulates that the chosen persons shall have the integrity of character, soundness of judgment and information and discretion sufficient to serve as jurors.

One town reported that Section 13 limited the choice of jurors to those personally known to the selectors. This view would seem to be reflective, to a greater or lesser degree, of the process employed in most municipalities. It is admitted, however, that in The City of Winnipeg, a subjective judgment is impossible and a random selection is made. The question in this context then is whether Section 13 is being complied with by the City. This is especially important since Sheriff Dawson reports that 80% of jurors have, in the past, come from Winnipeg. On the other hand, if it is felt that a person should be tried by his or her peers, the whole philosophy behind Section 13, as presently applied, can be called in question. The following would seem to be reflective of the criteria employed in implementing Section 13 by municipalities: unemployed persons, welfare recipients, "busy farmers", married women in pregnancy or with small children are to varying degrees not considered for jury lists. Distance from the place of trial is also once or twice a consideration in selection. Indeed, apart from these categories, the officials concerned with selection tend to use general subjective criteria in completing the list. For example, the officials of one municipality tended to "decide in our own little minds" by asking "would we want this man or this woman to sit in judgment of us". Another municipality's officials wanted those who were "responsible in the community" or "good family people". In fairness, however, some other municipalities where 50% of voters were known personally to the selectors, sought to "mix them up and try to find persons representing different types of occupations". But even in this municipality, the selectors would tend to choose women whom they knew to be suitable and who had the time. And they were not likely to choose unemployed persons and welfare recipients. In one city, it was said that there was a requirement that 50% of names on the jury list be of "French extraction, either male or female". Also, no ladies with large families (i.e. with two children) would generally be considered.

Sometimes, it must be noted, even in the case of municipalities, a more random approach seems to be taken. One reported that persons selected are often merely names taken from a list, not persons known to be discreet or competent.

In summary, it is fair to say that while certain trends in use of selection criteria are visible as seen above, the process of selection is far from uniform. Perhaps the situation is aptly summed up by saying that at present there are 1,001 ways to select a jury.

(ii) Final Selection

The process of final selection would seem to be a cumbersome procedure involving the making of numbered ballots from the lists received for the purpose of balloting from a drum. Additionally, power is given to the board of final selectors to make up deficiencies in the following cases: a) where a municipality or Indian band fails to send in a list or b) where such a list is sent in but is lost or c) a list does not contain sufficient names. Such deficiencies may be made up by the judge (chairman of selectors), from the list of electors of the municipalities and band lists of the Indian bands concerned. Again by virtue of Section 24(1) the same criteria are employed for final selection as employed for initial selection e.g. soundness of judgment, integrity of character, etc. Again it is to be remembered that failure by this board to select the requisite number of names does not invalidate the balloting or the jury roll thereby produced.

The practicalities of selection here were elicited in an interview with the late Mr. P.A. Draward, Deputy Prothonotary. He, along with Sheriff Dawson and the senior County Court judge drew names in an impartial manner. Mr. Draward felt that it was impossible to comply with Section 24(1) since the board cannot know everyone. This is the reason why, he stated, the selection is done impartially. Then the sheriff checks to see if anyone on the chosen panel was summoned and attended as a juror in the previous year. Summonses are served as required and at no time is there a check done on the members of the panel for criminal convictions or for professional exemptions under Section 5. At present, it was stated, it is up to the individual juror to state that he has a criminal record or to declare that he is otherwise exempt.

C. REFORM OF THE PRESENT SELECTION PROCESS

(i) The Impartial Jury

The Manitoba system, as presently operated, may be regarded as analogous to what is known in the United States as the "key man" system. That is, certain "key" people in the community are given the opportunity of selecting the jury. Professor Corlew[2] has stated that the greatest vice of such a system is that it tends to limit jurors to persons with whom the "key men" are acquainted. Theoretically, he continues, in order to be consistent with the philosophy behind the "key man" system, one would have to admit that it is the "key men" themselves who would best be suited to jury duty! The results of such a system, it is submitted, go contrary to the philosophy that

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2 Corlew, J.G., "Mississippi Jury Selection: A Proposed Statute", 1968-69, 40 Mississippi Law Journal, 393 at 397.

lies at the root base of all our traditions respecting the accusatorial system — that a person is entitled to be tried by a jury of his peers. The "key man" system does not give the litigant a chance to be judged by "fair community attitudes", but to a greater or lesser degree, by the personal standards of the "key men". The inherent danger, it would seem is that jury selection on the "key man" basis might be used to control the verdict. Admittedly the danger is remote.

Let not, however, the Manitoba system be regarded as unique. Lord Devlin in a celebrated phrase was able, in 1956, to characterize the typical juror as "male, middle-aged, middle-minded and middle class". On the other hand, as Professor Cornish has idealistically pointed out in making his case for retention of trial by jury:

> Moreover the *[legal]* system has a built in mechanism for sustaining the public trust which supports it. For it continually draws ordinary members of the community into the workings of the courts, instructs them briefly in the processes of the law and then returns them to their ordinary lives generally well satisfied with the community duty which they have undertaken, and with the functioning of the administration of justice.[3]

Cornish's ideal carries with it, thus, a number of connotations. Since a person is to be tried by a jury of his peers, ordinary members of the community should be placed on juries. Secondly, if such juries are chosen, then this ensures public trust in the legal system since the public is involved in the system. Thirdly, if it is one of the purposes of jury service to instruct the ordinary person in the processes of the law and the workings of the courts, qualifications relating to educational attainment and high tenets of intelligence would seem out of place. Fourthly, that our society regards serving as a juror as a community duty.

It is submitted that these major premises are worthwhile goals and that reform proposals should be directed towards serving these ends. Should this be agreed to, then two basic ideas in "*The Jury Act*" relating to selection of jurors would need to be changed. Firstly, as empirical evidence collected for this project has shown, initial selectors use extremely diverse criteria in selection of jurors to the extent that certain segments of the community are excluded from juries due to the subjective feelings of such selectors.

Under the U.S. Constitution, juries are required to be impartial. The U.S. Supreme Court has consistently held that a fair cross-section of the community fulfils the constitutional requirement of impartiality. Thus the jury must be "representative" and it has been held that the selection process must be free from discrimination. Apart from racial discrimination, a particular selection statute may be held unconstitutional for other reasons which prevent a fair cross-section from being obtained. An example would

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3 W.R. Cornish, "The Jury", Allen Lane, London, 1968.

be the case of persons excused on the basis of the economic hardship they might suffer by being called for jury duty. It has been held that if jury selection is found to have been made on an unrepresentative basis, then it is immaterial that the motives behind such bias in selection were commendable. In practice, it is discernible that State statutes are less strict in their demands for impartiality. State courts have held that statutes requiring jurors to be "of good intelligence" or "of sound judgment and character", are not unconstitutional. In some States, to claim that a jury is not representative, it must be shown that exclusion of certain groups was a systematic policy rooted in prejudice.

While then, some States allow subjective criteria like "good intelligence" or "sound judgment" to be used, the move to impartiality is truly discernible in The Uniform Jury Selection and Service Act. This model Act is a product of The American Law Institute. The Institute is a most influential body comprising, depending on the subject matter, the leading jurists in the U.S. The Uniform Act sets out that nebulous criteria such as "sound judgment" should not be employed in selection procedures. Rather, the ability to disqualify prospective jurors should be reserved for the court and such disqualification should be based not on mere subjective opinion but on "competent evidence". The same movement towards impartiality is discernible in England. The Report of the Departmental Committee on Jury Service (The Morris Committee) reporting in 1965 recommended that the names of those on electoral registers be fed to a computer. The "summoning officer" should then send to those persons selected at random by the computer, a questionnaire designed to elicit whether they are qualified and liable.

IT IS RECOMMENDED:

(1) That the selection functions of officials at the local level be abolished and that their functions be confined to the up-dating of electoral lists or band lists as the case may be, and their provision to the office of the Sheriff of the Judicial District.

(2) That those criteria now employed for selection such as "integrity of character", "soundness of judgment", and "the extent of their information" be repealed.

(3) That sections similar to the following be adopted:

(i) The clerk or other official or officials of the municipality or city who has or have custody of electoral lists shall be responsible for updating and revising such electoral lists for submission during the first ten days in October to that body responsible for jury selection in the judicial district.

(ii) The clerk or other official shall certify, when sending the list, that to the best of his knowledge and ability the list submitted is up to date as regards electors in the municipality or city in question.

(iii) In respect of Indians living on an Indian Reserve, the Chief of the band to which the Indians belong and the band manager shall be responsible for updating, revising and submitting band lists as hereinbefore mentioned.

Note: Should these recommendations be adopted then the following sections should be repealed: 7 (1), (2); 8; 9; 10; 11 (1), (2), (3); 12 (1), (2), (3); 13; 14; 15; 16; 17; 18; 18.1 (1), (2).

(ii) New Selection Procedures

It has been recommended that a list of electors be produced at the local level and be sent to the summoning officer or prothonotary or deputy clerk of the Crown and pleas of each judicial district, as the case may be. At present, when officials at local levels have made their selections, the names are submitted to a "Board of Final Selectors" in each judicial district who conduct a ballot by placing the names in a drum, shaking the same and drawing names. This would seem to involve a most cumbersome procedure. Meetings must be called, numbers placed against lists, a balloting held, notes entered on a jury roll as selection takes place.

In most of the literature canvassed, it was discovered that such a balloting procedure has been abandoned or a strong recommendation that it be abandoned has been made. A goodly number of American States now select by computer. In England, the Morris Committee recommended that "The Home Office should encourage summoning officers to make use of computers and other modern business aids", in drawing names from the register.

In Manitoba, it would seem that there is no bar to the use of a computer in drawing forth the requisite numbers required on a random basis. Professor R.G. Stanton, Head of The Department of Computer Science, University of Manitoba, states that it would be a simple and cheap procedure. The following is an extract from his letter on the subject to the Chief Research Officer.

> As a matter of fact, I would suggest the following extremely simple procedure. All you really need is to have a list of prospective jurors and to attach a number to these. This is the sort of thing which could be maintained in a manual file at your own office; in this way you would have complete security.
>
> You could then supply some computer firm with the total number of prospective jurors (suppose that this were 100,000). For example, if you were to request us to do so, we could (at a very small charge) write a simple programme to select random numbers between 1 and 100,000. Upon request, we could run (at an even smaller charge) this programme for selecting random numbers and provide you at any time with 25 random numbers, 50 random numbers, 100 random numbers, or however many you required for the particular selection. It would be essential to run the different selection blocks at different times.

On receipt of this list of random numbers, you would simply go to your master file, look up the name corresponding to the numbers which were sent you as randomly generated numbers, and notify the corresponding individuals that they had been selected for jury duty. This would be an extremely simple procedure, and yet would provide complete security.

I hope that these remarks, which indicate one simple way in which a computer could be employed, will be of service.

Professor Stanton also indicated, in a telephone conversation, that there should be no problem in programming the computer so that the random numbers chosen for one jury session would not again be chosen for a specified period of time thereafter.

In summary, the proposed procedures would be as follows: Lists of persons would be kept in a file for each judicial district. The names would be number 1 — 3,000 or more. The computer would at random draw the required number of numbers on a totally random basis. Professor Collins, of the Computer Science Department, indicated that the cost for drawing 2,000 random numbers would be about $10. The numbers chosen would then be matched to those in the Sheriff's file. On this basis the prospective jurors would be chosen on a completely random basis. Professor Collins stated that no human agency had any control over the computer's selections. (The post selection procedures as employed by the sheriff's office are dealt with later.)

When questioned as to total computerization of the whole system including random drawing of names and read-outs of occupations, etc., Professor Collins felt that some expense would be involved here. He recommends that this not be sought at this time. There have been some problems in computerizing operations where there is a shifting personnel factor e.g. the Autopac system. With, however, the continued development of the Provincial Government's Data Processing Systems, the possibility might be looked at in the future.

RECOMMENDED:

(1) That the mode of selection be changed to allow for random selection of numbers by computer. This will eliminate the Board of Final Selection.

The procedure now involved will be as follows:

The Sheriff's Office will place a number against each name on the electoral lists and band lists received. (It is to be noted that the Sheriff adopts such a system at present with the selective lists submitted by officials at the local level.) When the randomly selected numbers are received from the computer, then these numbers will be matched, by the Sheriff's Office, against the numbers placed on the electoral or band lists. This will produce a list of randomly selected potential jurors.

In light of this new proposed procedure, the following sections should either be repealed or modified to take account of the computer selection: 19 (1), (2); 20; 21 (1), (2), (3); 22; 23; 24 (1), (2), (3), (4); 25; 26; 27; 28; 29 (1), (2); 30 (1), (2); 31 (1), (2); 32; 33.

(2) The number of names to be selected must be determined anew. Since more names will be included, without arbitrary vetting, probably it will be necessary to draw more numbers. However this would seem to be no great problem in the future in that pressing a button will produce more numbers at once. The numbers selected at the municipal level by the present Sections 12(2) and 12(3) will, of course, be abandoned. At present for final selection, 1,000 names must be drawn in the Eastern Judicial District and 400 in each of the other judicial districts. Additionally for some reason an extra 200 names must be drawn from "The City of Winnipeg" to serve on civil juries. "The City of Winnipeg" having now legally disappeared, and the policy reason for the selection of the select 200 not being visible, we feel that the specific provision for the City of Winnipeg be abandoned.

In light of our proposed new procedures setting an upper limit on the numbers involved is not necessary at all. Sections giving power to draw the required number of numbers as the need arises will be sufficient.

(3) Provision should be made to record the names of those selected. Here it would be best to continue with present well-worn procedures as found in Sections 25, 26, 27, 29 (2), 30 (1), (2), 31 (1), (2) and 32 of "The Jury Act" with suitable changes to take account of the computer or other random selection operation.

(4) The computer, if employed, should be so programmed as to provide against the drawing of the same numbers for the next two years. The present Section 33 should be modified for this purpose.

(5) There should be provision for remuneration of the computer operation and possible liability for failure to produce numbers (present Section 39).

(6) Should a computer operation be found too cumbersome for present purposes, a manual selection similar to the present "final selection" would be employed. Sections 19 (1), (2); 20; 21 (1), (3); 22; and 23 of the present Act would serve as illustrations of the procedures that should be adopted for manual selection.

III. DISQUALIFICATIONS AND EXEMPTIONS

A. PRESENT DISQUALIFICATIONS

"The Jury Act", in Section 4, states that two categories of persons are disqualified from serving on juries. These will be discussed individually:

a) a person afflicted with blindness, deafness or other mental or physical infirmity incompatible with the discharge of the duties of a juror.

It is felt that this category should remain disqualified and that such a person should notify the Sheriff of such ailment.

b) a person who has been convicted of, or who is charged with, an indictable offence.

At first blush this would seem to be a harsh disqualification. A number of points may be made.

(i) In our judicial process, it is said, everyone is innocent until proved guilty. Why, then is a person charged with an indictable offence disqualified?

On the other hand it is, perhaps, possible to argue that a person charged with an indictable offence may be so influenced by the fact that such a charge is pending against him as to be prejudiced or biased in the discharge of his duties as a juror.

(ii) What of the person who was convicted but received a pardon or perhaps had his sentence remitted? Should such a person still be disqualified?

(iii) The disqualification in question suggests that once a person is convicted, that person can never serve on a jury. Does this mean that society is to regard that person as inferior or "condemned" for the rest of his life? Should a person be eligible and liable when the sentence is complete or contact with law enforcement officials ceases? On the other hand, it is argued that a person with a criminal record may be susceptible to threats or bribes or could not discharge the duties of a juror in an honest or disinterested way.

The Morris Committee in England felt that people with serious criminal records should be disqualified. In its report it recommended that:

A person who within the previous five years has been in prison or other detention with a sentence of three months or more (without option of a fine) shall be disqualified.

These recommendations were carried further in the subsequent Criminal Justice Act (1972). Under this Act, disqualification extends to:

Any person who has at any time been sentenced to imprisonment for life or for a term of five years or more or to be detained during Her Majesty's pleasure, or any person who during the last ten years has served any part of a sentence of imprisonment of three months or more or who has been detained in a Borstal institution.

It is to be noted that these English provisions refer to criminal rather than civil juries. In England, those with criminal records are permitted to sit on civil juries.

In Ontario, Bill 251 to amend "*The Juries Act*" states that a person who is disqualified from serving as a juror who "has been convicted of an indictable offence, unless he has subsequently been granted a pardon". Quebec has a section similar to that in force in Manitoba. "*The Jury Act*" of British Columbia disqualifies "persons convicted of indictable offences, unless they have been free of imprisonment for the last ten years".

The Commissioners having considered these arguments make the following recommendations:

RECOMMENDED:

(1) That a person be disqualified for five years after serving a term of imprisonment for an indictable offence unless sooner pardoned. This rule should include those persons classified as juveniles either at the time of commission of the offence or at the time of release.

[It is to be noted that three Commissioners think that a person should be disqualified for ten years after imprisonment.]

(2) Persons charged with an indictable offence shall be disqualified from serving on a jury.

Accordingly, a section similar to the following should be inserted as Section 4(b):

No person is qualified to serve as a juror:

(a) . . .

(b) (i) who within the previous five years has been in prison or other detention on conviction for an indictable offence, without option of fine, unless sooner pardoned;

(ii) who is charged with an indictable offence.

B. ADDITION TO PRESENT DISQUALIFICATIONS

In addition to these categories of disqualification, we think that a third general disqualification will be necessary in light of our proposed new scheme. We propose that as many segments of the community as possible be involved in the jury process. We would disqualify certain persons holding certain positions in our society and eliminate many of the present exemptions. We would allow claims for excusal by individuals on the

grounds of public interest or undue hardship. By thus extending the jury franchise, so to speak, a third general disqualification is necessary. We are concerned that all jurors be capable of understanding court proceedings and thus they should be able to understand, speak and read the language in which proceedings are conducted. Trials, without exception, however, are conducted in the English language in this province. Indeed, if a witness testify in another language in the court, a translator will translate to English. In this context we feel that the position must be looked at from a practical point of view. We perceive that considerations of substantial justice should be regarded as more important than the feelings of various ethnic groups as to the extent to which other languages should be used in society. We are cognizant of the fact that Canada has two official languages and we in no way by our recommendation intend to derogate from that fact. Indeed, in this province, it would seem that most persons whose first language is French will also have a working knowledge of the English language. The provision we have in mind will affect people of a number of ethnic origins, including jurors to be drawn from Indian bands. We merely feel that the goals of justice and a fair trial, at least with the courts as presently organized, require this further disqualification.

ACCORDINGLY, WE RECOMMEND:

There be an additional disqualification category, 4(c) as follows:

No person is qualified to serve as a juror who is unable to understand, speak and read the language in which court proceedings are conducted.

C. EXTENSION OF DISQUALIFICATIONS AND EXEMPTIONS

It is our belief that in the new streamlined scheme suggested, it will be appropriate to extend the class of persons utterly disqualified under the Act and abolish that class of persons presently deemed exempt. Having reviewed the materials and evidence on this matter, we have come to the conclusion that the recommendation made by this Commission to the office of the Deputy Attorney-General on April 21st, 1972, cannot be impugned. Only slight modification of that report is now envisaged. This relates to the question of "vowed members of a religious order who live in a monastery, convent or other religious community". Rather than disqualifying such persons, the Commissioners believe that those of this category who wish to perform civic duty by serving on juries, ought to be allowed to do so. Those who have taken religious vows inconsistent with such duties might claim exemption. This would be facilitated by expanding the present Section 63(3) so that exemption could be claimed not only on grounds of public interest and undue hardship but also on the basis of conscience and religious vow.

The relevant extracts, as amended, of the 1972 report follow together with our up-dated recommendations:

> In regard to what passes for exemptions, we perceived only two valid principles:

(1) All persons who might reasonably be thought to harbour real and/or only apparent bias (especially in criminal prosecutions) ought to be disqualified; and

(2) All persons who provide essential and urgent services to the public, and who are so few in number that the unscheduled absence of only one or two of them at a time on jury duty would impair those essential services, ought to be disqualified. (In this statement 'the public' does not necessarily mean the public *en masse* because it is in the public interest to protect individual lives and properties.)

. . . It seems to us that many of those who presently enjoy a mere exemption (which the Act does not prevent them from waiving) ought to be absolutely disqualified . . . . Section 63(3) relating to undue hardship will permit appropriate individuals to avoid jury duty without the sweeping exemption of whole classes of persons. Our conclusion is, therefore, to recommend the positive disqualification of certain classifications of persons, but fewer than those presently accorded exemptions, so that in apt circumstances individual members of a class which would no longer enjoy exemption might individually apply for it. We foresee only two classes, then:

(i) those positively disqualified by statute; and

(ii) all the rest, for whom the new provision under Section 63(3) would always be available.

Our view is not identical to that manifested in the recently re-enacted *Jury Act* of British Columbia (Chap. 15, 1970) but we found much of what we consider sensible expressed in it. Its deficiencies, however, prevent us from endorsing it totally. We think our Manitoba statute can be significantly better.

In terms of the first principle we consider that all persons engaged in the administration of justice ought to be excluded, that is to say, disqualified. Some of us consider that, additionally, the immediate families of all such persons ought to be excluded. In our adversary system of litigation, as you may recall from your days as an active prosecutor, there not unnaturally develops a sense of "us and them". This factor does not seem to taint the social and other out-of-court contacts of prosecutors and defenders or their respective auxiliaries, but it certainly is to be reckoned at the very focal point of the system which in this context is the jury trial.

That those referred to in Section 5, items (f) court officials, (g) judges, (h) police, (i) gaolers, and some in (n) barristers, solicitors and attorneys should be exempt (we suggest: disqualified), admits of no doubt. It is surely questionable to accept the spouses of such persons as jurors, in the naive assumption that despite a lifetime of living together none of the

attitudes of the principals would ever be assimilated by their families. It is no wild speculation to suggest that even sheriff's officers and court clerks as jurors would be preferable to the spouses of judges, Crown attorneys, defence counsel and police personnel as jurors, in the opinion of most experienced trial counsel. This is not to suggest that such persons are incapable of rendering a true verdict, despite perhaps social and familial pressures, but rather to suggest that there is much merit in the concept of justice not only being done but in manifestly appearing to be done. In accordance with the spirit of our traditional concept of trial by jury, the law itself should not permit it to appear that a juror is not completely impartial between the contending parties. We think, therefore, that the spouse of everyone designated in items (f) — court officers; (g) — judiciary and justices of the peace; (h) — police officers and constables; and (i) — gaolers, as well as of barristers, solicitors and attorneys designated in (o) ought to be disqualified from jury service.

None of the other exemptions (we suggest: disqualifications) preserved by the draft Bill have any bearing on the first principle of exclusion from jury services, but one — (e) — might be re-cast so as to narrow the exemption down to a specific minimum. Instead of exemption of "all officials and employees . . . of the Government of Manitoba", why not provide exemption only for "all officials of the Government of Manitoba and all employees of the Attorney-General's Department of Manitoba"?

Now the second principle of exclusion from jury service ought to be considered. It is not always so clear or easy to apply.

We questioned the exemption for the clergy of all denominations. On January 31st, last, we wrote to the President of the Manitoba Inter-Faith Council in the same manner as we wrote to the other professional and occupational organizations. We have received no reply to date. *[No reply, it seems from our files, was ever received.]* Unless the tenets of a particular religion impose a strict prohibition on the faithful from serving on juries, it surely would not be considered anti-religious to require the clergy to sit shoulder-to-shoulder with their flocks in jury boxes and demonstrate the application of civic duty. Where individuals have taken solemn vows to avoid the world, and may submit to legal punishment rather than violate the vow (i.e. as with the seal of confession) it would be inhumane, useless and socially disruptive to compel service. . . . *Perhaps, therefore, in these cases a new category of exempt persons should be adopted. That is, those who for reasons of conscience or because of the taking of a religious vow should be exempt from service. Clearly, however, by being exempt only, a choice of service or not is left to each individual.*

We note that the exemption of registered nurses and licensed practical nurses is intended to be dropped. This is quite in accord

with the expression of opinion which we received from the Manitoba Association of Registered Nurses. Their letter in response to our question stated:

> "The Board will support any move that can be made to remove this exemption from The Jury Act. The Board can see no reason why registered nurses could or should be prevented from serving as jurors.
>
> You may be interested in seeing, on page 11 of the enclosed Agreement, the inclusion of Jury and Witness Duty. Nurses, in general, and their employers are obviously not aware of the present exemptions."

The Manitoba Association of Licensed Practical Nurses also expressed interest. Their letter in response to our questions said:

> "A motion was passed at our general meeting that Licensed Practical Nurses would accept Jury duty."

The Western Subsection of The Canadian Bankers Association, through its chairman, state that they would like to keep the present exemption in common with the rest, however would not strongly object to changes in a spirit of community obligation.

As indicated we polled the other categories of exempt persons through their professional organizations where such exist. Except for those quoted above there was a universally negative response. Quite honestly, we are not convinced that the reasons stated are all that valid, given:

(a) the arrangements which are made by practitioners in most fields to provide substitute service during vacation and convention times; and

(b) the infrequency with which any one person is summoned, if ever, for jury duty. Increasing the numbers of persons eligible for service would, probably, further diminish the likelihood of being summoned more often than once in a lifetime, if ever.

. . . *Thus*, pharmacists, through their representative organization have not conclusively persuaded us that the exemption of such persons is necessary in the public interest. The College of Physicians and Surgeons, on the other hand, raised one substantive objection which could have application to our first stated principle concerning bias, and, in addition, proposed *hesitante* an alternative to outright abolition of their traditional exemption. They stated:

> "It was also the feeling of members of the committee that many cases which go to jury trial involve, to some extent, evidence of a medical nature. We wondered if a physician sitting on such a jury might not exercise an undue influence because of his professional background and knowledge.

I was instructed to inform you of the above matters to make your Commission aware of factors which may not have come into their consideration. Should it be considered that these reasons were not strong enough or that they did not apply in all instances, then it might be possible to consider doctors for jury duty with the provision that they might elect not to serve on a jury in the same manner as, I believe, is the prerogative of women. This would allow for an individual decision in each instances."

In the opinion of most of us, most physicians and surgeons and dental surgeons would invariably apply for exemption and, we think, most would be excused by reason of "undue hardship" upon that portion of the public who are their patients, if not upon themselves. We therefore suggest that physicians, surgeons and dental surgeons (but not their spouses) be disqualified. We think that the individual exemption for "undue hardship" be left open to pharmacists but that they ought not otherwise to be disqualified.

The retention of any sort of specific exemption for persons actually employed in the running of railway trains may not be necessary. Most collective labour agreements, we think, provide for absence on jury duty and, we think, all railways operate a 'spare-board' system for their running and operating employees . . . . *It is our belief that the "undue hardship" provision would again aptly apply here.*

One point of drafting occurs to us with regard to item (j) of Section 5: "Officers and men of the Canadian Forces . . ." Many women serve in the Canadian Forces. Minds not imbued in the glories of *"The Interpretation Act's"* consecration of expressions of the male gender importing the female may justifiably regard this as silly, especially when other acceptable military terminology is available. Thus, the term "officers, non-commissioned officers and other ranks" is euphonious to the military ear and does not convey any gender distinction. The term "members" might be equally suitable.

In light of the foregoing:

WE RECOMMEND:

(1) The extended list of disqualified persons following a) blindness, deafness, etc. and b) conviction of indictable offences (as amended above), etc. should read as follows:

(c) members and officers of the Privy Council, or of the Senate, or of the House of Commons of Canada;

(d) members and officers of the Executive Council or of the Legislative Assembly of Manitoba;

(e) all persons engaged in the administration of justice or the enforcement of the law and, without restricting the generality of the foregoing:

(i) all officials and employees of the Department of Justice and Solicitor General's Department of Canada, and of the Attorney-General's Department of Manitoba;

(ii) every officer of any court, including sheriffs, deputy sheriffs, sheriff's officers, constables and bailiffs;

(iii) judges, magistrates and justices of the peace;

(iv) police officers and police constables;

(v) gaolers;

(vi) practising barristers, solicitors and attorneys;

(f) the spouse of every person mentioned in paragraph (e);

(g) practising physicians, surgeons and dental surgeons;

(h) members of the Canadian Forces who are in the regular forces or special forces, or who are in the reserve force on active service.

(2) That the notions in the present Section 63(3) be expanded so that a plea of "conscience or religious vow" be grounds for exemption from jury services. "Public interest" and "undue hardship" grounds, of course, should be retained. Accordingly, a section similar to the following should be employed:

"A person may be exempted from serving as a juror upon any of the following grounds:

(a) that his conscience or religious vow is such as to preclude him from serving as a juror;

(b) that serving as a juror will cause the person exceptional hardship in terms of his livelihood or in terms of discharging legal or moral obligations to others who are immediately relying on that person;

(c) that serving as a juror would be contrary to the public interest because the person performs essential and urgent services of public importance which cannot reasonably be rescheduled or cannot reasonably be performed by another and which are not ordinarily performed by another during that person's absence on vacation.

D. PROOF OF DISQUALIFICATION OR EXEMPTION ON MEDICAL GROUNDS

Specific documentary procedures for claiming disqualification and exemption will be referred to later. The substantive right to exemption is founded in Section 63(3). This amounts to a claim based on public interest factors or undue hardship (and under our present recommendations on conscience and religious vow grounds) to the prospective juror. The onus of proving such factors would seem to reside with the person claiming exemption.

In claiming disqualification on medical or other grounds or in seeking exemption based on undue hardship with medical or other reasons, the following sub-sections should be inserted.

WE RECOMMEND THAT:

(a) A person claiming exemption or disqualification may be required to produce a physician's certificate and such other evidence required by the court, and the certifying physician is subject to inquiry by the court at its discretion.

(b) A person claiming exemption or disqualification may be required to produce evidence of the grounds for such exemption or disqualification and any person who participates in the providing of such evidence is subject to examination by the court at its discretion.

E. AGE LIMITATIONS FOR SERVICE AS A JUROR

Section 3 of "*The Jury Act*" states that every inhabitant of Manitoba, male or female, who is between the ages of 18 and 65, and is a British subject, is liable to serve as a juror in jury trials.

The question that arises here is why should the upper limit be fixed at 65? One would assume that there are many able and competent people in the community over the age of 65 who would welcome the opportunity to serve on a jury. The fact that a person is retired should not, *per se*, mean that such a person is no longer a "peer" of other segments of our society. Indeed it may well be that with the rural depopulation that has occurred over the last ten years, aging communities might be found in some rural areas in the province. Thus if the trend of rural depopulation were to continue it might be difficult to get qualified personnel from such communities should the upper age limit not be increased over the age of 65. Lastly, is it anomalous that a judge over 65 may try a case, but the average person over 65 is felt not to be capable of sitting as a juror?

The Position in Other Jurisdictions

(a) England

In England the age limit has been raised to 65 during both World Wars but has reverted back to 60 when these wars were over. The Morris Committee on the Jury Service reporting in 1965 thought that the age limit

should be 65. The Committee believed that the normal retiring age from employment was a reasonable limit for jury service as well.

(b) Canadian Jurisdictions

In considering a revised upper age limit, the recent Ontario Bill to reform the Ontario *Juries Act* stated that the age limit be fixed at 69 instead of at 70 as at present. Section 2(c) of the Bill (Bill 251) states that a person is eligible and liable who "in the year preceding the year for which the jury is selected has attained the age of 18 years or more and had not attained the age of 69 years or more". The British Columbia *Jury Act* disqualifies from serving as a juror in Section 5(e) "persons of the age of 70 years or over".

Under the Alberta *Jury Act*, a person who would otherwise be qualified and liable to serve as a juror and whose name is on a current jury list, may if he is over the age of 60 years claim exemption from serving on a jury, and if exemption is claimed, he shall be excused from serving on the jury. By Section 5 of the Quebec *Jury Act* any person over the age of 65 is exempt from jury service.

It is proposed that the policy of a new Jury Act should entail spreading the net for potential jurors as widely as possible. But in setting an upper limit there would seem to be conflicting interests at hand. On the one hand, it is reasonable to suppose that there are many people over the age of 65 who would well be able to serve on a jury and would welcome that task. On the other hand it may be said that jury duty may be a most exacting experience which might be too exhausting for some over this age limit. Of course the concept of the upper age limit must be viewed in the Manitoba context both in cultural and geographic terms.

After lengthy consideration a majority of Commissioners recommend the following:

WE RECOMMEND:

That the age limitation for jury service should be 75.

Of course, it will still be open to anyone to claim exemption on the basis of public interest or undue hardship as well as conscience or religious vow. (It is to be noted that two Commissioners recommend that the age limitation be set at 70 years of age.)

IV. THE USE OF ELECTORS LISTS IN THE JURY PROCESS

At present, jurors are selected from a list of electors. A list of electors is defined in Section 2 as "a list of electors prepared and certified to be used at a municipal election in Manitoba". "*The Local Authorities Elections Act*" by Section 5(1) states who may vote at a municipal election, and those who may appear on the voters' list. Such a person must be a) a Canadian citizen i.e. a person who is a citizen under the *Citizenship Act* or who is a resident of Canada and a British subject, and b) 18 years or over and c) not disqualified under the Act and d) not disqualified under law and e) resident in the local authority area for 6 months.

Additionally a person is qualified if a), b), c), and d) are fulfilled and that person owns land or is a tenant of land in the area in question. This means that a non-resident person may appear on the list of electors in the municipal district in question. Under Section 3 of "*The Jury Act*", on the other hand, those qualified and liable for service as jurors are:

> every inhabitant of Manitoba, male or female, who is between the ages of eighteen and sixty-five years and is a British subject.

We feel that a number of problems arise under these provisions: a) Is the list of electors presently used the best way to enumerate those liable as jurors, b) What, anyway, is the meaning of "inhabitant of Manitoba", c) Why is particular mention made of "British subject" and d) Should there be an upper age limit of 65?

A. THE USE OF MUNICIPAL ELECTION LISTS AS JURY LISTS

It is the intent of this proposal to catch as many people as possible in the prospective jury net. Under "*The Local Authorities Elections Act*", those liable to vote at municipal elections and thus to serve as jurors are Canadian citizens and British subjects respectively. We wonder whether this is casting the net as widely as it can be cast. We wonder if a) any other list can be used as a supplement if we wish to widen the net and b) if we do widen the categories of those liable, how should it be done?

(i) The Use of Other Lists

Our reseach indicates that at present supplementary lists are employed on the local level. The Clerk in one city indicated that a field sheet of the census was employed since the voters list did not include occupations. In a number of instances, the jury lists for the preceding two years were employed, without further investigation. Others used city directories and ratepayers lists. While these supplementary lists have obviously been used in good faith to solicit further information regarding the qualifications of constituents, we feel that with our new scheme the use of the present municipal list only together with some modification will be sufficient.

Under the proposed scheme all that is required of officials at local level is the submission of a list of electors under "*The Local Authorities Elections Act*". It is intended that scrutiny of the chosen jurors will take place at a post-selection stage. However, it may be necessary for officials at the local level to note on such a list those electors who have died or left the area. This may be set down as a duty of the office of the Secretary-Treasurer before the list of electors is submitted. In regard to these persons coming into a local authority area between enumerations we suggest that such persons should register with the Secretary-Treasurer as electors if they so wish. This fact should be advertised in the municipality in question at least six weeks prior to the date for submission of lists by the Secretary-Treasurer.

(ii) Unorganized Areas

There exist in the Province a number of Local Government Districts for whom selectors have not been appointed. Mr. G.J. Forsyth, Supervisor of the

19 Local Government Districts stated that excluding treaty Indians, there were approximately 39,000 people living in these areas. Mr. Forsyth stated that some of the districts in question were in the process of drawing up lists. Mr. J. Reeves, Chief Electoral Officer stated that he could shed little further light on the matter. It was suggested to him that where there was no municipal organization either in Local Government Districts or in unorganized territory, electoral lists employed for Provincial elections might be employed. Mr. Reeves suggested that this was a possibility subject to a) the fact that there might be some movement of population between elections, and b) *"The Election Act"* would have to be amended to provide more copies of the list in these areas. (At present 100 copies are made under the Act, for the use of candidates and the Chief Electoral Officer.) These problems would seem not to be major ones if it is believed that an effort should be made to draw jurors from these areas. Short of utilizing the census sheet or leaving these areas unrepresented, we feel that the use of the Provincial list is the only answer.

RECOMMENDED:

That in Local Government Districts having no municipal organization and in other so-called "unorganized territories",

(i) Provincial Elections lists be used for the purpose of eliciting the names of potential jurors;

(ii) the local Resident Administrator be responsible for setting down such names and submitting them to those persons in the judicial district designated under the Act to summon prospective jurors.

(iii) Inhabitants of Manitoba

Section 3 of *"The Jury Act"* states that "every inhabitant of Manitoba" etc. shall be liable to jury service. Under Section 5(1) of *"The Local Authorities Elections Act"* a person is placed on the electors list which is used for jury selection, if that person is resident in the municipality for six months and is a Canadian citizen or British subject or is a Canadian citizen or British subject and who owns land or is a tenant of land or business premises in the municipality. It is thus possible for a non-resident of the municipality to be on the list of electors and thus on the list of jurors. Such a non-resident might not only be a non-resident of the municipality but a non-resident of the Province. We wonder whether this situation is known to officials at the local level. If the person in question were resident in Manitoba it would be possible for his name to appear on at least two jury lists: a) at the place of his actual residence and b) at the place where he owns land or is a tenant of land or business premises.

A parallel problem that comes to light at the same time is that under Section 3; those liable are to be "inhabitants" of Manitoba. Nowhere in the Act is "inhabitant" defined. Since municipal election lists are to be used to provide prospective jurors, then at least with regard to some jurors, at least six months residence is required to be an "inhabitant" as per *"The Local Authorities Elections Act"*.

Clearly the position at present shows a number of anomalies and calls for a uniform policy and for clarification.

ACCORDINGLY WE RECOMMEND:

(1) That for a person to be liable for jury duty, that person must either

(a) have been continuously resident in Manitoba for six months or

(b) is actually resident in Manitoba for six months of the year.

(2) That a person be liable to be summoned for and to jury duty only in the judicial district in which his principal residence is located.

(3) That a suitable question be placed in the Juror Information Form (see infra) to elicit such information.

(iv) The Concept of "British Subject"

We wonder why, at this stage in our history, the concept of "British subject" is retained as a factor in jury selection. The qualification is necessary before a person can vote at a municipal election, but post-selection procedures could be developed to elucidate citizenship given the retention of municipal electoral lists as the basis for jury selection. We wondered, however, whether the basis of jury selection should be widened. It is presumed that the policy relating to the granting of voting rights and jury duty to British subjects who are not citizens is based on historic connection and on the fact that such persons are very likely atuned to institutions. While the historic connection may be looser now than in days gone by, we wondered how long it takes the non-British immigrant to be acquainted with our institutions. We wondered whether, for example, the landed immigrant should serve on a jury after say, six months' residence in a given Province.

After extensive discussion on this question, the Commissioners think that it should be one of the privileges of citizenship to serve on a jury and be a part of the judicial process.

ACCORDINGLY IT IS RECOMMENDED:

(1) That a person, to be liable to serve as a juror must be a Canadian citizen, natural-born or naturalized, and that British subjects not falling into the aforementioned categories be ineligible;

(2) That a question directed towards ascertaining citizenship be included in post-selection procedures, namely the Juror Information Form (see infra).

Consistent with our previous recommendations,

WE RECOMMEND:

That Section 3 be amended to read:

"Subject to sections _____ (the disqualification and exemption sections) every person who has resided in Manitoba for at least six months and whose name is entered on the current voters list, who is between the ages of eighteen and seventy-five and is a Canadian citizen is liable to serve as a juror in jury trials, in the judicial district in which his principal residence is located."

V. POST-SELECTION PROCEDURES AND THE USE OF THE JUROR INFORMATION FORM

1. When the requisite number of names have been selected, with the new system by computer, duplicate copies should be kept by the sheriff and the deputy clerk of the Crown and pleas or the prothonotary as the case may be to safeguard against loss. Such general procedures are already provided for in the Act.

WE HAVE ALREADY RECOMMENDED THAT:

Section 29 (1), (2); 30 (1), (2); 31 (1), (2) and 32 be retained but may be altered as may seem fit to take account of the fact that selection of numbers is now made by computer.

2. What if the computer fails for some reason? Here it is proposed to adopt procedures akin to those set out in the present Act in Section 37. This now states that where the board of Final Selectors has not carried out its duties, then upon application of the sheriff or prothonotary or deputy clerk of the Crown and pleas, a judge of the Queen's Bench may appoint one or more fit persons to act as selectors.

WE HAVE RECOMMENDED THAT:

1. *Where for any reasons the computer operation for the selection of jurors' numbers has not performed its duties within the time fixed, upon the application of the sheriff or the prothonotary or deputy clerk of the Crown and pleas, a judge of the court may appoint one or more fit persons who shall act as selectors upon the order and direction of the judge.*
2. *Those persons appointed under subsection 1 shall select in an impartial and random manner the requisite number of names by manual means.*
3. *The sheriff shall enter such names as are chosen by subsection 2 on a jury roll as required by sections _____(as per the normal computer operation).*
4. *The roll made under subsection 3 is of the same effect, and shall remain in force during the same period, as if it had been duly made by the normal procedures.*
5. *Unless a valid reason is given, the computer operation in default is liable for expenditures in making the jury roll under this section.*

3. A section will be required to facilitate the notation of those exempted or disqualified as time goes on. This information would be conveyed to the municipal officials who would amend their lists accordingly.

WE RECOMMEND:

That a section similar to Section 36 be employed. We doubt however whether the affidavit noted therein is strictly necessary. A statement to the effect that a person is exempt or disqualified could be made in the Juror Information Form. This signed Form might be deemed an affidavit for these purposes.

4. The Summoning of Jurors

(i) Sections to be retained

WE RECOMMEND:

That the present summoning procedures as prescribed in the Act be retained and indeed added to. The evidence collected indicates that those procedures are working well without complaints from officials concerned and the public. The present additions will take account of our proposals to help clarify whether a prospective juror is disqualified or exempt or liable. The following sections thus should be retained:

a) Criminal trials, and civil jury trials, in all but the Eastern Judicial District.

Section 40 is retained subject to the deletion of the reference to special jury trials and is subject to a change in the reference to the number of the sections referred to within it.

Sections 41 (1), (2), (3); 42 (1), (2) — retained in whole.

Section 42 (3) — changed so as to allow further numbers to be printed out by the computer.

Sections 43; 44 (1), (2), (3); 45; 46 (1), (2); 47; 48 (1), (2); 49 (1) — retained.

b) Civil jury trials in the Eastern Judicial District

Sections 49 (2); 50 (1), (2); 51; 52; 53 (1), (2), (3) — retained.

(ii) Additional Requirements

In addition to these provisions which are retained or slightly modified, we wish to add provisions allowing the sheriff's or prothonotary's office to elicit some information regarding the prospective juror. This involves three main considerations: a) whether the person concerned is disqualified, b) whether the person is disqualified by virtue of having a criminal record, c) procedures for allowing a claim for exemption.

1. Present Procedures

At present it seems, from the evidence of the Deputy Prothonotary, that the only check that is run regarding the qualifications of jurors is done

by the Sheriff to see if anyone on the panel summoned has attended as a juror the previous year. At no time is there a check for criminal convictions or for professional exemptions under Section 5. Everything is left to the individual juror. Sheriff Dawson in an interview agreed with the late Mr. Draward and added the following facts. On a few occasions attempts were made to serve summonses on persons who are dead, which is very embarrassing to all parties. Though at present the occupation of each prospective juror is placed on the jury list, the board of final selection does not take notice of it. When a person has been selected, notice is served on him, regardless of his occupation. It is up to the individual to declare that he is exempt. Sheriff Dawson feels that there is a need for improvement regarding the checking of criminal records. In 1971, Mr. Dawson requested that he be allowed to send the names on the Jury Roll to the R.C.M.P. and the City Police for checking. He was not allowed to do so because it was felt that people would object to the procedure. He was told that authority would have to be given by the Attorney-General before a police check could be made.

To sum up the present procedures, it is fair to say that the weeding out process so as to comply with the disqualifications and exemptions of the Act is left basically to the initial selectors at local level and to declaratory statements by the summoned themselves. We have already found that officials at the local level act in a most arbitrary manner. They may do some weeding, but they also take some flowers at the same time. The individual may well know that he or she is disqualified or exempt or indeed may be counted upon to declare a criminal conviction. However, we cannot be sure of this under the present system. Certainly, no guidance is given to the summoned person in this respect. Sheriff Dawson has certainly provided evidence of misuse of the system. He cites the case of two young men being summoned to serve as jurors at an assize. Luckily one of the men stepped forward to state that he had a criminal record and was on probation. The sheriff then felt that he should question the other jurors and found that another young man had finished his sentence but a couple of months before.

2. Reform of Present Procedures

We are of the opinion that much can be done to improve the present position. Indeed we feel that a better system of weeding out can be instituted in the following manner: a) by eliciting information in advance of trial, b) by further questioning on mustering for the panel at the court house, and c) by checking for criminal convictions either by sheriff's questioning or by police check.

It is necessary to deal with each of these procedures individually.

a) Information and the Jury Notice

The procedure envisaged here is that an "information gathering form" be sent out together with the jury notice to those selected for jury service. The form will be simple in nature and little time will be spent in its completion. Clearly the intent here is that those obviously disqualified can be dropped at an early stage. Included in the form will be a section whereby

exemption may be claimed and where reasons for the claim must be given. On the reverse side of the form would be an extract of *"The Jury Act"* instancing those disqualified under the Act and stating upon what grounds exemption may be claimed. If necessary, penalties may be set down for the giving of false information or for not returning the completed form within due time.

We acknowledge that this concept is not totally new. It has commended itself in various forms to bodies in other jurisdictions. For example the Morris Committee in England felt that:

> Summoning officers should send prospective jurors an explanatory letter with a questionnaire designed to elicit whether they are qualified and liable.

Similarly, *The Juries Act, 1973* in Ontario provides for a "Return to the jury service notice" to be completed and mailed to the county sheriff. In the United States, Section 7 of The Uniform Jury Selection and Service Act states in part:

> The Clerk shall mail to every prospective juror whose name is drawn from the master jury wheel a juror qualification form accompanied by instructions to fill out and return the form by mail to the clerk within 10 days after its receipt.

We believe that this initial information will help to give effect to the provisions of *"The Jury Act"* and will certainly improve on present practices. Additionally we emphatically reject the naive supposition that this is one more attempt to create a form filling bureaucracy. We have canvassed other solutions and have come to the unavoidable conclusion that this solution is much to be preferred. In an interview with Sheriff Dawson and the Sheriff's Deputy, it was said that the use of the Form should be made by the sheriff's officers when delivering the summons, rather than by mailing. The rationale behind this is that the officer will be likely to verify some of the statements on the spot and perhaps report on a claim for exemption or disqualification. There is much to be said for this approach, as long as it does not lend itself to subjective evaluation of the circumstances. At present all summonses are taken to the place of residence of prospective jurors by hand. We do not see why this procedure should be changed. However, there is, we think, in these circumstances a need to give the prospective juror a sufficient opportunity to fill out the Form properly. Additionally, the privacy of the prospective juror should be protected, for example, in making a declaration as to a disqualification. Thus, where a prospective juror believes that his privacy would be better protected by making an oral declaration to the sheriff or sheriff's deputy, then that procedure would be allowed.

ACCORDINGLY WE RECOMMEND:

(1) That when a jury notice is taken to a prospective juror by a sheriff's officer, such officer shall also deliver a Juror Information Form (to be prescribed in a Schedule to "The Jury Act"). The juror then shall have the opportunity of either:

(a) completing the Form and handing it to the sherriff's officer, or mailing it in before arraignment day;

or

(b) orally relating any confidential material to the sheriff or a deputy at the court house on or before arraignment day under circumstances which will preserve the privacy of the prospective juror; and of making a declaration as to the truth of such statements.

Thus a prospective juror may elect to hand back or send back the Form or rather than fill in the Form, make a declaration at the court house. There being no obligation to return the Form, there will be no penalty for failing to do so, so long as the person summoned actually turns up at the time and date noted in the summons.

(2) Example of Juror Information Form

1. Contents

(1) Name; (2) Where is your principal residence for most of the year? (Give exact detailed address); (3) If your principal residence is the above address for only 6 months of the year, where are your other residences? (Give exact detailed addresses); (4) occupation; (5) age; (6) citizenship; (7) ability to understand, read and write the language in which the court proceedings are conducted; (8) ability to understand and speak the French language, as well as English; (9) any blindness, deafness or other mental or physical infirmity impairing capacity to render satisfactory jury services; (10) any criminal conviction or charge of an indictable offence; (11) any disqualification by occupation as set out on back of form; (12) right to claim exemption by virtue of public interest, undue hardship or conscience or religious vow (space for reasons).

2. Declaration

The form should then contain a declaration that responses are true to the best of the signer's knowledge and an acknowledgement that a wilful misrepresentation of a material fact may be punished by a fine of up to $500 (without any option of punishment by imprisonment).

3. Procedures in Filling the Form

It is thought that notarization of the form should not be necessary. If the prospective juror be unable to fill the form, another person may do so for him and shall indicate that he has done so and the reasons why it was done. If the form contains, when returned, any ambiguity, omission or error, the sheriff or similar official may require another form to be sent with

instructions for necessary clarification. Such form must be returned ten days after its receipt, or the return made orally at the court house.

4. Reverse Side of Form

The back of the form should contain an extract from the new Jury Act relating to disqualifications under the Act and how exemptions may be claimed.

b) Questioning and Further Questioning at the Court House

It has already been recommended that a prospective juror should be able to elect whether to return a completed Juror Information Form or submit to questioning and make a declaration at the Court House. We think that the same penalty for misrepresenting the facts at the Court House should be imposed as is imposed for making false statements in the Juror Information Form.

Apart from this initial questioning on the attendance of the prospective juror, we think the sheriff or sheriff's deputy should have the opportunity to question any prospective jurors, even those who have completed Juror Information Forms. Indeed, if suspicion has arisen that a certain prospective juror has misrepresented his qualifications in the Juror Information Form, this will be an opportunity to investigate such suspicion.

ACCORDINGLY, WE RECOMMEND:

1. Any prospective juror who wilfully misrepresents material facts, having elected to be orally questioned at the Court House or who makes a false declaration at that time shall be liable to a fine of up to $500 without any option of punishment by imprisonment.

2. The sheriff or his deputy shall have the opportunity to question further anyone who has filed a Juror Information Form.

Further, the sheriff may wish to question prospective jurors as to whether any has an interest in the case or has knowledge of counsel or the parties. This may be a convenient time for such fuller questioning.

ACCORDINGLY WE RECOMMEND:

That the sheriff or his deputy, in their discretion, may question prospective jurors as to their interest in the case or their knowledge of counsel and the parties.

c) Checking Criminal Convictions

As noted earlier, no check on criminal convictions is made at final selection. In the case of some municipalities, the police are asked to run a check at initial selection. It seems at the moment it is up to the individual to come forward and identify himself as a convicted person unless specific questioning takes place.

Under the new scheme, we propose that each person declare, subject to penalties, whether or not there be criminal convictions against him. Additionally, it is suggested that the sheriff should question jurors further in this respect if he deems it necessary. We feel that this will be sufficient for the present. Should evidence arise that this system is not working, then the feasibility of police checks may be investigated. We fear, however, that in some cases the running of police checks may unduly delay the selection process and indeed may be abhorrent to some sections of the community.

WE RECOMMEND:

1. That the Juror Information Form contain a question relating to previous convictions.

2. That the sheriff or his deputy question anyone who has elected to make an oral declaration rather than submit a Juror Information Form as to criminal convictions.

3. That the sheriff or his deputy be required to personally check the background of jurors to be empanelled where there is suspicion that a person may have a criminal record or where a check is deemed to be necessary.

(In this way a person disqualified by previous conviction could confide the fact orally to the sheriff rather than recording it on the mail-in form.)

VI. MIXED JURIES

Under the *Criminal Code* (Section 556(1)), an accused may ask for half of the jury empanelled to be French speaking. This policy is not adopted in *"The Jury Act"* of Manitoba.

Sheriff Dawson indicated that there had been no request for a mixed jury in the last twelve to fifteen years. Despite this fact, we feel that a definite procedure should be available for the provision of a mixed jury.

ACCORDINGLY, WE RECOMMEND:

The Juror Information Form should contain a question relating to the ability to speak and understand the French language as well as the English language.

VII. CIVIL JURIES

A. THE PRACTICE IN MANITOBA

In Manitoba juries are permitted in civil actions under the terms of *"The Queen's Bench Act"* which reads in part as follows:

Jury actions.

66(1) Actions for defamation, criminal conversation, seduction, malicious arrest, malicious prosecution, and false imprisonment, shall be tried with a jury, unless the parties in person or by their solicitors or counsel waive such trial.

. . .

Actions against municipalities, tried without a jury.

66(3) Actions against a municipality for damages in respect of injuries sustained by reason of the default of the municipality in keeping in repair a highway or bridge shall be tried by a judge without a jury.

Am.

Issues of fact and assessment of damages.

66(4) Except where otherwise expressly provided by this Act, all issues of fact shall be tried, and all damages shall be assessed, by a judge without a jury, unless otherwise ordered by a judge.

Trial judge may direct action to be tried with a jury.

66(5) Notwithstanding anything in subsections (1) to (4), a judge presiding at a trial may, in his discretion, direct that the action or issue shall be tried or the damages assessed by a jury.

It is to be observed that *"The Queen's Bench Act"* provides for trial by jury of six types of actions as of right (which may be waived) and specifically forbids the jury trial of one other type of action. It also provides that a judge may exercise his discretion in granting a jury trial in any other type of case.

A civil jury is composed of six members, five of whom may give a verdict. If the parties agree, however, the trial may be by five jurors, in which case, the verdict must be unanimous. The same jury may try several issues at the same sitting (Sec. 72). No civil action may be heard by a jury during an assize (Sec. 49(1)).

Since 1944 in Manitoba there have been only four civil actions tried by jury, the last one being in 1956. Two of these were actions required to be tried by a jury under Section 66(1).

There has been a series of unreported decisions of the Manitoba Queen's Bench in which applications were made for civil jury trial and rejected. The Manitoba courts have held that the onus is upon the applicant for a civil jury trial to show that the order should be granted, that there are special circumstances which would render the case one in which a jury would be better suited than a judge to deal with it (per Freedman, J., *Bryce v. Northland Greyhound Lines* (1955) 62 M.R. 20). In most applications made in recent years, the courts have found that these special circumstances have not existed and have accordingly refused to grant an order for trial by jury.

In the case of *Kisiw et al v. Dietz et al* [1969] 5 D.L.R. 3d 764, Mr. Justice Hunt considered an application for a jury trial in a case involving serious personal injury. He rejected the plaintiff's application with the following comments:

> An important aim of civil justice is the speedy determination of issues between the parties. Justice delayed is often justice denied, and the present law and practice in this Province enable the Courts to hear cases of this kind as soon as the solicitors for the parties

have their cases prepared. We seldom have the delays which appear often to plague those jurisdictions where trial by jury, as a right in almost every civil case, has persisted.

It is also important to maintain both a measure of uniformity in the amounts awarded and consistency in the application of the law. The results of a trial before a Judge sitting alone can be predicted with much greater confidence, and prospective litigants can be advised with much greater certainty than is the case where the determination of liability and the assessment of damage is left to a jury untrained in evaluating either.

. . .

The factors which I have mentioned, speedy trial, reasonable predictability of result, and reasonable consistency in awards, should be among the principal aims of civil justice.

. . .

The experience of the past 38 years has demonstrated that, in the absence of special circumstances, the aims of justice in cases such as this are better achieved by trial by Judge alone than trial with Judge and jury. Circumstances may alter cases, and in some instances a departure from the general rule may be justified, but these circumstances must be apparent and demonstrated.

A contrary view is taken by Molloy C.C.J. in *Desiatnyk and Desiatnyk v. Brown [1962]* 40 W.W.R. 65; the learned judge was at pains to enunciate clearly the intent of our legislation providing for civil juries and the policy reasons therefor. Judge Molloy stated that where he had a discretion to decide whether a trial be by civil jury, such discretion was not an unfettered discretion. It is the duty of the judge to peruse statute and precedent to determine, as far as possible, the intent of the Legislature in exercising the discretion given. While, he said, the usual or general mode of trial is by judge without a jury, the Legislature clearly intended and desired that some cases should be tried by juries. This was to be so in a "suitable case", but what is a "suitable case"? "Certainly it is not one in which the applicant can demonstrate danger of injustice if it be heard by a judge alone. Neither is it one which can be tried more speedily, conveniently or economically by a jury. If that were so, no case could be suitable for jury trial." Judge Molloy felt that the dearth of civil actions tried by juries in Manitoba was not due to the lack of worth of the jury itself. He continued as follows:

In any event, an institution so valuable and ancient cannot be destroyed by mere disuse and can be abolished only by direct and positive enactment.

Rather than doing that, as recently as 1958 the legislature increased the fees payable to jurors while leaving intact all other provisions relating to juries.

I cannot conceive of this application as a contest between available modes of trial. Even if I were of opinion that judges are

invariably to be preferred to juries for the trial of civil actions, and that the legislature was unwise in providing otherwise, it would not be open to me to refuse this application for that reason. It is my function to apply the law, not correct it, as was said by Willes, J. in *Lee v. Bude & Torrington Ry.*, *supra*, at p. 582:

> "I would observe, as to these Acts of Parliament, that they are the law of this land; and we do not sit here as a court of appeal from Parliament * * * Are we to act as regents over what is done by parliament with the consent of the Queen, Lords and commons? I deny that any such authority exists * * * The proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them."

Though the statute, which I am here required to administer, itself offers little assistance to the exercise of my discretion, ample guidance is afforded by a long line of reported decisions, upon the subject of jury trials, handed down by the courts of this province.

There followed an exhaustive list of such cases. Judge Molloy then continued:

> Almost all of those judgments touch upon the considerations which should be present to the mind of a judge who is required to exercise his discretion upon an application for an order that an action be tried by a jury. From them, I extract the following propositions:
>
> 1. Findings of fact, determination of degrees of negligence and assessment of damages are matters essentially within the province of juries.
>
> 2. Assessment of damages for serious or permanent physical injuries is peculiarly fitting to be determined by juries. In performing that difficult function, in the view of the Manitoba court of appeal expressed in *Kingsbury v. Washington*, *supra*, at 449:
>
> > "a jury is more likely to reach a fairer conclusion as to the extent of the Plaintiff's injuries and the amount of damages to be awarded, than is a single professional mind, however able and experienced."
>
> As a corollary, jury awards act as a standard of reference and a corrective for judges.
>
> 3. A jury is favoured to try cases where the evidence is likely to be contradictory, with hard swearing on either side, involving appreciation of testimony and difficult questions of fact.
>
> 4. That some questions of law or of mixed law and fact are involved (as is generally the case) is not a reason for refusing a jury trial. The presiding judge can deal with the law and the jury can determine the facts.

5. If the questions of law involved in the action are very difficult of appreciation and inextricably mixed with the questions of fact, a jury trial will generally not be granted.

6. Jury trial will not be granted where the matters at issue require investigations and explanations of a scientific or highly technical character.

7. Where damages are trivial, jury trial should not be ordered.

8. An involved computation of figures is an undesirable element in a jury trial.

9. If there is likely to be need for a view, under difficult circumstances, which cannot be conveniently conducted with a jury, trial by jury may not be ordered.

Judge Molloy, applying these considerations in exercising his discretion granted an order that the action before him, a personal injuries action resulting from a car accident, be tried and the damages be assessed by a jury. The facts were applied as follows:

> In the instant case, apart from the claim respecting the male plaintiff's automobile, compensation is sought for damages arising out of the female plaintiff's physical injuries. If the defendant's liability is established, substantial damages may well be awarded. The claim is certainly not trivial.
>
> It is probable that the evidence as to liability will be contradictory. There will be need for appreciation of that testimony and of the female plaintiff's testimony as to her subjective symptoms.
>
> No difficult questions of law or computations of figures will be encountered. I cannot foresee any need for a view but, if a view should prove desirable, there will be no difficulty in conducting it with a jury.
>
> The medical evidence will be of a kind to be expected in any action involving physical injuries and will not require scientific or highly technical explanations. Whiplash injury follows sudden and excessive stretching and consequent spasm and contraction of the neck muscles. I have found no difficulty in understanding medical evidence upon the subject and I see no reason to expect that the educated and well-informed jurors which this city provides will experience any greater difficulty.

B. THE CIVIL JURY IN CANADA, AND THE REPORT OF THE ONTARIO LAW REFORM COMMISSION

It is interesting to note that although every province in Canada has some provisions for civil jury trials, surprisingly little use is made of them.

In the Report on the Administration of Ontario Courts[4] published by the Ontario Law Reform Commission, it is indicated that jury trials are indeed very rarely used in practically all parts of Canada:

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[4] Part I, 1973.

> In Newfoundland and Labrador, civil cases are tried by jury in less than 10% of cases . . . . In Nova Scotia, we are advised that civil juries are employed in not more than 5% of cases in the Supreme Court and infrequently in the County Courts . . . . Trials by jury in New Brunswick in Civil cases are extremely rare . . . . In Prince Edward Island, no civil cases have been tried with a jury in the past five years . . . . In Alberta, the extent to which civil cases are tried by jury is negligible . . . In Quebec, not more than 50 civil cases per year in the Province are tried by jury . . . Civil cases in Manitoba are almost never tried by a jury *[in fact the last civil case was tried by a jury in the Manitoba Queen's Bench in 1956]* . . . . In Saskatchewan, a negligible number of civil cases in the Court of Queen's Bench are tried by jury . . . . In B.C., less than 10% of civil cases are tried by jury.

In Ontario the Report indicates that in 1971 approximately 6% of all civil cases are put on the jury list but of these only 15% actually reach trial.

The recommendation of that Commission regarding civil juries is that they be abolished completely except in case of actions for libel, slander, malicious prosecution and false imprisonment. In the Commission's analysis of the reasons why actions are set down for jury trial, it suggests that it is, in most cases, a tactical ploy adopted by lawyers and their clients. Of the 210 cases awaiting trial on the Supreme Court of Ontario jury lists at Toronto as of September 1, 1971, 192 of these were for motor vehicle cases.

The Report proceeds to discuss the "most cherished reasons" for retaining the civil jury, observing that it is said to stand as a "bulwark" of liberty. The Report questions whether this has any relevance to the trial of a motor vehicle action and concludes that, not only is it completely irrelevant but that civil juries are mainly used by counsel and their parties as a tactical ploy in motor vehicle actions and not for the preservation of liberties. For example, in this day and age where everyone is covered by insurance, juries are aware that it will be an insurance company that will be paying the damages awarded to the plaintiff and accordingly adjust the award. The Report continues at p. 336: "Participation by citizens as jurors in order to adjust claims and administer loss distribution in motor vehicle cases is unlikely to nurture an appreciation of the administration of justice or to give 'them a sense of identification with the law and courts' ".

The Commission suggests that the jury is no longer

> . . . an instrument for redress of wrongs inflicted upon the weak. In fact, there is some evidence that the jury is being used to oppress the injured plaintiff and this may account for the greater incidence of jury trials requested by insurers. Payment into court by defence counsel in conjunction with delivery of a jury notice often serves as a deterrent to a plaintiff's proceeding to trial. Because there is no objective basis for predicting the range of quantum that a jury will assess for the injuries in question, a

plaintiff often settles for the amount paid into Court rather than risk the penalty of costs that he will incur should he recover less from the jury.

Other tactical reasons include (a) having the action put on the jury list to obtain a preferred position on the trial list, ahead of non-jury cases, and on the appearance in court indicating to the judge that the parties are ready to proceed without a jury; (b) bringing the action before a jury where the evidence of the defendant's liability is weak, hoping the jury will sympathize with the plaintiff's suffering.

C. ADVANTAGES AND DISADVANTAGES OF CIVIL JURIES

The Report of the Ontario Law Reform Commission proceeds to discuss some of the advantages of trial by a judge alone compared with trial by jury. It suggests firstly that the experienced judge sitting alone lends uniformity and predictability to the outcome of the case. This was asserted by the judgment of Mr. Justice Hunt in the *Kisiw* case above. The Report continues:

> Counsel who specialize in this type of litigation have to advise on whether a settlement should be effected without the necessity of trial. It is in their interests to be able to forecast with some measure of accuracy what attitude a Court will take on the question of liability. The degree of variance among judges as to what constitutes reasonable conduct will be much less than amongst juries. The years of judicial experience in such cases will guarantee a consistency of result which cannot be expected of juries.

One of the elements of trial by jury is that the Court of Appeal is unlikely to interfere with a jury award unless perversity can be established. The appellant must, of course, have a very strong case. The Court of Appeal will, however, look into an award given by a judge and in this respect the scrutiny can surely only be looked upon as an advantage of a judge sitting alone.

Another element of jury trials is the fact that juries are not given any guidelines as to the manner in which they are to assess damages whereas judges have their knowledge and experience in assessing similar cases. It is suggested that, because of their lack of experience and the fact that they are not permitted access to precedent, juries award damages blindly, often resulting in some measure of injustice because the awards are much higher or much lower than the prevailing trend.

The Law Reform Commission of Ontario Report then proceeds to discuss further reasons for the abolition of jury trials in that province. It suggests that a jury trial takes longer than a non-jury trial and quotes from a study of Messrs. Linden and Sommers in which the authors in their research concluded that a jury trial takes approximately one half a day longer than a trial by judge alone. It indicates, however:

> Estimates given by sheriffs of various counties indicate, however, that with most motor vehicle actions, a jury case will take twice as long to try as the same case before a judge alone. Time consuming factors such as the empanelling of the jury, opening and closing addresses by counsel, the charge to the jury, jury deliberation, the care that counsel take in examining witnesses before a jury, and the occasions upon which the jury must be absent for rulings on evidential questions, result in lengthier trials.

The Report continues by estimating that approximately $80,000 to $100,000 per year is given as the cost to society of preserving the civil jury in the Judicial District of York alone. Even though these figures are rough estimates it suggests that it is a large amount to come out of the public pocket for the preservation of a system which appears primarily to be used for tactical purposes only and not in the preservation of the individual's liberty.

The Commission suggests that the inconvenience and monetary loss to jurors who are compelled to arbitrate upon private disputes is a factor to be considered. It suggests that the jury fees in Ontario are far too low, in fact they are $10.00 per day which is below the minimum wage rate for Ontario. (In Manitoba the fees paid to a juror are $18.00 in the Queen's Bench and $9.00 in the County Court.)

The Report continues at page 346:

> Besides the pecuniary loss, jurors awaiting duty often become irritated by reason of the many hours of idleness passed in the jurors' lounge. This occurs because it is impossible for administrators to predict with any degree of accuracy whether a case will be settled at the last moment or how long particular cases will take and accordingly jurors suffer inconvenience and are kept waiting with nothing to do. Sheriffs may be overly concerned about there being a sufficient number of jurors available to meet every contingency and thus might summon considerably more jurors than are required; inconvenience, however, remains as a fact of life for those individuals who are called upon to serve as jurors.
>
> Is the inconvenience and financial loss to such individuals overborne by the traditional right of litigants to have their private controversy resolved by a jury? That which may be a right to one person may be a hardship to another.

The Commission therefore concludes that the civil jury should be abolished in Ontario for motor vehicle actions. In discussion whether or not the jury should be retained for actions involving defamation, malicious prosecution and false imprisonment, the Commission suggests that this type of action involves the liberty of the individual and for this reason should be retained as an action which can be tried by a jury of one's peers.

At page 349 the Report provides:

> In other actions, predictability becomes of paramount importance to a litigant. He will want to know prior to commencing an action what his chances of success are and whether it is worth the investment of costs. He will want to know whether the case warrants a compromise or not. In the case set out in Section 59 *[libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution, false arrest]* the element of predictability wanes in importance because a litigant has more at stake than his pocketbook. His dignity and reputation are in question and accordingly vindication from the community is sought.

Lord Devlin in the case of *Ward v. James* [1965] 1 A11 E.R. 563, states as follows:

> When, for example, a man is on trial for his liberty, . . . predictability is quite unimportant. What is then wanted is a decision on the merits that will after the event satisfy the public that justice as the ordinary man understands it has been done. Likewise, when a man's honour or reputation is at stake, he is more concerned to have a judgment that fits his merits than to weigh the probable cost of a lawsuit against the offer of a compromise. In any case in which there is going to be hard swearing on both sides, the result is unpredictable anyway until the witnesses have been heard and compared.

It is now important to discuss the other elements which affect the merits of a trial by jury.

(i) Juries have no experience

One of the criticisms levelled against juries is that they have no experience in evaluating testimony of witnesses. Most jurors have never been called upon to judge the credibility of witnesses whereas judges are exposed to this problem daily, and accordingly have built up a fund of experience on which they can draw to better assess the testimony of witnesses appearing before them. Likewise judges hear a vast number of cases which cover the whole spectrum of society and its problems and accordingly build up a vast amount of knowledge on matters not strictly related to law. Most jurors, however, are not exposed to these things in their lives and accordingly have no knowledge or experience on how to handle these problems. On the other hand this can be treated as a benefit of the jury system because judges must, with this fund of knowledge, have built up personal biases of their own on a particular problem whereas a jury will come to the problem without any necessarily preconceived notion.

(ii) Jury does not reveal reasons

A jury is not bound to disclose the reasons for coming to a certain decision. A judge ordinarily ought to express his reasons for his findings and his reasons are subject to appeal.[5] As discussed above, the right of appeal from a judge's decision is seen as a distinct benefit of trial by judge alone.

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5 *Wright and Wright v. Ruckstuhl [1955]* 2 D.L.R. 77 (Ont. C.A.); but see *Nelson v. Murphy* (1957) 22 W.W.R. 137 at 139 (Man. C.A.).

When a jury does not have to disclose any reasons for its decision, it is impossible to determine whether or not the jury reached its decision on sound reasoning. Therefore, because no reasons are given, the Court of Appeal cannot look into the decision of the jury unless on the face of the decision it was obviously an incorrect decision.

(iii) Jury trials appeal to the speculative litigant

It is suggested that where a judge sitting alone would be averse to a party's claim, the litigant would be better to take a chance on a trial by a jury. A jury, for example, would no doubt be more likely to identify with a litigant than a judge might. This again can be treated as a criticism of the jury system as indicated above, as it makes the jury a tactical method rather than an instrument of justice.

(iv) Community Benefit of Civil Juries

Is there a community benefit in inviting ordinary citizens to participate in the operation of one of society's most important institutions, the court? Or is the institution historically and functionally better off if the people are kept out of it? Today, there is on the part of the average Manitoban considerable ignorance — and frequently fear — of the workings of our courts. Are the institutions of any community not more securely based when they are familiar to the people? Has the community something to fear or dread by the introduction of a little populism into an institution which many criticize as being too élitist? It is observable that while many people are unenthusiastic about being summoned for jury service, few are anything but fascinated by the actual experience. As more people actually serve on juries, and talk to their families and friends about the experience, one would expect more civic awareness among our people. Unless they be in fact so desparately deficient that only radical reform or replacement could set matters right, the courts and the law should both generate more public respect — not less — by the participation of the people in their operations.

(v) Minority viewpoint heard

It is interesting to note that one American author, Howard Frank, in an article entitled "The Case for the Retention of the Unanimous Civil Jury" (1966), 15 de Paul Law Review, p. 403, indicates that one of the reasons he sees for the retention of the civil jury is the fact that it gives protection to the minority viewpoint. In his opinion the civil jury allows the minority to speak and have its point well taken and understood by all jurors.

(vi) Judge shopping

Numerous authors in their quest to have the civil jury retained quote as a criticism of the system of a judge sitting alone to try a case, the fact that many lawyers seek to have their cases tried by particular judges who they feel will give their client a better decision. It is suggested, for example, that when lawyers are advised that a certain judge will be trying their case, they will seek to have the matter adjourned to the next trial list in the hope of getting a 'better' judge. These authors therefore suggest that with a jury, this practice would be obviated.

(vii) Juries are better fact finders

Mr. Frank in the article referred to above, suggests that jurors are much better fact finders than judges in that they deliberate on questions of facts and their deliberations allow for wider discussions of the facts. This prevents hasty decisions. A jury of course is a collection of many minds rather than the mind of one trained professional with his built-in biases. Juries are also said to "inject the compassion of the community so as to mollify the harshness and fragmentary experience of the coldly professional judge". The judges of course being trained to analyze the situation are less apt, it is suggested, to base their decision mainly on common sense but more on experience. In some cases this would be detrimental to the cause of justice.

(viii) A jury trial ends with a verdict, with fewer delays and adjournments

To assemble a civil jury of six persons requires some effective preliminary organization. Given the possibility of all peremptory challenges being exercised, as well as some challenges for cause, it might be necessary, in a simple case with only two contending parties, to summon a panel of about eighteen persons. But once the jury had been selected, one could be well assured that the trial would proceed to its conclusion without delay or adjournment. One would be less likely to observe ill-prepared counsel offering to tender evidence later, or seeking adjournments to call some witness whose importance was underestimated, or asking leave to submit written arguments at a later date. A jury trial must proceed once it has begun. A further advantage is that at the end of the trial a verdict is rendered, instead of waiting for the judge to compose, write and publish reserved reasons for judgment. It is not unknown in Manitoba for reserved judgments to be rendered as long as one year after the end of a civil trial. Therefore, two advantages to be expected from the re-institution of civil trials by jury would be:

(i) the more efficient and better organized performance of the bench and the bar; and

(ii) the pronouncement of judgment taking place at trial's end.

Now although the Ontario Law Reform Commission ultimately recommended the abolition in general of civil juries, the Appendices on pages 18 and 19 of Part I of its Report tell a story which might be seen to support the value of the civil jury. They record and compare non-jury cases and jury cases on the weekly Supreme Court list at Toronto during a particular week. One may assume that the week chosen was not significantly atypical. It is interesting to note how long after commencement of the actions the various cases were scheduled to be tried:

Time Elapsed	45 Non-Jury Cases	63 Jury Cases
Within 1 year	4%	3%
Between 1 and 2 years	11%	54%
Between 2 and 3 years	45%	24%
Between 3 and 4 years	27%	9.5%
Over 4 years	13%	9.5%

The delay demonstrated by the above table is not an example of anything to be praised, but it does seem to indicate that most of the jury cases were

scheduled to be tried earlier than the non-jury cases of the same vintage. On the narrow basis that justice delayed is justice denied, one might observe that justice was more aptly fulfilled through the civil jury trials than through the non-jury proceedings. Why? Perhaps they involved less preparation. One might also justifiably speculate that the jury cases were brought on sooner because they demand more attention to organization for trial than do the non-jury cases.

D. THE FUTURE OF THE CIVIL JURY IN MANITOBA

From the foregoing, it is clearly seen that the civil jury is all but a dead letter in Manitoba. The question to be answered now is whether the provisions relating to civil juries should remain in "*The Jury Act*". The dearth of cases involving civil jury trials clearly indicates that a) litigants are not taking advantage of the provisions of Section 66(1) of "*The Queen's Bench Act*" to require a jury trial and b) judicial discretion under Section 66(4) of "*The Queen's Bench Act*" is not being exercised by the judiciary to grant civil jury trials. The relative merits and demerits of trials by jury have been canvassed and it is not intended to review them again here. It may well be that in a number of cases trial by jury may be used as a tactical tool by counsel. Could this have been the case in *Desiatnyk v. Brown* where Judge Molloy passed on the merits of the jury and ordered a jury trial? There does not seem to have been a subsequent trial so that the parties must have settled once a jury trial was the mode of determination! Perhaps the position could be rationalized as follows: If undue tactical advantage is taken of the use of jury trials then have they, in the present context, lost their value, especially in light of their absolutely minimum use? Alternatively, if there is no great abuse, should not the aim be to provide for the litigant and the court, the most effective, suitable and diverse means of trial as may be required? There might be a case for saying that the provisions of "*The Jury Act*" relating to civil juries should be retained as at present. Lastly, it is arguable that if one believes the jury to be an archaic institution in the province, serving no useful purpose at present, it is always possible to argue for partial retention. Section 66(1) of "*The Queen's Bench Act*" deals with specific situations where the parties are entitled to jury trial as of right. It has been said that these situations affect the liberty of the parties. While the judiciary might not favour juries and thus control the situation by exercise of discretion, should that also deprive the litigant of his choice? Perhaps then, civil jury trials should, at least, be retained with regard to Section 66(1) situations.

The Commission after lengthy discussion of these questions is of the view that, at least for the present, the civil jury should be retained in Manitoba. Indeed, the majority of the Commission (with one dissenting opinion) thinks that there should be a test period instituted to see how "*The Queen's Bench Act*", modified so as to encourage civil jury trials, would work. The Commission thinks that there should be no recession from the mandatory provisions of Section 66(1) of "*The Queen's Bench Act*". Section 66(3) (actions against a municipality for damages sustained due to default of municipality to be tried by judge alone) does not need to be retained. The majority of the Commissioners believe that 66(4) should be changed so that

its present intent is reversed. At present, except as otherwise provided by the Act, all issues of fact are to be tried, and damages assessed, by a judge alone, unless the judge orders otherwise. It has been seen that this provision hinders the use of jury trials in that the judiciary "guards" its privileges under this subsection and is extremely loathe to order a jury trial. Section 66(4) might be amended to provide that in future all issues of fact and assessment of damages should be adjudicated by jury unless the parties themselves or through their counsel waive the privilege. Alternatively, if counsel for one of the parties makes a proper case before the judge to the effect that the privilege of jury trial should be foregone, then the judge shall so order. In determining what is a proper case, the judge should be guided by the rules laid down by Judge Molloy in *Desiatnyk and Desiatnyk v. Brown*. The rules, the Commission thinks, should be codified as presumptions in "*The Queen's Bench Act*".

As previously stated, one member of the Commission does not agree with the proposed amendment to Section 66(4), and instead is of the opinion that the present wording of Section 66(4) should be retained as in his opinion the reasons already given in this Report, which are critical of civil juries in cases other than those presently specifically provided for, outweigh those in support of the proposal that the use of civil juries should be expanded.

Further the Commission thinks that the judge should not be forbidden from stating rules as guidelines for the jury when an assessment of damages is called for.

ACCORDINGLY, IT IS RECOMMENDED:

1. *That the provisions of Section 66(1) of "The Queen's Bench Act" be retained.*
2. *That the provisions of Section 66(3) be amended as follows:*

   (3) The following classes of actions shall be tried by a judge without a jury, unless the parties in person or by their solicitors or counsel consent to the issues of fact being tried and the damages being assessed by a jury:

   (a) actions in which all of the original parties are corporations or trustees and in which no third or fourth party is an individual person;

   (b) actions for a declaration in which the facts are admitted by the adverse parties and no contentious testimony or evidence is adduced;

   (c) actions for advice and directions or the construction of an instrument, statute or other writing;

   (d) actions in which judgment can be pronounced without a trial and upon consent of the parties.

3. *That Section 66(4) be amended as follows:*

(4) Except where otherwise provided by law, all issues of fact shall be tried, and all damages shall be assessed, by a jury, unless the parties in person or by their solicitors or counsel are deemed under subsection (2) to have waived their right to a jury trial or expressly consent to the facts being tried and damages assessed by a judge without a jury.

4. *That Section 66(5) be amended as follows:*

(5) Notwithstanding anything in subsection (3), a judge presiding at a trial, or a judge presiding at the calling of a list of causes and actions about to proceed to trial, may in his discretion direct that the action or issue shall be tried or the damages assessed by a jury.

5. *That a new Section 66(6) should be enacted as follows:*

(6) Upon the application of any party to an action, and notwithstanding subsection (4), a judge, if he finds that the trial of an action or issue and the assessment of damages by a jury would be substantially inappropriate or contrary to the public interest, may order or direct that the action or issue be tried or damages be assessed without the intervention of a jury; but no such application shall be entertained if a direction has been given pursuant to subsection (5) and only one such application shall be heard and determined in any action.

6. *In exercising discretion under Section 66(5), the judge shall take judicial notice of the following presumptions which, it is thought, should be made a part of "The Queen's Bench Act":*

(a) fact finding, determining the degrees of fault and assessment of damages are matters essentially within the province of juries;

(b) assessment of damages for serious or permanent injuries is particularly fitting for determination by jury;

(c) where the evidence is likely to be contradictory, with hard swearing on either side, involving appreciation of testimony and difficult questions of fact, a jury trial should be utilized;

(d) where a question of law or of mixed law and fact is involved, this in itself is not a reason for refusing a jury trial;

(e) *where in an action the questions of law involved are very difficult of appreciation and inextricably mixed with the questions of fact, a jury trial, generally, should not be granted;*

(f) *where the matters at issue require investigations and explanations of a scientific or highly technical character, jury trials should not, generally, be granted;*

(g) *where damages are trivial, jury trials should not, generally, be granted;*

(h) *where an action involves a computation of figures, a jury trial should not, generally, be granted;*

(i) *where there is likely to be a need for a view under difficult circumstances which cannot be conveniently conducted with a jury, a jury trial should not, generally, be granted.*

7. *The foregoing provisions shall remain in effect for a period of seven years from the date of Royal Assent and shall apply to all contested actions and proceedings over which the Legislature has jurisdiction, other than chambers proceedings, if such actions be not already set down for trial and proceeding to trial on the day on which this provision receives Royal Assent, and shall apply to all such actions and proceedings as have been commenced prior to the expiry of the seven year period.*

The combined effect of Sections 27(1)(b) and 67 of "The County Courts Act" with Section 66(1) of "The Queen's Bench Act" allows that in contested cases of defamation the action shall be tried by a jury unless the parties in person or by their solicitors or counsel waive such trial.

8. *Unless these provisions be sooner amended or repealed, upon the expiry of the seven year period these provisions shall lapse and subsection (4) of Section 66 shall forthwith become operative except as to those actions and proceedings commenced prior to the expiry of the seven year period as provided in the preceding paragraph.*

9. *The judge should not be forbidden from laying down guidelines for the jury when assessing damages, and the statute should specifically so provide. Counsel may, in writing, cite authorities concerning the quantum of damages to the judge, provided that such written citations be also provided to the adverse parties, and the judge may propose to the jury guidelines as to the assessment of damages based on such of the cited authorities as he considers apposite to the matters in issue.*

VIII. THE SPECIAL JURY

"The Jury Act" of Manitoba envisages two types of juries — common and special. By Section 35(1) of *"The Jury Act"* certain persons, not normally disqualified as jurors, and living within ten miles of the court house of the judicial district in question, are liable to serve as special jurors if they fall within the following categories: Justices of the peace, bank officers, retail or wholesale merchants, stock brokers, chief officers of bodies corporate doing business in the province, chief agents or officers of a body corporate at any town where the court house is situated.

The special jury, it seems, is to fulfill two rather different functions: (a) to be informed fact finders in some technical non-legal field and (b) to be jurors of higher social status than is usual. Section 55 envisages that in Manitoba the juries decide issues of fact or assess damages, "according to the law and practice which existed in England on the 15th day of July 1870".

At the turn of the century in England, special juries were popular in personal injuries cases. This was due to the belief that people of higher status were likely to think in larger sums when assessing damages. Again such juries were popular in defamation cases where elements of class or political prejudice were often advantageous to one side or the other. It is to be noted that the party choosing to go before a special jury had to pay for that privilege. Special juries were also employed in commercial disputes, but by 1895 due to dissatisfaction with special juries in these cases it had become the practice of litigants to seek a trial by judge alone.

The special jury was abolished in England in 1949 with the express exception of the City of London where a special jury from that city may sit in the Commercial Court of the Queen's Bench Division. No special jury has sat in the Commercial Court since 1950. The final abolition of this exceptional jury has been recommended by the Morris Committee on Jury Service (reporting in 1965).

The position in Manitoba would seem to be reflected in an interview with the late Mr. P.A. Draward, Deputy Prothonotary. Mr. Draward had been a member of the Board of Selectors for some years and stated that a special jury is for all practical purposes unheard of in Manitoba. Mr. Draward said that in the twenty years he had been in the Prothonotary's office, he had never called such a jury or heard of one being called in the province. Mr. Draward thought that there is no reason to have special juries and believed that the provisions relating to them should be repealed.

RECOMMENDATION:

In view of the fact that the special jury is unheard of in the day-to-day judicial workings of this province, and in light of the fact that the jurisdiction which gave birth to such a jury has felt that it has outlived its usefulness, it is recommended that provisions regarding the special jury should be repealed. This involves repeal of the following Sections of "The Jury Act" completely: Sections 34 (1), (2); 35 (1), (2), (3); 55; 56; 57 (1), (2), (3); 58 (1), (2), (3); 59; 60; and 77.

IX. MISCELLANEOUS MATTERS

A. CHALLENGING JURORS

The system of challenging jurors by counsel is dealt with in *"The Jury Act"*. These provisions will apply only to civil cases since challenges in criminal cases are dealt with in the *Criminal Code*. We can find no great evidence as to the workings of the challenge system as set out under the Act. This is clearly due to the dearth of civil jury cases in the province. Both the Sheriff of the Eastern Judicial District and his deputy were of no help in recalling whether challenges were made.

Since we recommend the abolition of special juries we make no comment on challenges in that context. We notice however that three challenges without cause are allowed outside the Eastern Judicial District, while only two are allowed within the District in the case of common civil juries. There seems to be no apparent reason for this disparity.

IN LIGHT OF THE LACK OF EVIDENCE ON THIS MATTER IN THE PROVINCE, WE RECOMMEND THAT:

(i) the existing provisions regarding challenges be retained but that the number of challenges without cause be set at three in all cases;

(ii) challenges of special juries should be abolished.

Further consideration of challenge practices might take place at a future time as civil jury trials are utilized to a greater extent in the province.

If the recommendations be adopted, Section 76(1) should be amended in part, to provide three challenges without cause in all cases.

Sections 76(2) and 77 are repealed;

Section 78 should be amended to read:

> *Every challenge or exception to the panel or to any particular juror returned thereon shall be taken, made, and decided upon in open court on the grounds of real or apprehended prejudice or bias.*

B. JURORS' FEES AND MILEAGE

In our report #2A we recommended that jurors' fees be increased to $20 per day. Subsequently *"The Jury Act"* was amended (S.M. 1972 c. 56 s. 6) so that jurors' fees should be set at $18 per day. In this time of inflation we believe that the figure of $30 per day would be adequate compensation for a juror taking into account the amount of time and expense required to perform these duties.

THEREFORE WE RECOMMEND:

That Section 79(1) of "The Jury Act" be amended to provide that jurors' fees be increased to $30 per day.

We note that our recent informal Report* on Statutory Sums suggests an increase of jurors' fees to $30.00 per day. We make that recommendation at this time.

Section 79(3) states that up to 5¢ a mile is payable to a juror living within 10 miles of the court house and up to 10¢ a mile for the juror living outside that limit.

We wonder whether these payments are sufficient today.

ACCORDINGLY, WE RECOMMEND:

That the mileage expenses for jurors be increased. The amount of the increase should be such as to make the mileage rate paid to jurors equivalent to that paid to civil servants and other persons travelling on government business. Section 79(3) should therefore be amended. Section 79(2) regarding fees would be retained.

Miscellaneous rules regarding fees, mileage, etc.

These sections refer to the administration of granting fees, mileage and out-of-pocket expenses.

WE RECOMMEND THAT THEY BE RETAINED. Sections 79 (4), (5), (6); 80 (1), (2); and 82 retained.

C. LIABILITIES OF JURORS AND PUBLIC OFFICERS AND PROCEDURES THEREUNDER

These liabilities include fines for non-appearance of jurors, liabilities of public officers for not discharging their duties under *"The Jury Act"* and attendance procedures for jurors. These sections seem to be working well.

WE RECOMMEND THEIR RETENTION AS FOLLOWS:

Sections 80(3), (4); 81; 82 retained in whole.

Section 83 — liability of jurors be expanded to include new declaration procedures under the Juror Information Form and questioning at the court house. Additionally, the Commissioners consider that a change in the present penalty ($100 or 30 days) is required. The penalty should be "up to $500 fine with no option of imprisonment".

Section 84 — liability of public officers is retained in whole.

D. IRREGULARITIES

Section 86 states that an omission to observe the provisions of the Act is not ground for impeaching the verdict or judgment in any action or issue.

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*NOTE: The Commission's informal reports are not printed; the recommendations they express are conveyed to the Honourable the Attorney-General by letter only.

This does not prevent counsel from challenging jurors during trial on the ground that a juror is not qualified under the Act — Section 87.

RECOMMENDED:

That these provisions be retained.

X. *"THE JURY ACT"* AND *"THE COUNTY COURTS ACT"*

"The County Courts Act" makes separate provisions for the use and empanelling of juries. A number of differences, without apparent reason, appear between the provisions of *"The Jury Act"* and *"The County Courts Act"*. Juries are not now used in criminal cases before the County Court, thus all the provisions in *"The County Courts Act"* regarding juries will be relevant only to civil jury trials. We see no reason why our recommendations regarding the functioning of the civil jury before the Court of Queen's Bench should not be applicable to County Courts in as many areas as possible.

A. THE ENCOURAGEMENT OF CIVIL JURIES

We have already recommended that the provisions of Section 66 of *"The Queen's Bench Act"* be amended so as to encourage the use of civil juries. We think similar provisions should be enacted in *"The County Courts Act"*.

RECOMMENDED:

That Sections 55 and 56(1) of "The County Courts Act" be amended so as to conform with Section 66 of "The Queen's Bench Act" in its proposed amended form.

B. LIABILITY TO SERVE AS JURORS IN THE COUNTY COURT

Under Section 58 of *"The County Courts Act"*,

> All male and female persons, being Canadian citizens, between the ages of eighteen and sixty, resident in the County Court district in which the court is held and on the municipal list of electors, and who are not exempt or disqualified from serving under *"The Jury Act"* are liable to serve in court as jurors.

It is to be noted here that while the *disqualifications* and *exemptions* of *"The Jury Act"* are adopted, the *qualifications* for service in County Courts are different from those set down in *"The Jury Act"*. Section 58 talks of "Canadian citizens". "Canadian citizen" is not defined in *"The County Courts Act"*. However, the municipal list of electors is to be used in selection. The municipal list is to be drawn up in conformity with *"The Local Authorities Elections Act"* which prescribes that "Canadian citizens" for such elections includes any British subject. The question is thus open to doubt in the wording of Section 58 as to whether British subjects are liable for jury service. At present those to be liable are Canadian citizens who are on the municipal list of electors.

It is also to be noted that the age qualifications are also different. The age limit under *"The Jury Act"* is 65. The limit in *"The County Courts Act"* is 60. Is there any reason for this? We cannot find one.

Lastly, Section 58 stipulates that a prospective juror must be a resident of the County Court district in which the court is held. While this provision may breed convenience, we see no reason why anyone within the judicial district in which the court is held should not also be liable for jury service.

In light of the foregoing considerations:

RECOMMENDED:

1. *The qualifications, disqualifications and exemptions of "The Jury Act" in its new form should be adopted in "The County Courts Act".*
2. *All persons resident in the Judicial District in which the court is held and who are otherwise not exempt or disqualified from serving under "The Jury Act" are liable to serve in the County Court as jurors.*
3. *(i) Section 58 of "The County Courts Act" should accordingly be repealed.*

   (ii) Section 59(1) should be amended to read:

   The jurors summoned for a sitting may be taken from the lists of electors last made up and certified for the municipalities wholly or partly within the County Court district in which the court is to be held or from such lists from municipalities wholly within the Judicial District in which the court is held.

   (Note: This allows the sheriff to take names from lists which are representative of municipalities within the County Court district. If these be insufficient, he may then resort to lists from municipalities anywhere within the Judicial District in which the court is held.)

C. SELECTION UNDER *"THE COUNTY COURTS ACT"*

The selection procedures under the Act are even more arbitrary than under *"The Jury Act"*. The clerk of the court can pass over not only anyone who, to his knowledge, is ill, or is absent from the district but anyone whom he deems to be objectionable. Similarly any woman by application in writing will have her name passed over.

The question arises here as to whether the local jury should be the choice of the "key man" of the locality or whether we still want random selection juries in our County Courts. Consistent with our philosophy throughout this report, we feel that impartial selection as a norm should be adhered to.

RECOMMENDED:

1. *That the selection procedures adopted for the new "Jury Act" be employed as near as possible for "The County Courts Act".*
2. *That post selection procedures adopted for the new "Jury Act" be employed as near as possible for "The County Courts Act".*

Accordingly, the following sections of "The County Courts Act" will be affected.

59(2) repealed.

59(3) amended so as to read:

> *The clerk or the bailiff of the court shall obtain from the sheriff of the judicial district in which the court is held, a copy of the latest revised and certified list of electors.*

60(1) is amended so that sufficient jurors be summoned initially. In light of the proposed computer random selection, there will not be an initial "screening", except through the Juror Information Form. We think the number summoned for attendance where a jury is required should be eighteen. Where more than one jury is required, thirty should be summoned. These numbers may be increased if required in the future.

60(2) is retained.

D. NUMBER OF JURORS EMPLOYED

Under *"The County Courts Act"* six jurors are summoned, five are empanelled as a jury and four may deliver a verdict. Under *"The Jury Act"*, the jury consists of six persons, five of whom may deliver a verdict. Why the difference? In an interview with Sheriff Dawson and the sheriff's deputy, both were at a loss to explain the distinction. We see no reason why the distinction should continue and thus believe that the rules of *"The Jury Act"* be adopted.

RECOMMENDED:

To accord with "The Jury Act", the number of persons serving on a County Court jury should consist of six persons, five of whom may return a verdict. Special exceptions where trial and verdict by five jurors may be made in concurrence with Sections 67(2) of the present "Jury Act".

E. FEES AND MILEAGE

Why should there be any distinction in respect of fees and mileage between trials in County Court and in the Queen's Bench? The sums claimed by litigants might be larger but the loss to jurors in terms of time and money will be the same.

Additionally, from a policy point of view on a question of fees, we make specific reference to Section 61(6) of *"The County Courts Act"*:

> "The amount paid to a juror in each action shall be costs in the cause."

We see no reason why a litigant should be charged with the cost of payment of jurors' fees.

ACCORDINGLY WE RECOMMEND:

1. *That the fees and mileage rates paid to jurors under "The County Courts Act" be the same as laid down under "The Jury Act".*
2. *That there be no cost to the litigant in utilizing a trial by jury.*

(Note: The Commission discussed but did not decide whether to retain the initial set-down fee of $50 or some larger amount to account for inflation, but it was thought that at least during the proposed seven year experimental period there would be little need for such a fee if in the general practice jury trials were the norm.)

Sections affected:

Sections 61(1), (2), (3), (4), (5) be amended to accord with the provisions of the new "Jury Act".

Section 61(6) be repealed.

F. SERVICE IN OTHER COURTS

Section 62 of *"The County Courts Act"* states that service in the County Court does not exempt a person from serving as a juror in any other court. We think that once more here, to be consistent with the provisions of *"The Jury Act"*, and also from the viewpoint of public policy, a person who has given jury service in any court should be exempt for two years following such service.

RECOMMENDED:

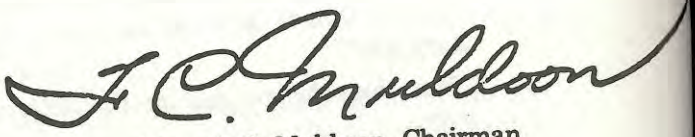
Consistent with "The Jury Act", a person who has served on a jury in the County Court shall be exempt from all jury service for the following two years.

G. CONCLUSIONS

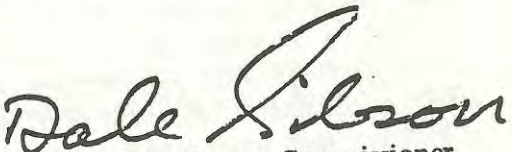
It is our impression that here is a case where two statutes have been permitted to develop independently where there seems to be no pressing policy reason why this should be so. In the interests of the uniform administration of justice there should be as close a correlation between *"The County Courts Act"* and *"The Jury Act"* as possible. Apart from repealing those sections in *"The County Courts Act"* as required, Section 85 of *"The*

Jury Act" will need amending. Section 85 states what present sections of "*The Jury Act*" apply in County Court. Lastly, we think that the practices relating to the utilization of the civil jury in the Court of Queen's Bench and the County Court should be uniform. This is facilitated by enunciating identical provisions in "*The Queen's Bench Act*" and "*The County Courts Act*" on this matter.

This is a Report pursuant to Section 5(2) of "*The Law Reform Commission Act*" dated this 11th day of February 1975.

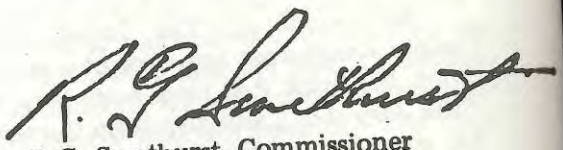


Francis C. Muldoon, Chairman



R. Dale Gibson, Commissioner

C. Myrna Bowman, Commissioner



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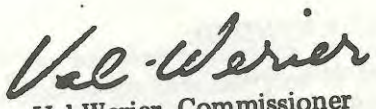

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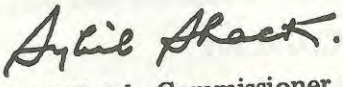
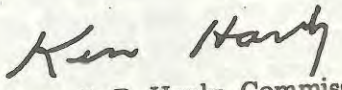


Sybil Shack, Commissioner



Kenneth R. Hanly, Commissioner