



Comments on a potential amendment to the *Juries Act*

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Submitted by: Ontario Bar Association



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Introduction

This submission is in response to the Ministry of the Attorney General's request for input regarding a potential amendment to the *Juries Act* (the “**Act**”) regarding accessibility of juror information.

The OBA

Established in 1907, the OBA is the largest voluntary legal organization in Ontario, representing lawyers, judges, law professors and students from across the province, on the frontlines of our justice system and in no fewer than 40 different sectors. In addition to providing legal education for its members, the OBA assists government and other decision-makers with several legislative and policy initiatives each year– both in the interest of the profession and in the interest of the public.

This response has been developed primarily by the OBA's Criminal Law section, with input from the Privacy Law section and Insurance Law section. Collectively, our members regularly represent the broadest possible range of clients in the Superior Court of Justice, and we are pleased to participate in dozens of consultations and initiatives every year with the goal of improving Ontario's justice system.

Overview

The OBA is pleased to provide member feedback to the Ministry, arising from preliminary conversations regarding the consultation, “on the appropriateness of an amendment to the *Juries Act*, to remove the requirement that juror residential addresses be included on jury panel lists to ensure juror privacy/security”.

It is noted that the terms ‘privacy’ and ‘security’ are two separate terms that have been treated as such in our submission. The *Journal of Criminal Law and Criminology* noted the difference between the two terms in 2013. “Privacy establishes a normative framework for deciding who should legitimately have the capability to access and alter information.”¹ Discussions regarding privacy

¹Derek E. Bambauer, *Privacy Versus Security*, “*Journal of Criminal Law & Criminology*”, Vol 103, No. 3, 2013, page 669.



often involve difficult “decisions about competing claims to legitimate access to information.”² This current consultation bears this out. Security, on the other hand is ensuring the proper implementation of the decision as to who has the legitimate access to the information.³ As such, our members submit that the Act, as it currently stands, has established the requisite balance of the competing claims of juror privacy against the need for an impartial jury. Any proposed changes should focus on enhancing security around that information as opposed to enhancing the privacy of the information.

It should be noted that in reviewing the consultation paper, it is not clear the factors influencing the Ministry’s thinking regarding privacy and security of both criminal and civil jurors. With no specific amendment proposed by the Ministry at this time, it is assumed that any proposed change would impact both criminal and civil juries. As such, we welcome an opportunity to speak to you further on this topic as a more thorough response to the consultation will turn in part on the specific concerns driving it. Given that, and the relatively short time frame to provide feedback, we are happy to provide the following high level commentary and look forward to working with you on this important issue.

Current System

The Act sets out the law on the preparation of jury rolls and jury panels in Ontario. The Superior Court of Justice relies on the Act for both civil and criminal juries. The Act is an important tool to help balance the need for an impartial jury against the privacy of jurors, in both criminal and civil trials. This bears particular importance in criminal trials where the accused is faced with the potential loss of liberty, as such our arguments focus primarily on the juror in a criminal trial albeit our rationale is transferrable in most cases to the juror in a civil context. Under the current Act, the requirement for the inclusion of juror street addresses is one such tool for both parties to ensure an impartial jury. There are a number of ways the current system supports this, including, but not limited to:

² Derek E. Bambauer, “Privacy Versus Security”, *Journal of Criminal Law & Criminology*, Vol 103, No. 3, 2013, page 683.

³ Derek E. Bambauer, “Privacy Versus Security”, *Journal of Criminal Law & Criminology*, Vol 103, No.3, 2013 page 683.



determining proximity of a potential juror to the alleged crime, representativeness of a potential jury panel, and the ability to correctly identify and research potential jurors.

Determining Proximity of a Potential Juror to a Crime Scene

The current requirement to release street addresses allows parties to identify prospective jurors who may be connected to the parties, and the alleged offence and therefore would be unable to impartially decide the case. For example, a prospective juror who lives in the same apartment building where an alleged crime has taken place may be unable to be an impartial juror. Further, if a prospective juror lives in a separate residential building, but lives in the immediate vicinity of the crime scene, the ability to be impartial may still be a concern.

Representative Jury Panel

Ensuring a jury is impartial also means the members must be representative of our broader communities. Residential addresses provide counsel with information on what neighborhood an individual is residing in. From that, it can also provide information regarding socio-economic status and potential community beliefs, biases, and neighbourhood issues.

Ability to Correctly Identify a Potential Juror

Lastly, the current system assists counsel in properly identifying potential jurors ahead of jury selection. The federal Bill C-75 proposes elimination of peremptory challenges. If the Bill passes, counsel will require a basis for challenging a juror. Under Rule 5.5 of the *Rules of Professional Conduct*, parties are allowed to investigate potential jurors for grounds to challenge for cause as long as they do not directly contact the juror. As such, the ability to identify a juror in order to develop the basis for a challenge for cause is an important consideration in proposed amendments to the Act.

Proposed Amendment to the Current System

As outlined in your consultation document, considered alternatives to the current system include: the release of the first three characters of the juror's postal code, release of only a potential juror's municipality, no juror address information to be released, or only to be released on a successful



motion to access same. In each of these four proposed alternatives to the current system, concerns arise as to how to ensure the benefits of the current system in ensuring impartial jurors.

At the outset, it bears mentioning that the Steering Committee on Justice Efficiencies and Access to the Justice System addressed potential changes to jury empanelment, in the criminal context, in a report in 2009.⁴ The Committee concluded that any such changes should be addressed at the federal level, by amendments to the *Criminal Code*, rather than at the provincial level, because “It would not be desirable for the anonymity of jurors in one province to be better protected than that of jurors in other provinces.”⁵

For the first two proposed alternative options, either providing the name of the municipality or providing limited postal code information, the removal of residential addresses will significantly reduce counsel’s ability to quickly ascertain information regarding potential jurors. Municipalities and postal codes vary in not only in geographical size, but also in population size. This is problematic for a number of reasons. If only the name of the municipality is available, what neighbourhood an individual resides in can be lost and the ability to identify potential jurors in advance research will be compromised in municipalities with individuals carrying the same names.

The use of only postal code information also creates potential concerns. In an urban setting, the provision of only the first three characters or even the full postal code may provide minimal differentiation in terms of the information counsel will be able to obtain with regard to neighborhood and potential impartiality. However, in rural areas, or municipalities outside of central southern Ontario, where postal codes may cover a significant geographical area, release of only postal codes will also restrict counsel’s ability to ascertain information for the same reasons noted under the release of only the municipality.

⁴ Steering Committee on Justice Efficiencies and Access to the Justice System, Report on Jury Reform, May 2009, available at <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/esc-cde/scje-cdej/toc-tdm.html> (“Report on Jury Reform”)

⁵ See “Report on Jury Reform”, s. 3.2.1, “The safety of jurors: anonymity”, available at <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/esc-cde/scje-cdej/p5.html>



Therefore, both of these proposed alternatives would impede counsel from engaging in timely and effective juror research, making it more difficult to ensure the selection of impartial and representative jurors under the time constraints of a jury trial.

The remaining two options put forward in this consultation — preventing counsel from receiving *any* residential address information or requiring a motion for such information to be released — raise all of the concerns identified above to an even greater degree. With no residential address information, research into the jurors would be even more difficult, if not impossible in some cases. Furthermore, introducing the need for motions in potentially every jury case would bloat the already lengthy jury trial process and raise concerns about delay as identified in *R. v. Jordan*, 2016 SCC 27 and following cases.

Alternatives to the Proposed Amendments

With the above in mind, our members believe the Act as it currently reads balances the need of jury privacy against an impartial jury. As such, an alternative to the proposals in the consultation document, which focus on the question of privacy, is an alternative approach which would be to enhance security of the jurors' privacy. Any alternative options must bear in mind at least two current aspects of the justice system which assist in ensuring privacy concerns for jurors are maintained and respected at all times. The first is that counsel are expected to conduct themselves responsibly and behave in an ethical manner, regarding all aspects of the law, including privacy of jurors and any information they may receive regarding them. Failure to protect the security of such information can result in discipline from the Law Society or criminal charges. The second is that the *Criminal Code* affords jurors further security of their privacy in appropriate cases. Section 631(6) of the *Code* empowers judges to make whatever order is necessary to restrict publication and disclosure of the identity of jurors, or any information that could identify them, as well as to limit access to or use of juror information. This could include prohibiting copies being made, requiring lists be returned or requiring lists be shredded or sealed. Failure to comply with such a court order would constitute



a criminal offence. Judges in the Superior Court of Justice also have the inherent power to make these orders in civil trials, and some do routinely.⁶

Having noted the two examples above that currently assist with concerns of security of juror privacy, consideration could be given to the increased use of undertakings in matters involving jurors, to strengthen the security. Currently, defence counsel in criminal cases regularly receive disclosure materials containing personal information about people who are involved in criminal offences. The personal information counsel receives is secured by the requirement that counsel not provide copies of disclosure to their clients, and that they only use it to make full answer and defence to the charges at hand. In the context of privacy of information of jurors, counsel are handed the list of any potential jurors on a printed out sheet of paper, which, it is well understood, is to be used only for the case at hand. Should the Ministry determine that further steps are required to enhance the security of the privacy interests of jurors, it would be relatively easy and cost effective to have counsel sign undertakings stating that they would only use juror lists for the purpose of advancing or defending the case to be tried by the jury. Further, the undertaking could also include that counsel would not make or distribute copies of the materials or information therein, for any other purpose. This option also would not require the use of scarce judicial resources.

Conclusion

We understand the premise for the current consultation is to address questions that have arisen regarding privacy/security. However, privacy rights of potential jurors must be balanced against the needs to ensure a fair and impartial trial of accused persons, which is critical to our justice system. We believe that the system currently in place — restricting the release of personal information on potential jurors to their residential addresses, and providing this information only to counsel for the parties — considers the need for this balance.

If there is an ongoing pressing concern, regarding “privacy/security” of juror’s information, we would suggest this be addressed through measures to secure the privacy of the personal information of jurors as opposed to removing the right to counsel to review that information. As such, we encourage

⁶ See Donald S. Ferguson, *Ontario Courtroom Procedure 2009* (Toronto: LexisNexis, 2008) at p. 691.



consideration be given to adding a requirement of counsel to engage in an undertaking regarding the residential addresses. The undertaking could note that counsel is not to use juror address information for any purpose other than the case at hand, and not to provide copies of these documents to their clients, similar to the undertakings that attach to disclosure in criminal cases.

We appreciate the opportunity to provide a submission on this important topic on behalf of our members. As noted earlier, we would welcome further information as to the considerations embedded in this consultation and any proposed amendments, and would welcome the opportunity to provide additional information or answer any questions you may have.