

OPINION

Canada's courts need a system update to deal with internet-connected juries

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The Ontario Superior Court building is seen in Toronto on Jan. 29, 2020.

COLIN PERKEL/THE CANADIAN PRESS

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Twenty years ago, the Supreme Court of Canada outlined rules for how to respond if out-of-court information was to improperly seep into the jury room. Those rules are outdated now, in our time of smartphones, social media and high-speed internet. People serving on juries have virtually unlimited access to information, wherever they go.

These rules require modernization, especially given the unequal racial consequences they permit. Fortunately, there is one appeal working its way to the Supreme Court of Canada that could provide a critical opportunity for our jury-secrecy rules to be brought into the 21st century.

In 2011, Christophe Lewis was convicted of second-degree murder by a jury and sentenced to life in prison – time he continues to serve. But days after his conviction, a whistle-blowing juror came forward alleging that another juror retrieved prejudicial information from the internet, outside of the evidence presented at trial. Further, the whistle-blower suggested that the prejudicial information may have influenced the jury deliberations, thereby calling the fairness of the hearing – and the court’s verdict – into question. Mr. Lewis and his lawyers, Nader Hasan and Wes Dutcher-Walls, recently submitted materials to the highest court in the land arguing that it should grant Mr. Lewis’s request to revisit his conviction.

Their concern is straightforward: Juries are supposed to make decisions based on evidence presented inside the courtroom, but today it could not be easier for individual jurors to use technology to review information from outside the courtroom, and to improperly rely on that information in the deliberative process. Some of that external information may be true, but it may be prejudicial, and thus properly excluded from the courtroom. Other such information may be blatantly false. Regardless, such external information improperly influences the jury. With the click of a button or a tap on a screen, unqualified content from all corners of the internet can covertly infiltrate the trial process.

In all cases, reliance on untested out-of-court information by jurors risks injustice. But in cases with racialized accused, that risk is magnified. People such as Mr. Lewis, who is Black, are particularly vulnerable to wrongful conviction on the basis of prejudicial, irrelevant or inaccurate information circulating online. Indeed, Indigenous and Black accused are more

likely to be subject to stereotypical characterizations online that disproportionately affect jury deliberations in their cases when compared with white accused.

For example, social and broadcast media remain inundated with an overrepresentation of images and information that portray racialized people – especially Indigenous and Black people – as criminals. Research has shown how Black people can be unjustly portrayed as dangerous, threatening and violent in the news media and in popular culture. Without an updated jury secrecy rule, it would be difficult to prevent jurors from drawing lines between the circumstances of a given case and negative media portrayals of racialized individuals they consume; this risks perpetuating the Canadian state's disproportionate mass incarceration of Indigenous and Black people.

To be fair, judges routinely inform jurors of the impropriety of conducting online research. But we cannot assume all jurors comply with these rules. And when a whistle-blowing juror goes as far as to allege that improper information was introduced in the jury room, our courts must be equipped with the flexibility needed to respond. Mr. Lewis's case – where both the trial and appeal court refused to consider how the alleged introduction of improper information may have prejudiced his verdict – is emblematic of this concern, and of the pressing need to modernize Canada's jury secrecy rules.

The speed at which technology has advanced is staggering, and the criminal justice system must move along with it. The very legitimacy and integrity of the system is deeply threatened whenever it fails to evolve with society. Systemic racism and bias infect policy, policing, prosecutions and even adjudication. Mr. Lewis's case offers a rare opportunity for Canada's highest court to make the jury process more responsive to the technological and social climate of our times and, in turn, to mitigate systemic racism in one of the most sacred sites of the criminal justice system: the jury room.

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