

***R. v Kokopenace* –  
The Supreme Court Pronounces on Jury Representativeness for First Nations People**

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Introduction

On May 21<sup>st</sup> 2015, the Supreme Court rendered its decision in *R v Kokopenace*. It overturned the Court of Appeal's judgment, which held that the provincial government had failed to meet its obligation to address the under-representation of First Nations on-reserve residents on Ontario juries, and that this failure was a breach of the accused's s.11(d) and (f) *Charter* rights. In a four judge majority, with one judge concurring and two in dissent, the Supreme Court held that jury representativeness was not violated, and correspondingly that there were no violations of the accused's *Charter* rights. The three judgments differed primarily on the question of what it means for a jury to be "representative," with the majority interpreting the requirement narrowly while the dissent took a broader view.

Background

Clifford Kokopenace is an aboriginal man from the Grassy Narrows First Nation reserve in Kenora, Ontario. He was convicted of manslaughter for stabbing and killing another man during a fight. However, he appealed his conviction after discovering that the creation of the jury roll for the District of Kenora may have inadequately included the district's on-reserve residents. This potentially undermined the representativeness of the jury, and consequentially the fairness of his trial. On appeal Mr. Kokopenace argued that his rights under s.11(d), 11(f) and 15 of the *Charter* were violated, and sought public interest standing under s.15 of the *Charter* to challenge the composition of the jury roll on behalf of potential jurors who had been excluded.

The Jury Roll

In Ontario, the Jury roll is assembled by randomly selecting names from the most recent municipal enumeration. This does not capture on-reserve residents, who do not belong to a municipality, so there is a supplemental process which selects additional potential jurors from lists of on-reserve residents. However, this supplemental process was not working well. In 2000, the Federal Government stopped providing up-to-date lists of residents for the purpose of compiling the jury roll, and since then the lists used by the District of Kenora had been getting steadily more out of date, in spite of the efforts made by the employee in charge of jury selection to obtain newer lists from the reserves directly. In addition, response rates to the jury questionnaires sent to on-reserve residents in the district declined steadily. The rate, which had been 33% in 1994 (already significantly lower than the 60%+ response rate of off-reserve residents) reached a low of just 10% in the year that Mr. Kokopenace's trial took place.

The Representativeness Requirement

There was significant common ground between the judges' positions on the representativeness requirement. All of the judges located the representativeness rights under section 11(d) and (f) of the *Charter*, and all agreed that representativeness is fundamentally a procedural question, guaranteeing the integrity of the process and not its outcome. However, they disagreed on what it means for a jury roll to be representative, and the relationship between representativeness and the *Charter* rights of the accused.

Writing for a majority of four judges, Moldaver J. grounded his judgment in an extremely narrow definition of representativeness. According to Moldaver, representativeness means that an adequate process was employed in the compilation of the jury roll. Representativeness is not affected by selection from the jury roll, or by the composition of the petit jury. He indicated that a jury roll will be

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representative if i) it is compiled using lists which draw from a broad cross section of society, ii) it is randomly selected, and iii) notices are effectively delivered to those who have been selected, providing them with a “fair opportunity” to participate in jury selection. Additionally, the requirements are narrowed further because in order to satisfy these requirements, the state must only make reasonable efforts to ensure that all of the above conditions are met.

Moldaver J. also held that although s.11(f) would be triggered on any flaws in jury representativeness, s.11(d) would only be triggered where the non-representativeness of the jury raises a reasonable apprehension of bias. He held that this will occur in two circumstances: i) where a particular group is deliberately excluded, or ii) where the state’s efforts in compiling the jury roll are so deficient that it creates an appearance of partiality.

Karakatsanis J’s concurrence largely agreed with Moldaver J’s restrictive definition. However, she posited an additional requirement that broadened it slightly: the jury must adequately fulfil its function of representing the will of the community. In her words, this requirement is not met “when the jury roll is so deficient that society would no longer accept that a jury chosen from it could legitimately act on its behalf.” She also disagreed that reasonable efforts to meet the conditions of jury representativeness are sufficient, stating that “it is the adequacy of the process used, rather than the quality of the state’s efforts, which determines whether or not an accused’s *Charter* rights were violated.” Neither Karakatsanis nor Moldaver believed that the rate of response to the jury notices played any role in deciding whether a jury was representative.

The dissent took a significantly different approach. Cromwell J., writing on behalf of himself and McLachlin CJC., determined that there are two requirements for a jury roll to be representative. First, the lists used to randomly select potential jurors must be representative of the community and second, the group of people who return questionnaires must substantially resemble a random sample of the lists. There are important differences between this definition of representativeness and the others. Most importantly, this definition captures the rate of response of potential jurors under its second point. This means that Cromwell agreed with the Court of Appeal’s argument that Ontario had a responsibility to address the declining response rates of on-reserve residents in order to ensure that the composition of the jury roll was representative. In addition, Cromwell J’s position requires that the lists used to compile the jury roll be “representative of the district” rather than requiring that they “draw from a broad cross-section of society,” as Moldaver and Karakatsanis would require.

The final difference between Cromwell’s approach and the approach of the majority is that Cromwell separated the question of representativeness from the question of state responsibility. He held that to determine whether an accused’s *Charter* rights are breached, the Court must first ask whether the jury roll is representative, and then ask whether the non-representativeness is within the control of the state. If the non-representativeness is partially within the control of the state, and partially due to the actions of others, then the question will be whether the state has made reasonable efforts to ensure that the jury roll is representative.

The judges were sharply critical of one another’s approaches. Moldaver J. dismissed Karakatsanis’ “functional approach,” stating that it was “amorphous” and “difficult, if not impossible to apply”. He also argued that requiring more than reasonable efforts on the part of the state meant that it would be held accountable for the failure of individuals to comply with its requirements. For example, in the case at hand, the state made efforts to obtain updated lists from the reserves and was unsuccessful because the reserves did not respond. Moldaver J. argued that Karakatsanis’ position would hold the state responsible for this. He also expressed significant concerns about Cromwell’s definition of representativeness. He suggested that there is no principled reason for the court to stop at obvious or highly visible breaches of the representativeness requirement and that the logical extension of the principle would result in “an

inquisition into prospective jurors' backgrounds and a requirement that the state target particular groups for inclusion", because if the jury roll had to be representative of the population with respect to the proportion of on-reserve residents, there was no justifiable reason that it should not need to be proportional with respect to gender, race, age, employment status and so on. Furthermore, he stated that failure to address these additional dimensions of representativeness by Cromwell creates a right without a meaningful remedy. His conclusion was that Cromwell's definition would either be incoherent, or would result in a "procedural quagmire" at the beginning of trials as defense attorneys searched the jury roll for problems with representativeness, and undermine the administration of justice because it would result in massive delays as the state had to repeatedly compile new jury rolls. Lastly, he responded with strong language to Cromwell's criticism of his use of a slippery slope argument by calling it "unfair and unwarranted".

Cromwell J. argued that Moldaver's "fair opportunity to participate" test mistakenly focused on the opportunity provided to the prospective jurors, rather than on the *Charter* protected interests of the accused. The accused's right is to be tried before a representative jury, and whether people had a "fair opportunity" to participate in that jury are beside the point. He also concludes that the effect on jury impartiality is greater than Moldaver believes, because a representative jury helps to minimize the danger of unconscious prejudice on the part of jurors. Lastly, Cromwell challenged Moldaver's slippery slope argument, noting that similar arguments had been rejected in the context of racial bias in jury selection in *R v Williams* ([1998] 1 SCR 1128), and "the sky has not fallen."

#### The Role of the "Jury Representativeness" Right

These disagreements were informed by an underlying disagreement about the function of the s.11(d) and (f) rights in the case. Moldaver J's majority argued that the fair trial rights of an accused are not the correct place to address deeper underlying issues involving the alienation of First Nations peoples by the justice system. He expressed concern that attempts to address wrongs to Aboriginal peoples through the jury representativeness right would require targeting a particular group for inclusion on juries, and that this would actually undermine the procedures for random selection of jurors, and the protection of juror privacy. By contrast, Cromwell argued that representativeness under s.11(d) and (f) is about the legitimacy of the justice system, and that therefore it should extend to addressing underlying problems, where resolving those issues will encourage the participation of marginalized groups, and enhance the legitimacy of the jury system as a result. He wrote that the *Charter* "ought to be read as providing an impetus for change," and that failure to address these issues in the context of jury representativeness is a failure to do so.

#### Application to the Evidence:

There were also disagreements on the significance of several key facts in evidence. Moldaver J. rejected the argument that failings of procedure could be identified on the basis of the actual makeup of the jury roll, and characterized problems with the lists, and delivery of notices as being only partially within State control. He focused on the efforts of the singular employee responsible for the compilation of the jury rolls in the District of Kenora, Ms. Loohuizen. In doing so, he appears to presume that the broad approach of the government was reasonable, since he does not question whether Ms. Loohuizen was the correct person to bear the responsibility, or seriously address the training and resources she received. He notes that Ms. Loohuizen "did the best she could with the lists she received, and made ongoing and escalating efforts...to obtain better source lists." He also concludes that problems with delivery of the notices fundamentally resulted from the faulty lists, and so does not consider them independently. All in all, he finds that the government's efforts to obtain proper lists to draw from, and send notices to potential jurors were adequate. As a result, since Ontario's responsibilities end when it sends out notices appropriately, he finds that there was no breach of the accused's rights under s.11(d) and (f). Karakatsanis J. largely agrees with Moldaver J.'s conclusions on these issues.

By contrast, Cromwell J. takes the position that where the final jury roll “obviously and significantly departed from any result that could be obtained by a proper process of random selection,” an observer can conclude that the processes employed to obtain the jury roll were deficient. He also concludes that the State was fundamentally responsible for the quality of its lists, and the adequate delivery of notices. As a result, under his framework it does not matter whether the efforts made by the state were reasonable, since their results were inadequate. Additionally, he finds that the state did not make reasonable efforts to deal with the low return rate by on-reserve residents, as reasonable efforts would have included a more complete investigation of the causes of the low return rate, and efforts to encourage on-reserve residents to respond. He criticizes the government for relying on the efforts of a single junior employee with little formal training to formulate the jury rolls for the District.

### Section 15

None of the judges significantly addressed section 15. Moldaver J. upheld the Court of Appeal’s decision that Mr. Kokopenace did not demonstrate that he was disadvantaged, and denied him public interest standing on the basis that the interests of an accused person and of potential jurors might differ significantly. Karakatsanis J. agreed with Moldaver J., and Cromwell J. found it unnecessary to address s.15 as the issues had been fully canvassed under the s.11(d) and (f) analysis.

### The Remedy

Moldaver and Karakatsanis JJ found no breach of the accused’s *Charter* rights, and therefore awarded no remedy. Cromwell would have upheld the Court of Appeal’s order of a new trial, concluding that as they made no error of law he could only interfere with their remedy if it was “so clearly wrong as to amount to an injustice.”

### Comments

The majority in this case construes the right to jury representativeness so narrowly that it seems to have little meaning. Short of the deliberate exclusion of a significant part of the population, I can see few things that would trigger Moldaver J.’s representativeness right, since it cannot address anything that happens after the jury questionnaires are sent out. Concerningly, one of the things that perhaps could trigger the representativeness right as Moldaver framed it is sending out extra jury questionnaires to a subset of the population, as Ontario actually did in this case in an attempt to address the declining response rate of on-reserve residents. Moldaver stipulated that those receiving jury notices from the lists must be selected randomly, and it is at least arguable that deliberately selecting more names from one list than another might not be sufficiently random to fulfil this criteria. This is actually supported by the fact that Moldaver called the state’s approach “aggressive,” when the attempt clearly still resulted in significant under-representation of on-reserve residents on the jury roll.<sup>2</sup>

This reflects a very formalistic approach to the problem the court was asked to consider, and Moldaver’s bald assertion that section 15 was not engaged because the accused failed to demonstrate that he was disadvantaged by the process paid little heed to the evidence before the court regarding the relationship between First Nations peoples and the justice system. First Nations peoples are alienated from the justice system by hugely disproportionate incarceration, by their historical exclusion from serving on juries, and by prejudice that exists against aboriginal peoples, among many other things. The idea that these things do not become personal for an accused in the face of a jury trial where on-reserve residents are

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<sup>2</sup> The attempt to address the problem involved sending almost 50% more jury notices to on-reserve residents. This was intended to address a 17% return-to-sender rate, and the fact that the lists employed largely missed anyone under the age of 26 by 2008, and were missing entirely for nearly 10% of the reserves in the district. This is admittedly a back-of-the-envelope calculation, but it seems likely that the on-reserve population was still receiving fewer notices than their proportion of the population warranted, ignoring entirely their rate of response once it had been received.

significantly under-represented does not make a lot of sense. If the right of an accused to be tried by an impartial and representative jury is not the place to address these concerns, I struggle to find a place in the justice system that will be.