

# **R v Kokopenace (2013): Manslaughter Conviction Overturned Due to Lack of Aboriginal Jurors**

## **Introduction**

On June 14, 2013, the Ontario Court of Appeal overturned a manslaughter conviction because the jury roll did not adequately represent on-reserve Aboriginal Peoples.[\[1\]](#) Sections 11(d) and 11(f) of the *Canadian Charter of Rights and Freedoms (Charter)* guarantee an accused's right to a representative jury.[\[2\]](#) Since too few on-reserve Aboriginal Peoples were included in the jury roll process, Mr. Kokopenace's constitutional right to a representative jury was violated. The following Featured Court Ruling summarizes the Ontario Court of Appeal judgment and briefly explores the larger issue of Aboriginal Peoples' alienation from the criminal justice system.

## **Facts**

### **Jury Selection**

Jury selection in Ontario takes place in three stages. First, the jury roll is prepared by selecting individuals from the community who are able to serve as jurors. Second, individuals from the jury roll are selected to form jury panels. Third, individuals are selected from the jury panels to form juries for specific criminal trials.[\[3\]](#) The first two stages of jury selection are governed by provincial legislation. In Ontario, the governing legislation is the *Juries Act*.[\[4\]](#) The third stage is governed by the *Criminal Code*.[\[5\]](#)

To create a jury roll, the trial coordinator randomly selects names listed on the most recent municipal census and mails those selected individuals jury notices. Because municipal censuses do not list on-reserve Aboriginal Peoples, there is a separate process for including them in the jury roll. The *Juries Act* states that the trial coordinator is to use any available list of on-reserve Aboriginal Peoples to randomly select people who will be mailed jury notices.[\[6\]](#)

### **Mr. Kokopenace's Appeal**

Mr. Kokopenace challenged the first stage of the jury selection process. He claimed that due to errors committed by the Ontario Government, his jury was derived from a jury roll that did not adequately represent on-reserve Aboriginal Peoples. Mr. Kokopenace alleged that poor representation of on-reserve Aboriginal Peoples violated his constitutional rights under

sections 11(d), 11(f), and 15 of the *Charter*.<sup>[7]</sup> Additionally, Mr. Kokopenace claimed that section 629(1) of the *Criminal Code* applied.<sup>[8]</sup> Mr. Kokopenace applied to the trial judge for a mistrial.<sup>[9]</sup>

## Procedural History

On June 17, 2008, Mr. Kokopenace was convicted of manslaughter by a jury in an Ontario Superior Court.<sup>[10]</sup> Prior to sentencing, but after conviction, the defence brought forward an application for a mistrial claiming that Mr. Kokopenace's *Charter* right to a representative jury was violated because the jury roll was improperly compiled. The trial judge declined to adjourn the sentencing proceedings to hear a mistrial application. The defence appealed the trial judge's decision to the Ontario Court of Appeal. <sup>[11]</sup>

## Issues

The Ontario Court of Appeal considered the following issues:

1. What is the scope of Mr. Kokopenace's constitutional right to a representative jury roll under sections 11(d) and 11(f) of the *Charter*?<sup>[12]</sup>
2. In preparing the jury roll, did the Ontario Government make reasonable efforts to provide a fair opportunity for Aboriginal Peoples' distinct perspectives?
3. In preparing the jury roll, did the Ontario Government act partially, fraudulently, or with wilful misconduct per section 629(1) of the *Criminal Code*?<sup>[13]</sup>
4. Does failing to include a certain number of on-reserve Aboriginal Peoples in the jury roll violate Mr. Kokopenace's right to equality guaranteed under section 15 of the *Charter*?<sup>[14]</sup>
5. If Mr. Kokopenace's constitutional rights were violated, what is the appropriate legal remedy?

## Decision

In a 2-1 majority, the Ontario Court of Appeal ruled:

1. The constitutional right to a representative jury under sections 11(d) and 11(f) of the *Charter* required the Ontario Government to take reasonable steps to ensure that Aboriginal Peoples were included in the jury roll.<sup>[15]</sup>
2. The Ontario Government did not make reasonable efforts to ensure that on-reserve Aboriginal Peoples were included in the jury roll. Therefore, Mr. Kokopenace's constitutional right to a representative jury was violated.<sup>[16]</sup>
3. The analysis of section 629(1) of the *Criminal Code* was unnecessary.<sup>[17]</sup>
4. Mr. Kokopenace did not offer sufficient evidence for a section 15 claim. This part of

his appeal was dismissed.[\[18\]](#)

5. The manslaughter conviction was overturned and a new trial was ordered.[\[19\]](#)

## **Court's Analysis**

### **Issue 1: What is the scope of Mr. Kokopenace's constitutional right to a representative jury roll under sections 11(d) and 11(f) of the *Charter*?**

Sections 11(d) and 11(f) of the *Charter* do not make explicit reference to a representative jury.[\[20\]](#) Nonetheless, in *R v Sherratt*, a 1991 Supreme Court of Canada decision, the Court ruled that a representative jury was an essential component of the section 11(f) right to trial by jury.[\[21\]](#) Additionally, the Ontario Court of Appeal ruled that a representative jury was implied in section 11(d).[\[22\]](#)

The constitutional right to a representative jury does not, however, require every accused's jury to be composed of a specific number of different groups of people.[\[23\]](#) A fully representative jury would be difficult to achieve because of the random selection process used to create the jury roll.[\[24\]](#) Courts must examine the process used to create the jury roll, not the final composition of the jury roll.[\[25\]](#) The constitutional right to a representative jury was satisfied if the Ontario Government made reasonable efforts to provide a fair opportunity for Aboriginal Peoples to be included in the jury roll.[\[26\]](#)

### **Issue 2: In compiling the jury roll, did the Ontario Government make reasonable efforts to provide a fair opportunity for Aboriginal Peoples' distinct perspectives?**

In 2008, the Kenora District in Ontario had a population of approximately 65,000 people. The population of on-reserve Aboriginal Peoples was about one third of that total. The 2008 jury roll (the jury roll that Mr. Kokopenace's jury was selected from) was composed of 699 people - 29 of those were on-reserve Aboriginal Peoples. On-reserve Aboriginal residents made up 4.1% of the jury roll, but they represented 33% of the total Kenora District population.[\[27\]](#)

The Ontario Court of Appeal attributed the low rate of on-reserve Aboriginal Peoples to outdated band lists, low return rates of jury notices, and an even lower rate of eligibility. Beginning in 2000, Indian and Northern Affairs[\[28\]](#) stopped providing band lists to the trial coordinator - the person responsible for compiling the lists of potential jurors and mailing jury notices. As a result, the trial coordinator was forced to rely on outdated band lists. The outdated band lists did not include people who had turned 18 since 2000, and they did not take into account people who had died or moved. Approximately 10% of jury notices sent to on-reserve Aboriginal Peoples were returned, and only about 6% of the people who returned jury notices were eligible to be placed on the jury roll.[\[29\]](#)

The Ontario Court of Appeal ruled that the Ontario Government was well aware that on-reserve Aboriginal Peoples were under-represented on jury rolls.[\[30\]](#) While the Ontario Government attempted to increase the number of on-reserve Aboriginal Peoples on jury rolls by trying to obtain updated band lists and sending out more jury notices, the Court ruled

that the state's efforts were "sorely lacking" for several reasons.<sup>[31]</sup> First, the task of securing updated band lists fell to a relatively low-ranking employee, Ms. Loohuizen. Given her junior position, Ms. Loohuizen was not capable of securing the necessary lists, and she should not have had to shoulder the burden alone.<sup>[32]</sup>

Second, the Ontario Government's actions failed to take into account Aboriginal Peoples' historical estrangement from the justice system.<sup>[33]</sup> Aboriginal Peoples' unwillingness to serve on juries stems from the fact that the justice system has often ignored or discriminated against them.<sup>[34]</sup> For instance, jurors used to be selected from voter lists, but many Aboriginal Peoples did not have the right to vote until 1969.<sup>[35]</sup> The Ontario Government's decision to place a junior bureaucrat in charge of remedying such an important and complicated situation was unreasonable.<sup>[36]</sup>

For these reasons, the Court ruled that the Ontario Government failed to fulfil its duty to make reasonable efforts to ensure that Aboriginal Peoples' unique perspectives would be included in the jury rolls.<sup>[37]</sup> As a result, Mr. Kokopenace's *Charter* right to a representative jury was violated.<sup>[38]</sup>

### **Issue 3: In preparing the jury roll, did the Ontario Government act partially, fraudulently, or with wilful misconduct per section 629(1) of the Criminal Code?**

Section 629(1) of the *Criminal Code* only permits an accused person to challenge the jury process if the sheriff (or other person in charge of creating the jury) acted partially, fraudulently, or with wilful misconduct.<sup>[39]</sup> The Ontario Court of Appeal did not find it necessary to consider this issue because it had already ruled that Mr. Kokopenace's *Charter* right was violated.<sup>[40]</sup>

### **Issue 4: Does failing to include a certain number of on-reserve Aboriginal Peoples in the jury roll violate Mr. Kokopenace's right to equality guaranteed under section 15 of the Charter?**

Mr. Kokopenace alleged that by not having more on-reserve Aboriginal Peoples on the jury roll he was disadvantaged.<sup>[41]</sup> The Court of Appeal dismissed Mr. Kokopenace's section 15 claim because he failed to provide any evidence to demonstrate the disadvantage.<sup>[42]</sup>

### **Issue 5: If Mr. Kokopenace's constitutional rights were violated, what is the appropriate legal remedy?**

If a person's constitutional rights are violated, that person can apply for a remedy under section 24(1) of the *Charter*.<sup>[43]</sup> Since the Court of Appeal determined that Mr. Kokopenace's constitutional right to a representative jury was violated, the Court ordered to overturn the manslaughter conviction and send the matter back for a retrial.<sup>[44]</sup>

### **Justice Rouleau's Dissent**

Justice Rouleau ruled that the Ontario Government's efforts in response to on-reserve Aboriginal Peoples' participation on juries were reasonable, and, therefore, Mr.

Kokopenace's constitutional right to a representative jury was not violated.<sup>[45]</sup>

Justice Rouleau noted that the Ontario Government had made errors when it created the jury roll; however, the Ontario Government is not held to a standard of perfection, only reasonableness.<sup>[46]</sup> After discovering the low return rates and low eligibility of on-reserve Aboriginal Peoples, the Ontario Government attempted to obtain updated band lists, and it sent out more jury notices to compensate for the low return rates. Justice Rouleau determined that these efforts were reasonable.<sup>[47]</sup>

Additionally, Justice Rouleau noted that Aboriginal Peoples' alienation from the justice system is a complex problem that requires changes in policy and legislation. The Ontario Government should be given time to study the problem, create a solution, and implement that solution. Considering the complexity of the problem, Justice Rouleau determined that the Ontario Government acted reasonably. For these reasons, Justice Rouleau would have dismissed Mr. Kokopenace's appeal.<sup>[48]</sup>

## Significance of the Ruling

In *R v Kokopenace*, the Ontario Court of Appeal articulated a required standard of conduct for the Ontario Government when dealing with Aboriginal Peoples and the jury selection process.<sup>[49]</sup> Specifically, the Court ruled that for the Ontario Government to satisfy its duty to act reasonably, it "must demonstrate that it exercised diligence, resourcefulness, ingenuity and persuasion."<sup>[50]</sup> If the Ontario Government merely accepts its repeated failure to include more on-reserve Aboriginal Peoples in the jury roll process, its actions will be considered unreasonable, thereby violating people's Charter right to a representative jury.<sup>[51]</sup>

The decision in *R v Kokopenace* also serves to highlight a larger issue: Aboriginal Peoples' alienation from the criminal justice system. In February, 2013, former Supreme Court of Canada Justice, Mr. Iacobucci, released a report, "First Nations Representation on Ontario Juries."<sup>[52]</sup> In the report, Mr. Iacobucci attributed the under-representation of on-reserve Aboriginal Peoples on Ontario juries to a number of factors, such as Aboriginal Peoples' lack of understanding of the criminal justice system, the disconnect between Aboriginal Peoples traditional conflict resolution methods and the justice system, and the historical discrimination endured by the Aboriginal Peoples.<sup>[53]</sup> While the issue is undoubtedly complex, Mr. Iacobucci's report offers several ways to solve the problem. Most importantly, senior Ontario Government officials and Aboriginal leaders must coordinate their efforts by having a government-to-government relationship.<sup>[54]</sup> Mr. Iacobucci says "the time for talk is over, what is desperately needed is action."<sup>[55]</sup>

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<sup>[1]</sup> *R v Kokopenace*, 2013 ONCA 389  
< <http://www.canlii.org/en/on/onca/doc/2013/2013onca389/2013onca389.html> >.

<sup>[2]</sup> *Canadian Charter of Rights and Freedoms*, ss 11(d), (f), Part I of the *Constitution Act*,

1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (“[a]ny persons charged with an offence has the right...(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal...(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment” ss 11(d), (f)) < <http://laws-lois.justice.gc.ca/eng/Const/page-15.html#h-39>>.

[3] *Kokopenace*, *supra* note 1 at para 4.

[4] *Juries Act*, RSO 1990, c J.3 < [http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_90j03\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90j03_e.htm)>.

[5] *Criminal Code*, RSC 1985, c C-46 < <http://laws-lois.justice.gc.ca/eng/acts/C-46/>>.

[6] *Kokopenace*, *supra* note 1 at paras 7-8; *Juries Act*, *supra* note 4.

[7] *Kokopenace*, *supra* note 1 at para 2; *Charter*, *supra* note 2, ss 11(d), (f), 15 (“[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability” s 15(1)).

[8] *Criminal Code*, *supra* note 5, s 629(1) (an accused can challenge the jury only on the ground of partiality, fraud or wilful misconduct on the part of the sheriff or other person responsible for the jury composition).

[9] *Kokopenace*, *supra* note 1 at para 54.

[10] *R v Kokopenace*, 2008 CanLII 59322 (ONSC) < <http://www.canlii.org/en/on/onsc/doc/2008/2008canlii59322/2008canlii59322.html>>.

[11] *Kokopenace*, *supra* note 1 at paras 53-54.

[12] *Charter*, *supra* note 2.

[13] *Criminal Code*, *supra* note 5, s 629(1).

[14] *Charter*, *supra* note 2, s 15.

[15] *Kokopenace*, *supra* note 1 at para 159; *Charter*, *supra* note 2.

[16] *Kokopenace*, *supra* note 1 at paras 187-88.

[17] *Ibid* at para 214; *Criminal Code*, *supra* note 5, s 629(1).

[18] *Kokopenace*, *supra* note 1 at para 218; *Charter*, *supra* note 2, s 15.

[19] *Kokopenace*, *supra* note 1 at para 232.

[20] *Charter*, *supra* note 2.

[21] *R v Sherratt*, [1991] 1 SCR 509; *Charter*, *supra* note 2, s 11(f).

[22] *Kokopenace*, *supra* note 1 at para 26; *Charter*, *supra* note 2, s 11(d).

[23] *Kokopenace*, *supra* note 1 at para 43.

[24] *Ibid*.

[25] *Ibid* at para 45.

[26] *Ibid* at para 50.

[27] *Ibid* at para 119.

[28] The Department of Indian Affairs and Northern Development is a federal department responsible for policies related to Aboriginal Peoples.

[29] *Kokopenace*, *supra* note 1 at paras 116, 118.

[30] *Ibid* at para 208.

[31] *Ibid* at para 207.

[32] *Ibid* at para 271.

[33] *Ibid* at para 210.

[34] *Ibid* at para 150.

[35] *Ibid* at para 149.

[36] *Ibid* at para 212.

[37] *Ibid*.

[38] *Ibid* at para 214.

[39] *Criminal Code*, *supra* note 5, s 629(1).

[40] *Kokopenace*, *supra* note 1 at para 214.

[41] *Ibid* at para 218.

[42] *Ibid*; *Charter*, *supra* note 2, s 15.

[43] *Charter*, *supra* note 2, s 24(1) (“[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances” s 24(1)).

[44] *Kokopenace*, *supra* note 1 at para 232.

[45] *Ibid* at para 279.

[46] *Ibid* at para 301.

[47] *Ibid* at para 304.

[48] *Ibid* at paras 306, 336.

[49] *Ibid* at para 160.

[50] *Ibid*.

[51] *Ibid*.

[52] Frank Iacobucci, First Nations Representation on Ontario Juries, online: Ministry of the Attorney General.

[53] *Ibid* at 54-55.

[54] *Ibid* at 6.

[55] *Ibid* at 1.