

# Ladies and Gentlemen of the Jury, No Aboriginals Necessary: The Case of R v Kokopenace

*This article was written by a law student for the general public.*

## Introduction

The right to be tried by a jury of one's peers stretches back to the signing of the Magna Carta in 1215. The right is essential to the effective functioning of our justice system and it is protected in the *Canadian Charter of Rights and Freedoms*: Section 11(f) of the *Charter* guarantees the right to a trial by jury and section 11(d) guarantees the right to a fair trial by an impartial tribunal. Because of its importance, the selection process for jury members and the jury's representativeness are essential to trial fairness.

Jury composition and representativeness were the central issues in the recent case of *R v Kokopenace*.<sup>[1]</sup> The case is significant because it was the first time the Supreme Court ruled on the representativeness of juries. The majority of the Supreme Court held that a jury is representative if the selection process for jurors is fair. The final composition of the jury does not matter.

## Facts

In 2008, Clifford Kokopenace was convicted of manslaughter. He is Aboriginal and from a reserve in the District of Kenora.<sup>[2]</sup> At the end of the trial, his lawyer learned that there might have been problems including on-reserve Aboriginal residents on the jury role. Therefore, the jury might not have been representative.<sup>[3]</sup> A jury roll is a list of people who have been randomly selected from the community in a judicial district, and who can sit on a jury.

In Ontario, the process for selecting on-reserve Aboriginals to sit on a jury is separate from the process used for the non-reserve population. First, a provincial official must create a list of names of residents who live on each of the reserves. In this case, the province relied on Band lists. From those lists, the province then randomly selects members to be put on the jury roll. Jury notices are sent to every person on the jury roll, and those persons can be selected to sit on a jury.

The on-reserve adult population makes up between 21 to 32 per cent of the total adult population in Kenora. However, the province had difficulties obtaining accurate lists as well as issues with sending out jury notices. Many of the lists that were used for the jury roll were outdated, and many residents on the reserves do not have a mailbox for jury notices to be sent to. Finally, four of the reserves were accidentally excluded.

Ontario made efforts to improve the accuracy of the lists and increase response rates to jury notices. First, it tried to acquire updated lists of the on-reserve adult population by contacting chiefs several times, but it was unable to gather recent lists. Second, Ontario increased the number of jury notices sent out to the reserves by 50 per cent. Unfortunately, the outdated lists and absence of personal mailboxes on the reserves affected the quality of delivery.

In the end, only 10 per cent of the on-reserve adult population responded to a jury notice in the year of Mr. Kokopenace's trial. Only 5.7 per cent of on-reserve residents who responded to the jury notice were eligible to serve as jurors.

## **Issues**

What makes a jury representative and how does that representativeness factor into sections 11(d) and 11(f) of the *Charter*? Did Ontario meet its obligation to select a representative jury in this case?

## **Summary of the Decision**

The majority of the Supreme Court held that a representative jury depends upon a fair selection process, not upon the final composition of the jury. For a jury selection process to be fair, the state must make reasonable efforts to:

- (1) Randomly select individuals from source lists that draw from a broad cross-section of society
- (2) Send each of the individuals selected a jury notice.

In this case, Ontario satisfied these requirements. Ontario took reasonable efforts to ensure that the jury was representative.

## **Analysis**

### Representativeness

The Court decided that representativeness depends upon the process of compiling a jury roll, not the jury's final composition.<sup>[4]</sup> There is no constitutional right to a jury that "proportionately represents all the diverse groups in Canadian society".<sup>[5]</sup> Requiring a jury of proportional representation would be impractical because of the numerous classifications based on race, religion, age, gender, and so on.<sup>[6]</sup> It could also stall the criminal justice system.<sup>[7]</sup>

There are three requirements for ensuring representativeness in the jury roll process. First, the state must create lists that draw from a broad cross-section of society.<sup>[8]</sup> Second, the state must randomly select individuals from the list to place on the jury roll.<sup>[9]</sup> Every individual must have an equal chance of being selected from the list. <sup>[10]</sup>Third, everyone selected from the list must receive a jury notice.<sup>[11]</sup> Delivery of the jury notice must be adequate, which depends upon the circumstances.<sup>[12]</sup>

The state must make a reasonable effort to satisfy each of these requirements and “the quality of the state’s efforts will determine if the process is adequate.”<sup>[13]</sup> There is no obligation to actively encourage responses to a jury notice or to ensure that a jury is proportionately representative.<sup>[14]</sup> Finally, while the court acknowledged that there has been historical discrimination against Aboriginal peoples, the state is not obliged to address historical discrimination in the jury selection process.<sup>[15]</sup>

#### Section 11(d) of the Charter

The Court decided that a representativeness problem violates section 11(d) of the *Charter* only if it undermines the court’s independence or impartiality.<sup>[16]</sup> In this case, the Court only focused on impartiality. Impartiality comes only from the process of compiling the jury, not its final composition.<sup>[17]</sup> Impartiality is violated in two ways: (1) deliberate exclusion of a particular group; or (2) a process so deficient that it creates the appearance of bias.<sup>[18]</sup> In this case, Ontario did not violate section 11(d) of the *Charter* because it did not deliberately exclude on-reserve Aboriginal adults, and it took reasonable efforts to ensure the process was fair.

#### Section 11(f) of the Charter

Representativeness is required for an accused’s right to a fair trial.<sup>[19]</sup> Like section 11(d), section 11(f) of the *Charter* also protects the right to an adequate jury selection process. However, section 11(f) provides broader protection than section 11(d). The reason is that a problem with representativeness will violate section 11(f), the right to a fair trial, even if it does not violate impartiality; that is, deliberate exclusion of a group or a seemingly biased process.<sup>[20]</sup> In this case, the Supreme Court decided that Ontario’s efforts in compiling the jury roll did not impair Mr. Kokopenace’s right to a fair trial.

#### Did Ontario Meet Its Representativeness Obligation?

The Court decided that Ontario took reasonable efforts in the circumstances to fulfill the requirements for representativeness. It requested updates from the chiefs of reserves and sought the help of a Deputy Grand Chief. It also increased the number of jury notices to improve response rates. These efforts were sufficient to meet the requirements for representativeness. Ontario was not obliged to take more active and substantive measure to get response for jury notices.

#### **Conclusion**

*R v Kokopenace* is an important case because of what it says about the constitutionality of a representative jury. A jury’s composition does not have to be proportionate to all the diverse groups in a particular district. The important part of creating a representative jury is to ensure that the process in compiling the jury roll is fair. This means that the accused does not have a right to a jury with members that share the same racial, religious, or other characteristics as themselves.

The decision raises a number of issues around representativeness. It is interesting that the

majority of the Supreme Court interpreted representativeness in the way that it did. Should a jury have members who can understand an accused's experiences as belonging to a particular group? Or is the composition of the jury irrelevant when deciding how to weigh the evidence in a trial? What do you think representativeness means for a jury?

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[1] *R v Kokopenace*, 2015 SCC 28

[2] *Ibid* at para 4

[3] *Ibid* at para 5

[4] *Ibid* at para 40

[5] *Ibid* at para 39

[6] *Ibid* at para 73

[7] *Ibid* at para 76

[8] *Ibid* at para 40

[9] *Ibid* at para 40

[10] *Ibid* at para 42

[11] *Ibid* at para 40

[12] *Ibid* at para 45

[13] *Ibid* at para 63

[14] *Ibid* at para 64

[15] *Ibid* at para 64

[16] *Ibid* at para 48

[17] *Ibid* at para 51

[18] *Ibid* at para 50

[19] *Ibid* at para 55

[20] *Ibid* at para 58