

TOP FIVE 2015

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

R v KOKOPENACE, **2015 SCC 28, [2015] 2 SCR 398.**

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<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15373/index.do>

Facts

Clifford Kokopenace was an Aboriginal man who lived on the Grassy Narrows First Nation reserve in Kenora, Ontario. He was charged with second degree murder and convicted of manslaughter after a trial by jury. Before he was sentenced, his lawyers learned of problems with the inclusion of on-reserve Aboriginal people as jurors in Kenora. Despite the fact that this group was a significant part of the local population, it made up a very small percentage of those included as potential jurors for trials, and there were no on-reserve Aboriginal Canadians on Mr. Kokopenace's jury. Mr. Kokopenace appealed his conviction, arguing that his right to a fair trial had been violated under ss. 11(d) and 11(f) of the *Canadian Charter of Rights and Freedoms*.

Canadian Charter of Rights and Freedoms

- 11.** Any person 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

Procedural History

The Court of Appeal for Ontario (ONCA) held that Mr. Kokopenace had received a fair trial and that the jury that heard his case had not been affected by bias. However, that Court also found that the state has a duty to try to ensure a representative jury and that the accused's ss.11(d) and 11(f) *Charter* rights had been violated by the lack of efforts to do so. The Court held that this would undermine public confidence in the justice system and that the correct remedy was to order a new trial for Mr. Kokopenace. The Crown appealed to the Supreme Court of Canada (SCC).

Issues

1. What is the government required to do to ensure representativeness of juries in relation to ss. 11 (d) and 11 (f) of the *Charter*?
2. Did the government do enough to meet its obligation to ensure representativeness for the accused?

Decision

The majority of the Supreme Court allowed the appeal. The order for a new trial was set aside and the conviction reinstated.

Chief Justice McLachlin and Justice Cromwell dissented, and found that the appeal should be dismissed.

Ratio

The actual representation of different social groups on a jury is separate from the question of whether the state has taken adequate steps to try to ensure representativeness. As long as the process by which the jury is chosen is a fair one and produces a reasonable cross-section of the community, that jury is representative and the state's duty has been met.

Reasons

The majority considered that the state had met its obligation to ensure representativeness. This was achieved by providing a fair opportunity for a balanced cross-section of a given community to be selected to serve on a jury. To do this, the state must make reasonable efforts to:

- 1) Compile the list of potential jurors using a random and unbiased selection of residents that are themselves balanced, and
- 2) Deliver jury notices to all of those people who have been randomly selected without excluding anyone.

Writing for the majority, Justice Moldaver argued that the issue of representativeness is about whether a process is fair, not about whether a particular group is accurately represented on a jury. In other words, the state has a duty to take steps to ensure potential jurors accurately reflect their communities. The state has met that duty if these steps are taken.

The majority reviewed the process by which juries were selected in Kenora and found that reasonable efforts were made to ensure that:

- 1) The lists of potential jurors were not biased, and
- 2) That all those who were selected received jury notices.

The Court held that therefore the Crown had met the obligation to ensure the accused's *Charter* right to a representative jury was respected.

In reaching this conclusion, the majority found that on-reserve Aboriginal people were given a reasonable opportunity to be part of the jury pool, but that the response rate among this group was very low. Only about 10% of those who received notices responded, and only about half of these were eligible to serve as jurors. Of 175 potential jurors in Mr. Kokopenace's trial, eight were on-reserve Aboriginals and none of these eight were ultimately selected to hear his case.

The majority stated that there is no precedent in which courts have held that any number of individuals from the same ethnic group as the accused should necessarily compose the jury. Thus, the state has no constitutional obligation to take positive steps to encourage jury participation from any particular group – only to ensure that no group is systematically excluded in the selection process.

Dissenting Opinion

Justice Cromwell and Chief Justice McLachlin interpreted representativeness differently. They reasoned that the role of the jury must be taken into account when analyzing what representativeness means as it pertains to the *Charter*. Specifically, they found that an unbiased and representative jury is the basis of public faith in the justice system. For this reason, the focus should not be simply on the process by which jury pools are compiled, but also on whether the state actually succeeds in achieving representativeness. More simply, public perceptions of the justice system might suffer if the processes by which juries are generated do not result in representative juries.

In its analysis, the minority called attention to the historically difficult relationship between Aboriginal people in Canada and the law. They noted that Aboriginal people are grossly over-represented in Canadian jails and prisons, and that their under-representation on juries has been one of the contributing factors in this imbalance. They concluded, in contrast to the majority, that the state does have a positive obligation to encourage representative jury participation because of the estrangement of Aboriginals from the Canadian justice system. By failing to make greater efforts to do so, the Province of Ontario had, in fact, infringed upon Mr. Kokopenace's constitutional right to a fair trial. The minority would have upheld the ONCA's decision to award him a new trial.

DISCUSSION

1. Do you think that you would like to serve on a jury? Why or why not?
2. Why is it important for a jury to reflect the characteristics of a community?
3. How might the under-representation of Aboriginal people on juries contribute to the relatively high rates of Aboriginal people in prisons?
4. What matters more: whether a sincere effort has been made to include specific groups on a jury or whether, in the end, the jury includes representatives of those groups?
5. What could the government do to make people more likely to respond when called for jury duty?