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# The right to a representative jury and the role of the court: R v Kokopenac

Mari is currently in her second year of law school at the University of Ottawa. She has a joint master's degree in Environmental Policy and Planning from Technische Universität and Freie Universität in Berlin, and a bachelor's in Political Science from McGill University. Throughout her master's she studied environmental assessment and approval processes around the world, the EU cap and trade system and the impact of investor-state dispute settlements on environmental regulation. While in Germany, she also interned at various organizations, including the Environmental Justice Institute Berlin and Adelphi, a leading independent think tank and public-policy consultancy on climate, environment and development.

At the University of Ottawa, she has focused on gaining experience across a broad spectrum of the law. In her first year, she specialized in the Maanaajitoon Torts first year Indigenous law stream, contributed to the completion of an International Human Rights Canada database at the Human Rights Research and Education Centre, and completed a "Technoship" with the Centre for Law, Technology and Society on the role of public participation in copyright protection. This past year, she has continued to explore different areas of the law. In addition to working as a first year Contracts tutor, she is a research assistant at the University of Ottawa Refugee Hub, and participated in the Jury Selection and Charter values course for which this paper was written.

Introduction:

More than a quarter century after the Aboriginal Justice Inquiry of Manitoba concluded that the justice system had failed Indigenous people on a "massive scale"[1] Indigenous people in Canada continue to be grossly over-represented in Canada's prison system and significantly under-represented in the administration of justice.[2] The relationship between Indigenous people and the criminal justice system is still "among the most pressing social justice and human rights issues in Canada today."[3]

A dangerous symptom of this problem is the continued underrepresentation of Indigenous people on Canadian juries. In 2011, the Ontario government appointed former Supreme Court Justice Frank Iacobucci to carry out an Independent Review of the long-standing underrepresentation of on-reserve First Nations people on juries in the province. Published in 2013, the Iacobucci Report found that "there is not only a problem of a lack of representation of First Nations peoples on juries that is of serious proportions, but it is also regrettably the fact that the justice system generally as applied to First Nations peoples, particularly in the North, is quite frankly in a crisis."[4] The report

[1] AC Hamilton & CM Sinclar, *Public Inquiry Into the Administration of Justice and Aboriginal People, Report on Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People, 1991) online: The Aboriginal Justice Implementation Commission, <http://www.ajic.mb.ca/volumel/toc.html>, ch 11 (last accessed 18 December 2017) [ *Aboriginal Justice Inquiry of Manitoba*].

[2] According to the 2016-2017 Annual Report of the Office of the Correctional Investigator while Indigenous people make up less than 5% of Canada's population, they account for more than a quarter of its federal prison population. Over the past ten years, the federal prison population increased by less than 5%, while the Indigenous prison population within it increased by 39%. For Indigenous women, the situation is even more dire. Over one third of all women in federal custody are Indigenous. This figure has increased by more than 50% over the last ten years, despite long-standing knowledge of the "crisis" and courts' repeated recognition of the discrimination and alienation that Indigenous people experience in the criminal system. Online at: < http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20162017-eng.aspx>.

[3] Canada, Office of the Correctional Investigator, 2016-2017 Annual Report of the Office of the Correctional Investigator, vol 44 (Ottawa: CSC, 28 June 2017) online at: < http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20162017-eng.aspx>

[4] Honourable Frank Iacobucci, *First Nations Representation on Ontario Juries: Reprot of the Independent Review Conducted by the Honourable Frank Iacobucci* (Toronto: Ministry of the Attorney General, 2013) [Iacobucci Report].

outlined 17 recommendations for how the criminal justice system can begin to adapt to address the historical, systemic, and structural discrimination faced by Indigenous people.

In 2015, in *R v Kokopenace*, the Supreme Court of Canada was confronted with a similarly pressing question: the scope of an Indigenous person's constitutional right to a representative jury.[5] At issue was how to define the right to a representative jury as protected by s. 11(d)[6] and 11(f)[7] of the *Canadian Charter of Rights and Freedoms*,[8] and whether Ontario had met its obligations in this regard in relation to the applicant, Mr. Kokopenace, an Indigenous man from the Grassy Narrows First Nation reserve in the District of Kenora.[9] Mr. Kokopenace applied to the court after being found guilty of manslaughter by a jury selected from a jury roll which, he said, "did not adequately ensure the inclusion of Aboriginal on-reserve residents."[10] Only 4% of the people on Mr. Kokopenace's jury roll were Indigenous despite the fact that almost 33% of the population of the district of Kenora at the time was Indigenous. He stated that, as a result, the state had failed to compile an adequately representative jury roll, violating his rights under ss. 11(*d*), 11(*f*) and 15 of the *Charter*.[11]

In a 4-3 decision, the Supreme Court held that the state had satisfied its obligation to provide Mr. Kokopenace with a representative jury, and that there was no *Charter* violation in the case. The

[5] *R v Kokopenace* [2015] 2 SCR 398, 2015 SCC 28 [*Kokopenace*].
[6] Section 11(d) provides that: Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
[7] Section 11(f) provides that: Any person charged with an offence has the right 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;
[8] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), c 11 [*Charter*].
[9] *Kokopenace*, *supra* note 5 at para 1
[10] *Kokopenace*, *supra* note 5 at para 5.
[11] *Chaerter*, *supra* note 8 at ss. 11(d), 11(f), 15.

dissenting argument, articulating a broader constitutional standard for a representative jury roll, found a violation of the ss. 11 *d*), 11(*f*) rights, and would have granted Mr. Kokopenace a new trial. Since the court's decision in *Kokopenace*, several scholars have argued that the majority's definition of a representative jury does not go far enough in responding to the systemic and substantive equality dimensions of the case and the broader issue of Indigenous underrepresentation.[12] The intent of this commentary is to contribute to the discussion of the issue by critically examining the majority's refusal to consider systemic factors in its conception of representativeness, and its refusal to consider any structural responses to the underrepresentation of Indigenous individuals on Ontario's juries. It begins with an outline of the jury-selection process in Ontario so as to ground the discussion of how the court's majority and its dissent framed the state's constitutional obligations to jury representativeness. Second, it looks at courts' institutional capacity to provide constitutional remedies to systemic issues in both the Canadian and American contexts. Third, it examines the policy solutions proposed by the Iacobucci Report to the problem of Indigenous underrepresentation on juries. Finally, it puts forward some conclusions about the role of the courts in this context.

Juries in Ontario:

In Ontario, twelve people sit on a jury in a criminal trial and six people sit on a jury in a civil trial. Jury selection takes place in three stages, the first two of which are covered by the *Juries Act*.[13] The first stage is the preparation of the jury roll. Each year the selection process begins in May, when all 50 judicial districts in the province calculate the number of jurors needed for the upcoming year. Questionnaires are then sent out to randomly selected individuals across each of

[12] See Vanessa Macdonnell, "The Right to a Representative Jury: Beyond Kokopenace" (2017) 64 CLQ 334 [Macdonnell, "The Right to a Representative Jury"]. Also see Rosemary Cairns Way, "An Opportunity for Equality: *Kokopenace* and *Nur* at the Supreme Court of Canada" (2014) 61 CLQ 465 at 466 [Cairns Way, "An Opportunity"]
[13] RSO 1990, c J3 [*Juries Act*].

the districts to determine those individuals' eligibility. Sections 3 and 4 outline a number of eligibility requirements for jury duty, including the requirements that a jury member be over the age of 18, a resident of Ontario, and a Canadian citizen who has not been convicted of an indictable offence.[14]

Following s. 6(2) of the Juries Act, the province uses municipal voters' lists to send out its questionnaires.[15] But because these lists do not include the names of Indigenous people living on-reserve, s. 6(8) of the *Juries Act* creates a separate process for including them. It directs the "sheriff" of the county or district in which the First Nations reserve is located to select the names of eligible individuals from "any record available."[16] Such day-to-day sheriff's responsibilities are carried out by Court Services Division employees tasked with identifying the reserves in a district, obtaining lists to identify potentially eligible jurors, sending questionnaires to randomly selected individuals from those lists, and adding returned questionnaires to the preliminary jury roll.[17] Once the questionnaires are returned and sorted, the final jury roll is created and certified. The jury roll represents the list of individuals eligible to serve as potential jurors.

<u>R v Kokopenace and the scope of the right to a representative jury roll:</u>

In 2008, Clifford Kokopenace, was charged with, and convicted of, manslaughter in the district of Kenora. At sentencing he made a *Charter* application for a new trial arguing that his jury was selected from a jury roll that "did not adequately ensure the inclusion of Aboriginal on-reserve

[14] *Juries Act*, *supra* note 10, s 3-4.
[15] *Ibid*, s 6(2).
[16] *Ibid*, s 6(8).
[17] *R v Wabason and R v Capay*, 2015 ONSC 4763 at para 9.

residents."[18] According to the records, despite the fact that more than 30% of the District of Kenora's adult population was Indigenous, only about 4%, or 29, of 699 potential jurors on the Kenora Jury Roll, were Indigenous. Mr. Kokopenace said this lack of inclusion violated his s. 11(d) and 11(f) rights to a representative jury and his s. 15 equality rights under the *Charter*.

A majority of the Supreme Court of Canada found that in both regards Mr. Kokopenace's *Charter* rights were not violated. Writing for the majority, Moldaver J explained that a process that randomly selects individuals for the jury roll meets the requirements for representativeness under s. 11(d) and 11(f) of the Charter.[19] The focus here is on the process for compiling the jury roll, not its ultimate composition. As a result, there are two ways that a lack of a representativeness may impact an accused's right to an impartial jury:

> First, the deliberate exclusion of a particular group would cast doubt on the integrity of the process and violate s. 11(*d*) by creating an appearance of partiality. Second, even when the state has not deliberately excluded individuals, the state's efforts in compiling the jury roll may be so deficient that they create the appearance of partiality.[20]

The state therefore fulfills its obligation to create a representative jury role if it makes "reasonable efforts" to provide a broad cross-section of society with a fair opportunity to participate in the jury process.[21]

A major criticism of the majority's definition of jury representativeness as a process is that it does not take into account systemic factors.[22] There are several historic and ongoing structural forces, such as racism, colonialism and economic inequality, that can temper what a fair opportunity to

[18] *Kokopenace*, *supra* note 5 at para 5
[19] *Ibid*, at para 56
[20] *Ibid*, at para 50.
[21] *Ibid*, at para 61
[22] Macdonnell, "The Right to a Representative Jury", *supra* note 11 at 342.

participate means, particularly in the context of Indigenous individuals. For example, in both *R v Williams*[23] and *R v Gladue*[24], the court recognized that Indigenous people face systemic bias in the criminal justice system. Similarly, as stated by Justice LaForme in *Kokopenace* at the Court of Appeal, "[t]he underrepresentation of Aboriginal people on the jury roll illustrates another part of the same iceberg, sharing the same root causes: a relationship marked by tensions originating in the colonial era."[25] Moldaver J, writing for the majority, acknowledged the importance of these issues, which he referred to as pressing social problems.[26] He also acknowledged the structural and systemic elements of Indigenous individuals' estrangement from the criminal justice system. However, he stated that incorporating these elements into the law's understanding of the constitutional standard for representativeness would involve problematic "hindsight reasoning."[27]

He stated that the legal test for representativeness is therefore whether "the state makes reasonable efforts to: (1) compile the jury roll using random selection from lists that draw from a broad cross-section of society, and (2) deliver jury notices to those who have been randomly selected, thereby providing a fair opportunity for a broad cross-section of society to participate in the process." There is no requirement for proportionate representation of distinct groups in Canadian society, only procedural fairness. Representativeness, Moldaver J stated, "is not about targeting particular groups for inclusion on the jury roll."[28] This opinion reflects both practical and policy concerns, including judicial economy, juror privacy and the complexities and impossibility of guaranteeing proportionate representativeness for each accused in the context of the many intersectionalities

[23] [1998] 1 SCR 1128, 159 DLR (4th) 493 [*Williams*].
[24] 1 SCR 688, [1999] SCJ No 19 [*Gladue*].
[25] *R v Kokopenace*, 2013 ONCA 389, at para 135, 115 OR (3d) 481 [*Kokopenace* ONCA]
[26] *Kokopenace*, *supra* note 5 at para 65.
[27] *Ibid*, at para 103.
[28] *Kokopenace*, *supra* note 5 at para 61

that may occur, including race, gender, religion, and linguistic group. Instead the system uses random selection as a proxy for representativeness in an effort to ensure procedural fairness and to collect the "conscience of the community."[29]

Moldaver J went on to say that the right to a representative jury is held by the accused and not by the societal groups they may be part of.[30] He therefore rejected the dissent's suggestion that the state is obligated to actively encourage responses to jury selection questionnaires from particular groups in order to respond to systemic issues.[31] He concluded that in the context of Indigenous underrepresentation on juries, the state is only required to create a fair opportunity for participation. It is not "obliged to address the distressing history of estrangement and discrimination suffered by Aboriginal peoples."[32] Juries, he stated, are not the "appropriate vehicle" to address historical and systemic wrongs against Indigenous peoples.[33] Applying this test to the facts of the case, the majority found that Mr. Kokopenace's *Charter* rights were not violated by the almost 30 percent underrepresentation of on-reserve First Nations individuals on the jury roll. This conclusion, I would argue, speaks as much to the majority's understanding of the court's role in enforcing *Charter* rights and freedoms as it does to the scope of the right to a representative jury.

First, Moldaver J's constitutional standard for representativeness is very narrow and deferential to the state. The state must only make "reasonable efforts" to provide a process that provides individuals a fair opportunity to participate.[34] It does not need to necessarily succeed because the

[29] *Ibid*, at para 56.
[30] *Ibid*, at para 65.
[31] *Ibid*, at para 105
[32] *Ibid*, at para 64
[33] *Ibid*, at para 126.
[34] *Kokopenace*, *supra* note 5 at para 31.

focus is on the process. The majority and the dissent split over this standard and whether a jury roll's final composition is relevant to the representativeness analysis. Moldaver J placed the emphasis completely on the process, while in dissent, Cromwell J concluded that the final outcome speaks to the adequacy of the process itself. While Cromwell J agreed that jury representativeness is ensured through the randomness of the process, he concluded that this does not make the result irrelevant.[35]

According to Cromwell J, a truly random process of selection would not lead to the result that "[a]n Aboriginal man on trial for murder was forced to select a jury from a roll which excluded a significant part of the community on the basis of race – his race."[36] Such a result, he stated, is "an affront to the administration of justice and undermines public confidence in the fairness of the criminal process."[37] In his view, the *Charter* requires that the court provide a remedy to begin to rectify the rights violation even if the causes of Indigenous underrepresentation are multifaceted and systemic. He refused to accept that an issue's systemic nature frees the state from responsibility, in particular when the state played a substantial role in creating the systemic problems. In this regard, he stated, "the intractable dimensions and complexity of the problem do not provide an excuse for the state's failure to make appropriate efforts in the context of complying with the constitutional obligation to provide for a representative jury roll."[38]

Cromwell J's more activist stance, therefore, stands in contrast to the judicial restraint exercised by Moldaver J. Where Moldaver J places the onus on the executive to act, Cromwell J sees a place

[35] *Ibid*, at para 233
[36] *Ibid*, at para 195
[37] *Ibid*, at para 195.
[38] *Kokopenace*, *supra* note 4 at para 289.

for the courts to use the *Charter*. Moldaver J seems to view overhauling the jury selection process as a social policy to be exercised by the executive, not as a constitutional obligation that the court can mandate the state to meet. He declined the opportunity to use the courts to require the state to address the underlying causes of Indigenous underrepresentation on juries because it would require a "radical departure from the way the Canadian jury-selection process has always been understood."[39] This stems, at least in part, from the practical implications that such a change would have for the court's resources and institutional capacity. Moldaver J suggests that adapting the jury selection process to meet systemic concerns could lead to a floodgate of litigation that would make it "virtually impossible to have a jury trial."[40] These concerns seem to be as much about the institutional impact of crafting such a remedy as about the merit of the remedy itself.

By comparison, Cromwell J holds that the *Charter* and the constitutional obligations it places on the state can provide a basis for the courts to at least begin to address such issues. He takes more of a middle road than Moldaver J's all-or-nothing proposition. He states that "[w]hile there are many deeply seated causes which contribute to Aboriginal underrepresentation on jury rolls, the *Charter* ... ought to be read as providing an impetus for change, not an excuse for saying that the remedy lies elsewhere." He rejects the suggestion that the courts cannot take steps to address race-based underrepresentation in the jury-selection process without falling down a slippery slope. He points to the court's adoption of race-based challenges for cause in *Williams* as an example of courts taking steps to address a systemic issue without undermining the administration of justice or jury trials.[41] Similarly, he cites *Gladue* where the court took steps to ameliorate the magnitude

[39] *Ibid*, at para 64.
[40] *Ibid*, at para 79
[41] *Kokopenace*, *supra* note 5, at para 282.

of the problem of Indigenous overrepresentation in prisons by emphasizing the importance of taking the unique circumstances of Indigenous offenders into account.[42]

This disagreement about whether the courts can begin to address the underrepresentation of on-reserve First Nations people on jury rolls without disrupting the administration of justice speaks to a broader question about the court's role and institutional capacity. Moldaver J does not spend much time on an explicit elaboration of his reasoning after stating that the right to a representative jury is not the appropriate vehicle to address systemic harms. But throughout his judgment, there emerge themes of legal and institutional deference to the executive and legislature regarding systemic problems in the criminal justice system. By deferring the question to executive policymaking, Moldaver J implicitly makes a statement about the separation of powers between the courts and the executive, and the kinds of constitutional remedies that the courts should provide in criminal law.

Constitutional remedies to systemic problems

The entrenchment of the *Charter*, positioned the court as the independent arbiter between state action and an individual's rights. But in applying the *Charter* to state action, courts must be conscious of the broader implications of striking down legislation or requiring that the government meet certain obligations. The courts must also be careful to ensure that their remedies can and will be enforced.[43] Crafting effective remedies is critical in safeguarding and enforcing individual

[42] *Ibid*, at para 283.
[43] Debra M. McAllister, "Doucet-Boudreau and the Development of Effective Section 24(1) Remedies: Confrontation or Cooperation?" (2004/2005) 16:1. NJCL 153 at 158.

rights. As stated by former Chief Justice McLachlin, "[w]ithout effective remedies, the law becomes an empty symbol; full of sound and fury but signifying nothing."[44]

Constitutional remedies, particularly when they pertain to equality, can be difficult to square with criminal law, where the focus is primarily on the individual. The system asks adjudicators to focus on a certain moment in time, identify a harm, the causal connection leading to that harm, and then provide a remedy for those represented before the court. In doing so, the criminal law's ability to accommodate the fact that "those subjected to criminal law are disproportionately the victims of structural inequality" is underdeveloped.[45] This failure can make it difficult to give life to many of the *Charter*'s values, which when read broadly require taking the larger social context into account.

This tension over whether the criminal law can be adapted to include substantive equality values is pervasive throughout *Kokopenace*. For example, if the majority had concluded that Mr. Kokopenace's *Charter* rights were infringed as a result of the state's jury-selection process, determining an appropriate remedy would have required examination of the process that led up to this breach of rights. It might also have required, as the dissent states, targeting a distinct group, on-reserve Indigenous individuals, for inclusion on the jury roll because of their unique history in, and perspective on, Canada. This would place a requirement on the state to change its jury-selection process to the extent that it was found lacking. It would change the "negative prohibition" that Moldaver J articulated – that the state may not intentionally exclude any group or create the appearance of partiality – and transform it into a positive obligation for inclusion. Meaningfully

[44] Bevery M McLachlin, "The Charter a New role for the judiciary" (1991) 29:3 Alta L Rev 540 at 549 [Mclachlin, "The Charter a New Role"]
[45] Cairns Way, "An Opportunity", *supra* note 11 at 466.

responding to an obligation to include, as many scholars argue, would require incorporating substantive equality values.[46]

Historically, the courts have preferred to frame *Charter* rights as negative rather than positive rights, which prevent certain state action rather than requiring the state to act in a certain way.[47] This is tied both to the function of the courts, and their ability to enforce such decisions. As independent arbiters of the Constitution, courts have a duty to rise above political debate and leave it to the legislatures and executives to develop social policy. Their mandate is justice. It is only to the extent that social policies infringe on *Charter* rights that the courts should consider their applicability. However, as stated by Cromwell J in dissent in *Kokopenace*, "courts have always looked to both the purpose *and* effect of state action to determine its constitutionality."[48] He therefore rejects the proposition advanced by Moldaver J that a *Charter* breach can only occur, in the context of the jury-selection process, if it is "intentional or otherwise improper."[49]

But even if the majority in *Kokopenace* had decided to move from a negative prohibition to a positive obligation, how far could it, or should it, have gone to change how the province of Ontario selects jury rolls? Even when confronted with a violation of a constitutional right, courts are limited by their institutional mandate and their ability to enforce the remedies they choose. For many scholars, the answer to ensuring compliance and enforcement of court orders is respect for the judiciary. As stated by Strayer J, "[t]he courts must command the respect, or at least maintain the acquiescence, of other branches and levels of Government, and of the public, to be effective. They

[46] Cairns Way, "An Opportunity", *supra* note 11 at 476.
[47] *Chaoulli v Quebec (Attorney General)*, [2005] 1 SCR 791, 2005 SCC 3 [*Chaoulli*].
[48] *Kokopenace*, *supra* note 4 at para 257.
[49] *Ibid*, at para 257.

have no armies or police forces to enforce their will in constitutional matters."[50] This respect, is in this sense, also tied to the court's respect for the separation of powers.

For this reason, as Moldaver J implies in his judgment, there are strong institutional concerns about the appropriateness of employing judicial activism to social policy in terms of both legitimacy and competence. The law is often a blunt instrument, and the more intrusive a constitutional remedy becomes in an effort to fix a problem or rectify a rights violation, the less it looks like a remedy, and instead a policy. How far can the courts really go to rectify the underrepresentation of Indigenous peoples on juries? Where does protecting a constitutional right stop and policymaking start? In this regard, in the context of section 1 of the Charter – reasonable limits on Charter rights which can be demonstrably justified in a free and democratic society – the courts have repeated the need for deference to the legislature.[51] In particular, courts have repeatedly showed judicial restraint in their constitutional analysis regarding complex areas of legislation, or measures aimed at protecting socially vulnerable groups.[52] Moldaver J's judgment in *Kokopenace* mirrors this trend, but it is not the only option. Despite the tradition of judicial restraint, the Supreme Court of Canada affirmed in *Doucet-Boudreau v Nova Scotia (Minister of Education)* [53] that courts do have both the power to fashion complex and wide-ranging remedies to structural problems, and to supervise their implementation. The granting of such remedies, however, remains controversial.

[50] B L Strayer, "The Canadian Constitution and the Courts, 3rd ed. (Toronto: Butterworths, 1988) at 340.
[51] Irwin Toy Ltd v Quebec (Attorney General) [1989] 1 SCR 927, 58 DLR (4th) 577 [*Irwin Toy*]; *Chaoulli*, *supra* note 46.
[52] *Irwin Toy*, *supra* note 50.
[53] 2003 SCC 62, [2003] 3 SCR 3, 218 NSR (2d) 311 [*Doucet-Boudreau*].

In *Doucet-Boudreau,* as in *Kokopenace.* the applicants were seeking reform of the government's provision of services. While in *Kokopenace* this was in the context of the jury-selection process, in *Doucet-Boudreau* it was a group of francophone parents in Nova Scotia who asked the courts to enforce their rights under section 23 of the *Charter* to have their children educated in French. More specifically, they asked the courts to require that the province provide them with homogenous French-language schools. The province had over several years delayed the implementation of these programs despite the fact that parents were clearly entitled to the programs and despite the fact the province had promised numerous times over the years to act.

The trial judge found that the assimilation of the French-speaking minority was reaching "critical levels" and ordered that the government not only provide the facilities requested but to report to the court about the progress made on their implementation through scheduled reporting sessions. The issue on appeal was not the applicant's right to these programs but rather the legitimacy of the reporting sessions. As the case moved up through the appellate courts, judges at both the Court of Appeal and the Supreme Court were divided. There was considerable debate concerning whether ordering the government to report to the judiciary after the trial's conclusion was a legitimate exercise of judicial power, or whether it constituted judicial overreach into the executive's authority. Could the courts legitimately require the provincial executive to report on the status of its administrative duties?

In a 5-4 ruling, a majority of the Supreme Court upheld the trial judge's ruling. In dissent, Justices LeBel and Deschamps focused on the need for judicial restraint and respect for the separation of powers declaring that when "the trial judge attempted to oversee the implementation of his order,

he not only assumed jurisdiction over a sphere traditionally outside the province of the judiciary, but also acted beyond a jurisdiction with which he was legitimately charged as a trial judge."[54] This is reminiscent of Moldaver J's decision to leave large bureaucratic changes to the jury-selection process to the province of Ontario. By comparison, in *Doucet-Boudreau* the majority held that in light of the serious rates of assimilation and of the historical delay in the provision of French-language services, the trial judge's remedy "meaningfully vindicated" the appellants s. 23 rights.[55]

Critics of the decision in *Doucet-Boudreau* argued that through the post-trial supervision of the establishment of French-language schools, the judiciary unduly encroached on the executive's role and diminished mutual respect between the two branches. It placed the court as the executor of the executive's administrative process, and replaced the tradition of dialogue between the two institutions with judicial activism.[56] Not only that, but had the province refused, or had difficulty complying, the court would have been in a vulnerable position. With nothing but respect for the judiciary to enforce its decision, one could argue that the court gambled its legitimacy on a risky remedy.

While the province of Nova Scotia cooperated with the reporting order, in the United States, perhaps most notably in *Brown v Board of Education,*[57] that country's Supreme Court has faced strong opposition in enforcing supervisory remedies. In *Brown*, the court ruled that the "separate

[54] *Doucet-Boudreau*, *supra* note 44 at para 111.
[55] *Ibid* at para 60.
[56] Honourable Paul Rouleau & Linsey Sherman, "*Doucet-Boudreau*, Dialogue and Judicial Activism: Tempest in a Teapot" (2010) 41:2 Ottawa L Rev 171 at 182. [Rouleau, "*Doucet-Boudreau"*]
[57] 347 US 483 (1954) [*Brown*].

but equal" doctrine under which public schools were segregated by race violated the 14th amendment and was therefore illegal. The decision was met with fierce opposition, with many schools refusing to integrate. In *Brown v Board of Education II,*[58] often referred to as *Brown II*, the court had to deal with the appropriate remedy to get public schools to comply with its ruling. In *Brown II* the court instructed school boards to desegregate at "all deliberate speed", and tasked the federal courts with making sure the order was carried out.[59]

The Supreme Court gave the federal courts broad discretion in dealing with any challenges to compliance in recognition of the fact that the remedies required would vary depending on the problems each jurisdiction faced regarding desegregation.[60] The result of this discretion was that not only did the type of remedy handed out by the federal courts vary but so did the level of implementation. The decision faced opposition from many lower courts. While some judges faced strong local pressures not to comply, others chose to give detailed orders that virtually took over school administration. Others still, refused to act at all.[61] Ultimately, the Supreme Court's decisions in *Brown I* and *Brown II* prevailed, although in some cases only after years more of litigation. The case offers a clear demonstration of some of the practical implications of courts crafting remedies they cannot easily administer.

Reflecting on the U.S. experience, and emphasizing the need for judicial restraint in the Canadian context, former Chief Justice McLachlin warned that "[t]he image of a judge making day-to-day operational decisions in the running of a school – down to what kind of tennis balls to order in one

[58] 349 US 294 (1955) [*Brown II*].
[59] McLachlin, "The Charter a New Role", *supra* note 43 at 550.
[60] Rouleau, "*Doucet-Boudreau"*, *supra* note 47 at 183.
[61] McLachlin, "The Charter a New Role", *supra* note 43 at 550.

case – is hardly one most Canadian judges would embrace."[62] While a lighthearted comparison, the example does raise the issue of the role that courts play in Canada. From a practical point of view, there are very real concerns about whether courts have the expertise and capacity to oversee detailed administrative processes. There is also the threat of institutional disillusionment and loss of legitimacy if courts tread too far on legislative or executive authority.

These issues are relevant in the context of Indigenous underrepresentation on juries. For example, can the courts, as an institution deeply entrenched in the history of colonialism and systemic discrimination, and limited in their mandate, contribute to solutions to the problem? As stated by the Aboriginal Justice Inquiry, "[f]or a century the legal system made it clear that it did not want or need Aboriginal jurors. It is a message that Aboriginal people have not forgotten."[63]

The courts could require that the state collect more up-to-date lists of Indigenous individuals living on-reserve and send out more jury-roll questionnaires to Indigenous people. But these measures do little to address fundamental barriers to Indigenous people's participation on juries.[64] As the Iacobucci Report states, these barriers include the conflict between Indigenous cultural values, laws and ideologies regarding conflict resolution and the adversarial model and values of the Canadian Justice System. Justice Iacobucci also reported that Indigenous people often talked to him about systemic discrimination, historical marginalization, limitations on Indigenous people's rights, and the bad experiences they, or family members, had had, which all contributed to their negative perception of the justice system.[65] He wrote: "First Nations people generally view the criminal justice system as working against them, rather than for them. It is an affront to them to

[62] *Ibid* at 552.
[63] *Aboriginal Justice Inquiry of Manitoba, supra* note 1.
[64] Iacobucci Report, *supra* note 3 at para 26.
[65] *Ibid,* at para 27.

participate in the delivery of this system of justice."[66] Moreover, many Indigenous nations and leaders continue to push for more control over community justice, and a separate and sovereign Indigenous system as part of their inherent right to self-government. In addition, Justice Iacobucci also reported that there was a lack of knowledge about the jury system, concerns about privacy and specific content in the jury questionnaire itself, all of which discouraged jury participation.[67]

As the Iacobucci Report concludes, the underrepresentation of individuals living on reserves on juries is only a symptom of the dysfunctional relationship between Indigenous people and the justice system, a problem that must be understood systemically. Focusing narrowly on the courts' ability to fix complex, systemic and multifaceted problems overlooks how restrained the courts are in the types of remedies they can order. Viewed from this perspective, there are strong reasons to support Moldaver J's conclusion that the constitutional standard for a right to representative jury is not the "appropriate vehicle" to deal with the underrepresentation of Indigenous people on juries.

There is also the danger that relying on the courts too heavily can weaken any push for lasting change. For example, many critics of Brown suggest that such landmark cases "may even impair the cause of black rights by inducing a mood of unwarranted euphoria among supporters while stiffening resistance on the part of diehards and white supremacists."[68] Statistics show that in 1961, seven years after the original *Brown* decision, only 0.026% of black schoolchildren in North

[66] *Ibid* at para 27.
[67] Iacobucci Report, *supra* note 3.
[68] Richard Delago & Jean Stefancic, "The Social Construction of Brown v Board of Education: Law Reform and the Reconstructive Paradox, 36 WM & Mary L Rev (1995) 547 at 547 [Delago, "The Social Construction of Brown"]

Carolina and 0.09% of black school children in Virginia attended desegregated schools.[69] More shockingly, scholar Michael Klarman reports that "*not a single* black child attended an integrated public grade school in South Carolina, Alabama or Mississippi as of the 1962-1963 school year."[70] It was not until the 1964 Civil Rights Act, which threatened to cut federal funding to segregated schools, that integration rates began to rise. Klarman further argues that Brown's legacy was not to inspire the modern civil rights movement in the 1960s, but rather to crystallize southern resistance to racial change.[71] This crystallization led to violent clashes with civil rights demonstrators, which provoked an outcry from the nation and led Congress and the Government to enact the landmark 1964 civil rights, after which schools began to desegregate in much larger numbers.[72]

Both the impact of the remedies chosen by the court in *Brown II* and scholarship on its impact on the civil rights movement in the U.S. are helpful in reflecting critically on judicial activism and courts' institutional capacity, as well as on how social change occurs. Despite their many shortcomings, and although they did not bring about racial justice in and of themselves, I believe the *Brown* decisions did help move U.S. society closer to justice. In this respect, it is possible to draw parallels between *Brown* and seminal Canadian cases such as *R v Parks*[73] and *Gladue*.[74] Through his decision in *Parks*, Doherty JA made a bold step to confront racism in the criminal justice system by finally explicitly acknowledging its presence and establishing the need for challenges for cause to prospective jurors based on racial partiality. Similarly in *Gladue*, the

[69] Michael J Klarman, "Brown, Racial Change, And the Civil Rights Movement" (1994) 80:7 Va L Rev, 7 at 9 [Klarman, "Brown, Racial Change And the Civil Rights"]
[70] Klarman, "Brown, Racial Change And the Civil Rights, *supra* note 58 at 76.
[71] *Ibid,* at 85.
[72] *Ibid,* at 94.
[73] *R v Parks* (1993), 15 OR (3d) 324, 24 CR (4th) 81 [*Parks*].
[74] *Gladue*, *supra* note 23.

Supreme Court took steps to combat the discrimination and exclusion that Indigenous people face in the criminal justice system by requiring judges to consider the "Gladue factors" in determining a fit sentence for an aboriginal offender. These include: the unique systemic or background factors that may have played a part in bringing the particular aboriginal offender before the courts, and the type of sentencing that may be appropriate to the particular Indigenous heritage or connection.[75]

Almost 20 years after *Parks* and *Gladue,* racialized individuals continue to be disproportionately overrepresented in the criminal justice system. Indeed, 10 years after *Gladue,* the court was forced in *R v Ipeelee*[76] to clarify the Gladue factors in an effort to clear up any remaining misunderstandings, remind lawyers and judges of their duty to present and ask for individualized information about Indigenous offenders, and address the lack of progress in the years following *Gladue*. These failings in the outcomes, however, do not make the decisions taken by the courts irrelevant. They are important even in their symbolic nature, and the legitimacy that the court's acknowledgment of an issue provides. For example, as stated by Rakhi Ruparelia in her case commentary on *Parks*, despite their limitations challenges for cause play an important role in confronting racism in the justice system.[77] This is because "[t]he process fails, even symbolically, if accused persons are not allowed to challenge fully the racial biases of prospective jurors. Racialized accused receive the message that their right to be tried by an impartial jury and their right to be free from discrimination … deserve less protection than other considerations."[78] The

[75] *Ibid.*
[76] [2012] 1 SCR, 2012 SCC 13.
[77] Rakhi Ruparelia, "Erring on the Side of Ignorance: Challenges for Cause Twenty Years after Parks", (2013) 92 Can B Rev 267 [Ruparalia R, "Erring on the Side of Ignorance"].
[78] Ruparalia R, "Erring on the Side of Ignorance", *supra* note 77 at 300.

same, I would argue, is true for the right to a representative jury.

What then would a more appropriate remedy look like?

Applying this perspective to *Kokopenace* what could a more meaningful remedy have looked like? In *Doucet-Boudreau*, the majority outlined five principles regarding appropriate and just *Charter* remedies. [79] They were: First, an appropriate and just remedy "meaningfully vindicates the rights and freedoms of the claimants," whereas an ineffective remedy "smothered in procedural delays and difficulties" does not.[80] Second, an appropriate and just remedy employs means "that are legitimate within the framework of our constitutional democracy" including respect for the separate functions of the legislature, executive and judiciary.[81] Third, such a remedy invokes "the powers and functions of the court" which "can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent."[82] Fourth, such a remedy should also be "fair to the party against whom the order is made" and "should not impose substantial hardships" unrelated to ensuring that the claimant's right is vindicated.[83] Fifth, an appropriate and just remedy evolves and may "require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand."[84] The approach must ultimately be flexible and responsive to the unique facts of each case.

[79] *Doucet Boudreau*, *supra* note 44 at para 54.
[80] *Ibid* at para 55.
[81] *Ibid* at para 56.
[82] *Ibid* at para 57.
[83] *Ibid* at para 58.
[84] *Ibid* at para 59.

Several scholars suggest that in the case of *Kokopenace* meaningfully vindicating the right to a representative jury would have required importing substantive equality values into criminal law.[85] In contrast to the majority's approach, which focuses on the procedural difficulties of targeting a distinct group for juries, or the dissent's focus on a fair opportunity for participation, several advocates argue that a substantive equality approach with careful attention to context, history, and perspective would have been the right path to take.

There already is a strong basis for such an approach within the framework of our constitutional democracy. Substantive equality has, for example, already been enshrined in section 15(2), the equality provision of the *Charter*, which "[d]oes not preclude any law, program or activity that has as its object the amelioration of those conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[86]

Several interveners in the case also argued that the Honour of the Crown, which requires that the state's efforts be respectful of its special historical relationship with Indigenous people, is engaged by the jury-selection process.[87] The Court of Appeal also held that because of the separate process for engaging Indigenous people under s. 6(8) of the Juries Act, the Honour of the Crown was engaged.[88] Understood through the lens of colonialism, the Honour of the Crown, and the ultimate goal of reconciling Indigenous people and the state, infusing the right to a representative jury with substantive equality should not be considered undue hardship or unrelated to Mr. Kokopenace's

[85] Cairns Way, "An Opportunity", *supra* note 11; Macdonnell, "The Right to a Representative Jury", *supra* note 11.
[86] *Charter*, supra note 8 s 15(2).
[87] *R v Kokopenace* [2015] 2 SCR 398, 2015 SCC 28 (Factum of the Intervener Nishnawbe Aski Nation at para 22).
[88] *Kokopenace* ONCA, *supra* note 24 at para 127.

claim. This is true even if as Moldaver J held, that "[r]equiring the state to target a particular group for inclusion would be a radical departure from the way the Canadian jury-selection process has always been understood."[89]

How, practically, could such inclusion be carried out? One intervener, the Advocate's Society, proposed placing a positive obligation on the state. It submitted that any assessment of the state's efforts should apply the Gladue principles, and take into account the broader problem of Indigenous estrangement from the criminal justice system.[90] The Society proposed implementing this by using a separate protocol to secure a representative jury roll for Indigenous people. It submitted that in all cases involving an accused who is Indigenous, the Crown should be required to disclose the composition of the jury roll before trial. This would give the accused the opportunity to challenge the jury roll if it is unrepresentative. If the accused was able to advance an argument that was not frivolous, the Crown would be required to prove on a balance of probabilities that they had taken reasonable steps according to the principles articulated by the Ontario Court of Appeal's decision in *Kokopenace* to compile a representative jury roll. If the Crown failed to establish reasonable efforts, and the accused's *Charter* rights were breached, the appropriate remedy would be a stay of proceedings pursuant to s. 24(1) of the *Charter*. Such an obligation, the society argued, would "ensure that the government remain vigilant in its efforts to ensure a representative jury roll, and would provide the individual affected by any deficiency in those efforts with a practical remedy that would require the Crown to establish, in appropriate cases, that it had made reasonable efforts."[91]

[89] *Kokopenace*, *supra* note 5 at para 64
[90] *R v Kokopenace* [2015] 2 SCR 398, 2015 SCC 28 (Factum of the Intervener Advocate's Society at para 10).
[91] Intervener advocate's society at para 21.

Just as *Brown* did not immediately fix segregation, it would be a misapprehension of the problem to say that even by using this approach the courts could solve the problem of the under-representation of on-reserve First Nations people on juries. But such an approach could contribute to the solution. As stated by the Aboriginal Justice Inquiry of Manitoba: "[d]espite the magnitude of the problems, there is much the justice system can do to assist in reducing the degree to which Aboriginal people come into conflict with the law. It can reduce the ways in which it discriminates against Aboriginal people and the ways in which it adds to Aboriginal alienation."[92] The *Charter*, as Cromwell J argued in dissent in *Kokopenace*, provides a basis for doing so. This was ultimately not the path chosen by the majority, in light of which a strong and sustained political response to is crucial.

Conclusion:

As Justice Iacobucci reported, the system is in "crisis", and solutions "cannot be accomplished without substantial input from First Nations people, as well as the organizations working on the ground."[93] Throughout this essay I have tried to ask the question of whether the courts through application of constitutional values of substantive equality can begin to alleviate a symptom of this crisis; the underrepresentation of Indigenous people on Ontario's juries. My answer is "yes". The courts can help, despite Moldaver J's suggestion that ultimately it is a question that the courts should defer to legislatures, and to collaboration between Indigenous nations and the federal and provincial governments.

[92] *Aboriginal Justice Inquiry of Manitoba, supra* note 1 at 111.
[93] Iacobucci Report at para 205

Courts do have have legitimate reasons for following an incremental approach to systemic change. But they have also repeatedly suggested that the common law should develop to remain in step with changing societal values and norms.[94] The Constitution is a "living tree" and one that, perhaps, grows slowly. But in the context of alleviating Indigenous estrangement, the courts can and should be an immediate and vital piece of the puzzle.

The kinds of solutions that Justice Iacboucci calls for in his report demonstrate that the problems need to be understood systemically. The report's 17 recommendations call on the Ministry of the Attorney General to focus on providing broader and more comprehensive justice education to First Nations individuals, amending the questionnaires sent to prospective jurors, and consulting with First Nations people to adopt measures that would reduce barriers to jury participation, whether linguistic, economic or automatic, such as exclusion of First Nations individuals with criminal records for minor offences.

Such policies begin to address the fact that although the jury-selection process provides for random selection of jurors, the randomness of the sample continues to be compromised by systemic forces. The report also discusses themes of exclusion that Indigenous individuals face when dealing with the criminal justice system and which create barriers and a "chill" on individuals' desire to become jurors. According to the report,

> the most significant systemic barrier to the participation of First Nations people in the jury system in Ontario is the negative role the criminal justice system has played in their lives, culture, values, and laws throughout history. This became very apparent in discussions with First Nations leaders, Elders and others during the engagement sessions. They uniformly expressed the position that, until significant

[94] *R v Salituro* [1991] 3 SCR 654, 68 CCC (3d) 289; *Gladue*, *supra* note 23.

> and substantive changes are made to the criminal justice system, the issue of jury participation will not improve.[95]

The report spurred the Ontario government to create the Debwewin Jury Review Implementation Committee to address and build on Justice Iacobucci's 17 recommendations. The committee says its focus is to "identify practical solutions to remove barriers to First Nations people's participation in the jury system and to strengthen the relationship between Ontario and First Nations communities on justice matters." Both the Iacobucci Report and the Debwewin Committee and its work represent positive policy directives from the Ontario government.

They should be complemented by a change in the courts. Despite the many arguments for judicial restraint, I agree with Justice L'Hereux-Dubé when she stated in *Corbière v Canada (Minister of Indian and Northern Affairs)* that "remedies granted under the *Charter* should, in appropriate cases, encourage and facilitate the inclusion in that dialogue of groups particularly affected by legislation. In determining the appropriate remedy, a court should consider the effect of its order on the democratic process, understood in a broad way, and encourage that process."[96] While the courts should respect their institutional capacity, institutional limits should not be a reason to pass the buck. As the independent arbiter of the *Charter*, the court must ensure that the state meets its constitutional responsibility to Indigenous people. A refusal to do so represents an implicit acceptance of the status quo.

[95] Iacobucci Report, *supra* note 3 at para 209.
[96] [1999] 2 SCR 203, at para 116, 173 DLR (4th) 1.

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