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The Tension Between Process and Outcome in Creating Representative Juries

By: Erin Sheley

Case Commented On: *R v Newborn*, 2016 ABQB 13

The Court of Queen's Bench has upheld the Alberta *Jury Act*'s exclusion from jury service of those criminally convicted or charged, in reasons that emphasize the conflict between the important goals of securing impartiality on individual juries and promoting racial representativeness in jury selection at the systemic level.

Jeremy Newborn, an aboriginal man charged with second degree murder in Edmonton, was granted an adjournment of jury selection after his counsel reported to the judge that none of the members of the jury array appeared to be of aboriginal descent. Mr. Newborn moved for a declaration invalidating s. 4(h) of the *Jury Act*, RSA 2000, c J-3, which provides that persons who have been convicted of a criminal offence for which a pardon has not been granted, or who are currently charged with a criminal offence, are excluded from serving as jurors. His argument turns on the fact that Aboriginal persons form a disproportionate percentage of the criminally accused, relative to their representation in the general population, and that the s. 4(h) exclusions therefore violate his right to a representative jury under ss. 7, 11(d) and 11(f) of the *Charter*.

In support of his motion, Mr. Newborn offered the testimony of sociologist Jacqueline Quinless, who testified that, given the aboriginal population of Edmonton, nine aboriginal persons would be the most statistically likely to be selected to compose Mr. Newborn's 178-person jury array. She provided a sociological analysis of why that number was instead zero, including "the effects on indigenous Canadians of white race colonialism, racism and stereotyping, the residential schools experience, higher incidents of violence, higher rates of incarceration and involvement with the police, inferior educational opportunities and achievement, and higher mobility rates" (at para 20). She concluded that these factors, insofar as they have damaged the relationship between indigenous and non-indigenous Canadians, have resulted in indigenous Canadians being reluctant to serve as jurors (at para 20). Finally, she testified that while there are no definitive statistics on how many indigenous Canadians have criminal records, we can reason from their overrepresentation in the prison system (20% of the prison population, compared to the 2% they comprise of the general population) that they would form a significantly higher percentage of the 3.8% of Canadians who have criminal records (at para 21).

On the basis of this factual proffer, Mr. Newborn argued that the Alberta legislature must have been aware of the disproportionate effect s. 4(h) would have on the indigenous population and have intended to exclude members of that group from jury selection. To evaluate this contention the ABQB considered *R v Kokopenace*, 2015 SCC 28, decided by the Supreme Court while Mr. Newborn's motion was pending. In *Kokopenace*, which also involved an appeal by an Aboriginal accused, the Court considered the appropriate constitutional test for representativeness under s. 11 of the *Charter*. In that case, the accused discovered that there might have been problems with including on-reserve Aboriginal residents on the jury roll.

Ontario compiles its jury rolls based on municipal assessment lists obtained from the Municipal Property Assessment Corporation (MPAC), which do not capture residents of First Nations Reserves (*Kokopenace* at paras 10-11). To compensate for this fact, s. 6(8) of the Ontario *Juries Act*, RSO 1990, c J.3, provides that the sheriff select names of eligible persons inhabiting each reserve and may obtain lists of names from any available records (at para 11). Because in practice this process is carried out by municipal authorities in the Court Services Division (CSD), the Ontario Ministry of the Attorney General provides guidance for its implementation (at para 16).

At the time of Mr. Kokopenace's trial, the District of Kenora had been experiencing severe decreases in responses to jury summons from First Nations reserves, and the official tasked with compiling the jury list reported difficulties in obtaining updated lists of residents from the reserves. The record indicates her extensive efforts to update the jury roll, and the efforts of Ontario to provide its officials with the proper training necessary to do so (at paras 21-28). However, a 2013 report conducted by Justice Frank Iacobucci concluded that "the problem with the underrepresentation of on-reserve residents is deep-rooted and multi-faceted, and that it extends well beyond the difficulty of obtaining accurate source lists. It explains that the problem is linked to the long history of Aboriginal estrangement from the justice system and the mistrust of that system that has resulted" (at para 29).

To determine whether Mr. Kokopenace's *Charter* rights were violated by a jury selected under these circumstances, the Supreme Court first needed to define representativeness and determine how it factored into the s 11 inquiry (at para 39). In defining representativeness, the Court focused on the fairness of the process rather than the production of a particular outcome (at para 39). The constitutional lodestar is the existence of "a representative cross-section of society, honest and fairly chosen" and with respect to the jury roll, "representativeness focuses on the process used to compile it, not the ultimate composition" (at para 40).

The Court then explained that the right to representativeness is tied to specific *Charter* rights: namely, the right to an impartial tribunal under s. 11(d) and the right to a jury trial under s. 11(f). Lack of representativeness will violate s. 11(d) *only* when it either (a) results in a deliberate exclusion of a particular group that would cast doubt on the integrity of the process and create an appearance of partiality, or (b) even in the absence of deliberate exclusion, the state's efforts in compiling the jury roll are so deficient that they create an appearance of partiality (at para 50). However, the Court holds that lack of representativeness may violate s. 11(f) in a wider range of contexts, because the representativeness of a jury is a "key characteristic" of a jury itself (at para 52).

After *Kokopenace*, the test for whether the state has met its representativeness obligation is whether it "provided a fair opportunity for a broad cross-section of society to participate in the jury process," which will be deemed to exist when 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" (*Kokopenace* at para 61). The Court emphasizes that it is the process that determines the constitutionality, not the outcome, and notes "representativeness is not about targeting particular groups for inclusion on the jury roll" (at para 61). Specifically, the majority reasons reject the "results-based" approach advocated by Justice Cromwell in dissent, which would have looked beyond procedure to the actual representation of Aboriginal people on jury arrays. The Supreme Court therefore concluded that the state had made reasonable efforts to compile the jury roll and to deliver

notices, and for that reason determined that Mr. Kokopenace's *Charter* rights had not been violated (at para 106).

Applying *Kokopeance* to the facts of the *Newborn* case, the Court of Queen's Bench pointed out that the Supreme Court's reasons had specifically referred to the acceptable need to exclude certain groups of persons from jury rolls for practical reasons, including government officials and participants in the criminal justice system, both practitioners and accused (*Newborn* at para 44). Relying on the process-driven analysis of *Kokopenace*, the *Newborn* court held that the exclusion of the criminally convicted and accused is reasonable and acceptable because "a person who has been convicted of a crime, or is currently charged with a crime, is *prima facie* likely not to be impartial as between the Crown and the accused in a criminal proceeding" and the status "does not cease to be a reasonable basis for exclusion because of the ethnic origin of the person in question" (at para 30). The court explicitly stated that the exclusion does not become unreasonable on the basis that its effect is to exclude a proportionally greater proportion of Aboriginal persons from jury duty relative to persons of any other ethnic origin, even when such an effect would have been obvious to the legislature when it established the exclusion (at para 30).

Newborn, while logically coherent, points to a broader problem in jury selection generally. On the one hand, the ABQB's decision flows fairly directly from the clear holding of *Kokopenace*. The Supreme Court explicitly rejected constitutional scrutiny of the results of a particular selection process. That being the case, the reasonableness of excluding potentially biased jurors, such as criminals, does not need to be constitutionally balanced against the substantive unfortunate outcomes such exclusions produce. The values that support the Crown's position in *Newborn* relate to impartiality: to put it in plain English, we do not want accused like Mr. Kokopenace and Mr. Newborn, both of whom were on trial for homicides, getting off because a member of the jury was biased against the Crown for having been convicted of a crime him or herself. Yet they create a potential for systemic bias, if our jury arrays fail to adequately represent segments of the population.

These cases also raise even more pernicious concerns. The Supreme Court's approach in *Kokopenace* does not take into account the cyclical relationship between substantive and procedural criminal law, or the relationship between law and society. In the first place, many legal scholars have observed that the justice system has the capacity to "silence" subordinate groups through its procedural rules, thereby denying their social power and contributing to the development of an underclass. (See Kimberly D. Bailey, "Deconstructing the Sound of Silence", [2009] BYU L Rev 1). While juror impartiality is important on a case-by-case basis, the principles of fundamental justice embodied in the *Charter* reflect not only the interests of the accused but broader social concerns: see *R v Seaboyer* [1991] 2 SCR 577, 1991 CanLII 76. The court should have considered the meaning of a fair cross-section in this light.

Even more subtly, the legitimacy of the criminal justice system to a given populace flows from its representation of socially shared norms of justice. For example, the body of scholarship on what has become known as the "utility of desert" shows that when the criminal justice system neglects shared social norms about justice—when it over or under punishes relative to what a community believes to be warranted—the system loses legitimacy. This loss of legitimacy results in an increased likelihood of law-breaking in the population at large (see Paul H. Robinson & John M. Darley, "Intuitions of Justice: Implications for Criminal Law and Justice

Policy" (2007) 81 S Cal L Rev 1). The evidence presented by Mr. Newborn, not to mention the findings of the Iacobucci Report, suggest the criminal justice system lacks legitimacy among Aboriginal communities, a fact which impacts their complying with jury summons. But by allowing the group to remain silent in the actual process of criminal punishment, that illegitimacy will only take further hold. In other words, by failing to create procedures that make sure all social views about substantive outcomes are taken into account in assigning punishment, those excluded will be less likely to comply with the law in the first instance.