May 3, 2019

Turning a Blind Eye? The Scope of the Charter Right to a Representative Jury

By: Amy Matychuk

Case Commented On: *R v Newborn*, 2019 ABCA 123 (CanLII)

In *R v Newborn*, Justices Frans Slatter, Ritu Khullar, and Barbara Lea Veldhuis of the Alberta Court of Appeal (ABCA) dismissed an argument from the appellant (the accused) that "the array from which his jury was selected was constitutionally flawed because it disproportionately excluded [A]boriginal citizens" (*Newborn* ABCA, at para 1). It also dismissed his argument that inadmissible expert evidence was allowed at the trial. However, this post will focus on the right to a representative jury as defined in the Supreme Court's decision in *R v Kokopenace*, 2015 SCC 28 (CanLII), *R v Newborn*'s application of *Kokopenace*, and the appropriate scope of the state's obligations under *Charter* s 11.

Facts

The accused in *R v Newborn* was charged with murder. He conceded manslaughter, but argued the Crown could not prove the intent necessary for murder because of his limited intellectual capacity. He had an IQ of 59, mild to moderate cognitive impairment, and had been measured as falling below the first percentile of the population (*Newborn* ABCA, at para 2). Before trial, he unsuccessfully challenged the jury selection process on the basis that none of the members of the jury array (the pool of people from which the trial jury was selected) appeared to be Indigenous. He argued that because persons convicted of crimes cannot serve on juries (per s 4(h) of the *Jury Act*, RSA 2000, c J-3) and Indigenous people are disproportionately more likely to have criminal records than Canadians generally, s 4(h) of the *Jury Act* violated his right to a representative jury under ss 7, 11(d) and 11(f) of the *Charter*. Justice Burrows for the Alberta Court of Queen's Bench (ABQB) dismissed Mr. Newborn's *Charter* application in *R v Newborn*, 2016 ABQB 13 (CanLII) (*Newborn* ABQB). Erin Sheley discussed that decision in The Tension Between Process and Outcome in Creating Representative Juries.

The Right to a Representative Jury as Defined in *Kokopenace*

In *R v Kokopenace*, the Supreme Court of Canada (SCC) carefully circumscribed the right to a representative jury protected by s 11(f) of the *Charter*. *Kokopenace* involved a jury selection issue arising from a trial of an Indigenous man in Kenora, Ontario. Due to problems the government of Ontario encountered obtaining information from individuals living in remote communities, Aboriginal on-reserve residents "formed 4.1 percent of the jury roll while representing about 30 percent of the adult population of the judicial district" (Cromwell J, dissenting, in *Kokopenace* at para 305). Unsurprisingly, given these numbers, only eight of the

175 people summoned to the jury panel for Mr. Kokopenace's trial were on-reserve residents. Of those, four were excused and two did not respond to the summons (at para 305). The Ontario Court of Appeal (ONCA) ruled that Mr. Kokopenace's rights had been violated and ordered a new trial. The majority of the SCC overturned the ONCA and restored Mr. Kokopenace's conviction for manslaughter, holding, "Mr. Kokopenace received a fair trial by an impartial and representative jury" (at para 129).

Justice Michael Moldaver for the majority in *Kokopenace* held not only that there is no right to a jury roll of a particular composition, but further, "there is no right to proportionate representation" on juries (*Kokopenace* at paras 39, 66). As Erin Sheley discusses in her post, the state is required under *Kokopenace* to meet certain procedural obligations related to the compilation of the jury roll and the delivery of jury notices, but beyond that, it is "not required to address systemic problems contributing to the reluctance of Aboriginal on-reserve residents to participate in the jury process" or "the distressing history of estrangement and discrimination suffered by Aboriginal peoples" (Moldaver J in *Kokopenace* at paras 95, 64). All that is required under s 11(f) of the *Charter* is a "fair opportunity for a broad cross-section of society to participate" and "reasonable efforts to include Aboriginal on-reserve residents in the jury process" (Moldaver J in *Kokopenace* at paras 2, 125). The state cannot deliberately exclude particular groups (at para 66), but it also has no particular obligation to deliberately include them.

Justice Andromache Karakatsanis, concurring, criticized this "reasonable efforts" approach. She commented, "A *Charter* breach is not defined by the state's efforts, but by the adequacy of the process actually used" (at para 134), noting that the question is black and white: "the process used is either constitutionally acceptable or it is not" (at para 160). However, Justice Karakatsanis concluded that the state had met its obligations in Mr. Kokopenace's situation and that remedying systemic factors leading to a lack of Aboriginal participation in the jury process was beyond the scope of s 11 of the *Charter*.

Justices Thomas Cromwell and Beverley McLachlin, however, felt that the state's constitutional obligations under s 11 extend much further than the "fair opportunity" and "reasonable efforts" standards articulated by Justice Moldaver. Justice Cromwell wrote for the dissent,

> [T]he right to a representative jury roll is the right of the accused, not of those who ought to have been included on the roll. Moreover, this "fair opportunity" formulation also takes the focus off the state's constitutional obligation to provide a representative jury. We do not speak of a "fair opportunity" to have a fair trial or issuing an "invitation" to be free of unreasonable searches and seizures. Respectfully, it seems to me to be inconsistent with basic principles of *Charter* rights to speak in terms of a "fair opportunity" to have a representative jury. I do not see any "fair opportunity" standard in ss. 11(d) or 11(f) of the *Charter*. (at para 249)

Further, he commented:

> The "reasonable efforts" standard makes it easy to lose sight of the fact that it is the state's responsibility to comply with the *Charter* and that it is the right of an accused

> person to be tried by a jury selected in accordance with the *Charter*. It is the state's constitutional obligation not to breach people's *Charter* rights, not simply to make "reasonable efforts" not to do so. Moreover, the "reasonable efforts" standard glosses over the question of whether the limitation of the right is the result of state action. (at para 250)

Justice Cromwell went on to articulate the right to a representative jury in terms of whether a non-representative jury roll has a causal connection to state action: "in order to determine whether the state has complied with its *Charter* obligations, the state conduct must be assessed in light of its contribution to the problem and its capacity to address it" (at para 255). He rejected the idea that the state's only responsibility is to avoid improper exclusion of Indigenous persons from juries rather than actively work toward their inclusion (at paras 257-258). Most importantly, he wrote, "Having played a substantial role in creating [systemic problems contributing to the estrangement of Aboriginal peoples from the criminal justice system], the state should have some obligation to address them" (at para 281). For greater clarity, he defined "systemic problems" as "a euphemism for, among other things, racial discrimination and Aboriginal alienation from the justice system" (at para 282). He also noted, "To ignore racial discrimination against Aboriginal people in the context of assembling a jury roll would be in marked contrast to the approach that this Court has taken to racial discrimination against Aboriginal people in relation to sentencing Aboriginal offenders" in the *Gladue* context (at para 284).

Justice Cromwell concluded,

> [I]n my respectful view, the assembly of representative jury rolls — a constitutional duty — is an appropriate forum to address racial discrimination against Aboriginal people and Aboriginal alienation from the justice system. While there are, as in the case of Aboriginal overrepresentation in correctional institutions, many deeply seated causes which contribute to Aboriginal under-representation on jury rolls, the *Charter* provides a basis for action, not an excuse for turning a blind eye. (at para 285)

Application of *Kokopenace* in *R v Newborn*

The ABCA's judgment in *R v Newborn*, like *Kokopenace*, involves a discussion of the scope of the state's *Charter* obligations regarding jury representation. The ABCA focuses on the concept of deliberateness—whether the state intended or did not intend to exclude a particular group from jury eligibility by enacting the impugned legislation (which, in *Newborn*, was the section of the *Jury Act* excluding those with criminal records). Respectfully, this approach, while aligning with the majority in *Kokopenace* and therefore not legally in error, is unjust because it focuses on the intent of the Legislature rather than the effect of the impugned legislation. As Justice Cromwell articulated in his dissent, the incontrovertible role the Canadian state plays in marginalizing Indigenous peoples should give rise to an obligation to take positive steps to remedy that marginalization wherever possible. "Fair opportunities" and "reasonable efforts" are, at this point, wildly insufficient.

The ABCA characterized Mr. Newborn's argument as follows: "he argues that [s 4(h) of the *Jury Act*] is unconstitutional because a disproportionate number of [A]boriginal citizens have criminal records, and therefore the section disproportionately excludes potential [A]boriginal jurors" (at para 7). It rejected this argument largely on the basis that the disproportionate exclusion of Indigenous jurors must be weighed against "the theoretical prospect of persons with serious criminal records sitting on juries" (at para 14). In essence, the ABCA found that extending jury eligibility to those with criminal records is not guaranteed to solve the problem of Indigenous underrepresentation and presents administrative problems (those problems, which mostly involve potential jurors unclear on the substance of their criminal records, are discussed at para 20). The Legislature solved those administrative problems by enacting a blanket exclusion against all individuals with criminal records, and Mr. Newborn did not demonstrate that the exclusion violates a constitutional right.

The majority of the SCC in *Kokopenace* and the ABCA in *Newborn* use somewhat similar reasoning here. In *Kokopenace*, the state encountered difficulties maintaining accurate records of those who live on remote reserves, ensuring their mail is delivered, and encouraging their participation in the justice system. Given these difficulties, its efforts to ensure representative juries were sufficient. In *Newborn*, the ABCA contemplated the difficulties that would arise if the state were required to include those with criminal records in an effort to boost Indigenous jury representation. Given these difficulties, the state's blanket exclusion of those with criminal records did not breach any constitutional rights. In both decisions, the courts declined to impose a positive obligation on the state to ensure Indigenous representation on juries. In both decisions, the courts focused not on whether state action led to an unjust or racist result, but on whether a state actor intended an unjust or racist result.

However, as many scholars have recognized, including those at the UCalgary Faculty of Law's own Alberta Civil Liberties Research Centre, racism takes both individual and systemic forms. While individual racism often involves an element of intent, systemic racism "includes the policies and practices entrenched in established institutions, which result in the exclusion or promotion of designated groups." No intent is necessary for systemic racism: it "derives from individuals carrying out the dictates of others who are prejudiced or of a prejudiced society." Both the majority in *Kokopenace* and the ABCA in *Newborn* failed to appropriately recognize that the systemic factors giving rise to Indigenous underrepresentation on juries (racial discrimination and Aboriginal alienation from the justice system) are the result of a prejudiced society rather than individual ill will. Accordingly, proof of legislative intent to discriminate should not be required when assessing the possibility that legislation has a discriminatory effect. As Justice Cromwell noted in his dissent in *Kokopenace*, the *Charter* should not operate as an excuse to continue turning a blind eye to racial injustice.

A more just analysis in *Newborn* would have involved a broadening of the state's potential obligations under s 11 of the *Charter*, as articulated in Justice Cromwell's dissent. To the extent that state conduct contributed to the problem of Indigenous jury underrepresentation, the state should be required to take positive action to remedy that underrepresentation. The ABCA may have been correct in concluding that none of the remedies Mr. Newborn sought presented a practical way to remedy the injustice he identified. However, it is inappropriate for courts to continue to require proof of bad intent by the legislature, and for courts and legislatures to

gesture toward administrative difficulties as a way of avoiding their obligations to Indigenous peoples.

This post may be cited as: Amy Matychuk, "Turning a Blind Eye? The Scope of the Charter Right to a Representative Jury" (May 3, 2019), online: ABlawg, http://ablawg.ca/wp-content/uploads/2019/05/Blog_AM_Newborn_May2.docx.pdf