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Supreme Court Judgments

Case name: R. v. Kokopenace
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 Date: 2015-05-21
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 Judges: McLachlin, Beverley; Rothstein, Marshall; Cromwell, Thomas Albert; Moldaver, Michael J.; Karakatsanis, Andromache; Wagner, Richard; Gascon, Clément
 On appeal from: Ontario
 Subjects: Constitutional law
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SUPREME COURT OF CANADA

CITATION: R. v. Kokopenace, 2015 SCC 28

DATE: 20150521

DOCKET: 35475

BETWEEN:

Her Majesty The Queen
 Appellant
 and
Clifford Kokopenace
 Respondent
 - and -
**Advocates' Society, Nishnawbe Aski Nation,
 David Asper Centre for Constitutional Rights,
 Women's Legal Education and Action Fund, Inc. (LEAF),
 Native Women's Association of Canada,
 Canadian Association of Elizabeth Fry Societies and
 Aboriginal Legal Services of Toronto Inc.**
 Interveners

CORAM: McLachlin C.J. and Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ.

REASONS FOR JUDGMENT: Moldaver J. (Rothstein, Wagner and Gascon JJ. concurring)
 (paras. 1 to 130)

PARTIALLY CONCURRING REASONS: Karakatsanis J.
 (paras. 131 to 189)

DISSENTING REASONS: Cromwell J. (McLachlin C.J. concurring)
 (paras. 190 to 307)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

R. v. KOKOPENACE

Her Majesty The Queen*Appellant*

v.

Clifford Kokopenace*Respondent*

and

Advocates' Society, Nishnawbe Aski Nation,

David Asper Centre for Constitutional Rights,

Women's Legal Education and Action Fund, Inc. (LEAF),

Native Women's Association of Canada,

Canadian Association of Elizabeth Fry Societies and

Aboriginal Legal Services of Toronto Inc.*Interveners***Indexed as: R. v. Kokopenace****2015 SCC 28**

File No.: 35475.

2014: October 6; 2015: May 21.

Present: McLachlin C.J. and Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — [Charter of Rights](#) — Right to a fair hearing — Right to trial by jury — Jury representativeness — Definition — Aboriginal accused from First Nation reserve convicted of manslaughter — Aboriginal on-reserve residents underrepresented on jury roll from which jury selected for accused's trial — What is the appropriate legal test for representativeness — Whether state met its representativeness obligation — [Canadian Charter of Rights and Freedoms](#), ss. 11(d), 11(f).

Constitutional law — [Charter of Rights](#) — Right to equality — Aboriginal on-reserve

residents — Aboriginal accused from First Nation reserve convicted of manslaughter — Aboriginal on-reserve residents underrepresented on jury roll from which jury selected for accused's trial — Whether state violated right to equality of accused or of Aboriginal on-reserve residents who were potential jurors — Canadian Charter of Rights and Freedoms, s. 15.

The accused, an Aboriginal man from a First Nation reserve, was charged with second degree murder and convicted of manslaughter after a trial by judge and jury. Prior to sentencing, the accused's counsel learned that there may have been problems with the inclusion of Aboriginal on-reserve residents on the jury roll for the District of Kenora, which raised questions about the representativeness of the jury in the accused's case. The trial judge refused to adjourn the proceedings to hear a mistrial application, as he considered himself to be *functus officio*. The representativeness issue was therefore raised for the first time on appeal, where fresh evidence was introduced regarding the efforts made by the province in preparing the jury rolls for the district. The Court of Appeal was satisfied that the accused received a fair trial and that his jury was not tainted by a reasonable apprehension of bias or partiality. However, the majority held that the accused's ss. 11(d) and 11(f) Charter rights had been violated and ordered a new trial. All three judges rejected the accused's s. 15 Charter claims.

Held (McLachlin C.J. and Cromwell J. dissenting): The appeal should be allowed. The order for a new trial is set aside and the conviction is reinstated.

Per Rothstein, Moldaver, Wagner and Gascon JJ.: Representativeness is an important feature of our jury system, but its meaning is circumscribed. What is required is a representative cross-section of society, honestly and fairly chosen. With respect to the jury roll, representativeness focuses on the process used to compile it, not its ultimate composition.

To determine if the state has met its representativeness obligation, the question is whether the state provided a fair opportunity for a broad cross-section of society to participate in the jury process. A fair opportunity will be provided 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. When this process is followed, the jury roll will be representative and an accused's Charter right to a representative jury will be respected. This process aims to ensure that there is an opportunity for individuals with varied perspectives to be included on the jury, and it seeks to preclude systemic exclusion of segments of the population.

Jury representativeness is captured by both ss. 11(d) and 11(f) of the Charter, but it plays a different role in these two guarantees.

The role of representativeness under s. 11(d) is limited to its effect on independence and impartiality. A problem with representativeness that does not undermine these concepts will not violate

[s. 11\(d\)](#).

The parties in this case focused on the impartiality aspect of [s. 11\(d\)](#). Even if the petit jury does not appear to be biased, [s. 11\(d\)](#) will be violated if the process used to compile the jury roll raises an appearance of bias at the systemic level. This may occur in two ways: the deliberate exclusion of a particular group, or efforts in compiling the jury roll that are so deficient as to create an appearance of partiality. However, where neither form of conduct exists, a problem with representativeness will not violate [s. 11\(d\)](#).

The narrow way in which representativeness is defined in Canadian jurisprudence means that impartiality is guaranteed through the process used to compile the jury roll, not through the ultimate composition of the jury roll or petit jury itself. A jury roll containing few individuals of the accused's race or religion is not in itself indicative of bias.

The role of representativeness in [s. 11\(f\)](#) is broader: it not only promotes impartiality, it also legitimizes the jury's role as the "conscience of the community" and promotes public trust in the criminal justice system. This broader role creates an important point of distinction: while a problem with representativeness will not necessarily violate [s. 11\(d\)](#), its absence will automatically undermine the [s. 11\(f\)](#) right to a trial by jury.

If the state deliberately excludes a particular subset of the population that is eligible for jury service, it will violate an accused's right to a representative jury, regardless of the size of the group affected. However, if it is a question of unintentional exclusion, it is the quality of the state's efforts in compiling the jury roll that will determine whether an accused's right to a representative jury has been respected. If the state makes reasonable efforts but part of the population is excluded because it declines to participate, the state will nonetheless have met its constitutional obligation. In contrast, if the state does not make reasonable efforts, the size of the population that has been inadvertently excluded will be relevant. When only a small segment of the population is affected, there will still have been a fair opportunity for participation by a broad cross-section of society.

Representativeness is not about targeting particular groups for inclusion on the jury roll. The province was therefore not required to address systemic problems contributing to the reluctance of Aboriginal on-reserve residents to participate in the jury process. Efforts to address historical and systemic wrongs against Aboriginal peoples — although socially laudable — are by definition an attempt to target a particular group for inclusion on the jury roll. An accused's representativeness right is not the appropriate mechanism for repairing the damaged relationship between particular societal groups and our criminal justice system more generally.

There is no right to a jury roll of a particular composition, nor to one that proportionately

represents all the diverse groups in Canadian society. Requiring a jury roll to proportionately represent the different religions, races, cultures, or individual characteristics of eligible jurors would create a number of insurmountable problems. There are an infinite number of characteristics that one might consider should be represented, and even if a perfect source list were used, it would be impossible to create a jury roll that fully represents them. A proportionate representation requirement would also do away with well-established principles, such as juror privacy and random selection. In their place, we would be left with an inquisition into prospective jurors' backgrounds and a requirement that the state target particular groups for inclusion on the jury roll. Such an approach would be unworkable and would spell the end of our jury system as we presently know it.

The province met its representativeness obligation in this case. The Court of Appeal raised potential issues with three parts of the process — the lists, the delivery, and the low response rates. Assessed in light of what was known at the time and against the proper standard, the province's efforts to include Aboriginal on-reserve residents in the jury process were reasonable. Accordingly, there was no violation of [ss. 11\(d\)](#) or [11\(f\)](#) of the [Charter](#). Although the problem of the underrepresentation of Aboriginal on-reserve residents in the jury system is a serious policy concern that merits attention, the accused's [ss. 11\(d\)](#) and [11\(f\)](#) [Charter](#) rights are not the appropriate vehicle to address this concern.

The accused's claims based on [s. 15](#) of the [Charter](#) must also be dismissed. With respect to his personal [s. 15](#) claim, the accused has not clearly articulated a disadvantage. With respect to his request for public interest standing to advance a [s. 15](#) claim on behalf of Aboriginal on-reserve residents who were potential jurors, it cannot be granted because the accused may have different, potentially conflicting interests from those of potential jurors.

Per Karakatsanis J.: Fair trial rights under [s. 11](#) of the [Charter](#) entitle an accused person to an independent and impartial jury, drawn from a jury roll that was created through a fair and neutral process of random selection from broad-based source lists without deliberate or substantial exclusion. That threshold was met in this case.

Representativeness does not require a jury roll to mirror what a random sample from the community would look like. Adopting such an identity-based approach would mark a significant departure from both Canadian jurisprudence and experience. Jury representativeness is aimed at ensuring that the jury can fulfill its important roles as finder of fact and as the link connecting the judicial process to the broader community. This right has a limited meaning in Canadian law. It does not mean that the jury must reflect a cross-section of the community or its different characteristics or perspectives. It instead describes the functioning of the jury as an institution, in which laypersons are asked to contribute to the criminal justice process and to provide the crucial link between that system and the larger community. A jury acts on behalf of, and thus represents, society. It is not rendered legitimate because its members reflect the demographics of that community.

The representative function of the jury is assured by the use of a fair and random selection process, based on broadly inclusive source lists, that does not deliberately or substantially exclude a subset of the community. Representativeness requires more than reasonable efforts to use such a process. It is the adequacy of the process used, rather than the quality of the state's efforts, which determines whether or not an accused's [Charter](#) rights were violated.

Ensuring that source lists are drawn broadly from the community is critical, but perfection is not required. Provinces must be given leeway to use a selection process that is practical given the nature of the source lists generally available. The state must also ensure that the mechanism used to contact selected potential jurors does not undermine the broad-based and random quality of the jury roll.

Unintentional exclusion of some segments of the community from the jury roll does not amount to a constitutional defect. Even the best source lists will still exclude some, and that inadvertent exclusion may disproportionately apply to certain groups of people. This alone is insufficient to establish a [s. 11 Charter](#) violation. Because there are no perfect source lists, the state must be accorded flexibility in choosing a source list. Such flexibility also recognizes the substantial leeway that governments must be given to define the boundaries of judicial districts, which are established for administrative and practical purposes and are not required to ensure the representation of any particular community or group.

However, the state could, in exceptional circumstances, violate an accused's [Charter](#) rights by unintentionally but substantially excluding a segment of the population. It may be that such substantial exclusion rises to a level that could leave the jury unable to fulfill its representative function, thereby depriving it of legitimacy in the eyes of society, and undermining its independence and impartiality. Where the jury roll is so deficient that society would no longer accept that a jury chosen from it could legitimately act on its behalf, an accused's rights protected by both [ss. 11\(d\)](#) and [11\(f\)](#) of the [Charter](#) will be violated.

Intentional exclusion of certain segments of the population from the jury roll would render it unconstitutional. A jury roll tainted by such deliberate exclusion cannot be considered to be drawn fairly and randomly from the broader community, nor could it be said to be independent and impartial. An accused will accordingly succeed in her challenge if she establishes deliberate exclusion for the purpose of restricting the representation of certain groups in the jury process.

An accused person's fair trial rights do not require the state to encourage jury participation among those who are unwilling to participate. [Section 11](#) of the [Charter](#) is not the source of any duty on the state to encourage participation, or to repair damaged relationships that may cause some to disengage from the justice system. It is simply beyond the scope of [s. 11](#) to require that the state address the reasons for this disaffection in order to uphold an accused individual's right to an impartial, independent and representative jury.

In this case, the accused has not established that the jury roll from which his jury was drawn was created in a manner that violated his rights under [s. 11](#) of the [Charter](#). With respect to the [s. 15](#) [Charter](#) claims, this is not a proper case to determine whether the equality rights of Aboriginal peoples are implicated as a result of their alienation from the justice system and their underrepresentation on jury rolls.

Per McLachlin C.J. and **Cromwell J.** (dissenting): Selecting a properly constituted jury lays the foundation required for a fair trial and public confidence in the administration of justice. Fundamental to our conception of a properly selected jury is that it be drawn from a random sample of eligible people in the district who, by virtue of that random selection, are representative of its population. In Canada, there is no stand-alone [Charter](#) protected right to a representative jury. But representativeness, in the sense that the jury roll is randomly selected from an appropriate pool of prospective jurors, is a component of the [Charter](#) rights to a jury trial and to be tried by an independent and impartial tribunal found at [s. 11](#)(f) and (d). [Section 11](#)(f) of the [Charter](#) enshrines in our Constitution the institution of the jury as a fundamental component of the Canadian criminal justice system. Representativeness is an integral part of that component, and is one of the fundamental characteristics of a properly constituted jury. Representativeness, along with impartiality, is essential in order for the institution of the jury to perform its function as the conscience of the community and in order for [s. 11](#)(f) to be meaningful and effective. Representativeness is also one of the components which ensure that the jury is an independent and impartial tribunal under [s. 11](#)(d) of the [Charter](#). Thus, defects in the formation of the jury that affect its representative character will be taken into account in order to determine whether there is a breach of [s. 11](#)(d). As it is guaranteed under [s. 11](#)(d) and (f), the right to representativeness of the jury roll is the right of persons charged with an offence, not of particular groups or the community at large. There is no corresponding right, under these provisions, of the community at large or of any particular group to be included on a jury roll, jury array or petit jury.

The focus of representativeness is on whether the jury roll, from which jurors will ultimately be selected, is as broadly representative of the community as would a group of people selected at random within that community. Thus, random selection is a proxy for representativeness. A representative jury roll is one that substantially resembles the group of persons that would be assembled through a process of random selection of all eligible jurors in the relevant community. But random selection is only a good proxy for representativeness if the pool of persons to whom a process of random selection is applied to assemble the jury roll is itself broadly based within the relevant community.

In order to achieve a representative jury roll, two things are necessary. First, the lists from which random selection will be made must be substantially representative of the district. The jury roll can only properly be representative of the population of the district if the list of people to whom notices may be sent is as complete and accurate as possible and is substantially similar to a random selection among all potentially eligible jurors in the district. Second, the group of eligible persons who return the questionnaires

must be substantially similar to a random sample of the list. This requires the state to look at elements such as the proportion of notices and questionnaires that are in fact received and factors which could affect the return rate. If the group who in fact returns questionnaires does not substantially resemble a random sample of the persons on the list, then the whole foundation of representativeness is at risk because randomness can no longer serve as an appropriate proxy for representativeness.

Allowing random selection to be a proxy for representativeness is supported by both practical and policy reasons. If representativeness in this context were given a broader meaning, there could be endless debates about who and what needs to be represented on the jury. Defining all of the relevant senses in which a jury should be representative, let alone going about assembling a jury roll that was representative in all those ways, would pose insurmountable practical problems and would lead to serious intrusions into the privacy of prospective jurors. These policy and practical considerations mean that we must not enlarge the Crown's disclosure obligations or expose potential jurors to intrusions into their privacy. The practical effect of protecting jurors' privacy is that an accused will rarely be in a position to establish the under-representation of a particular group other than by pointing to an inadequate list or some other significant departure from the random selection principle.

A flawed random selection may be demonstrated by showing faults in the process, such as the omission of large numbers of eligible jurors from the roll. But that is not the only way a departure from proper random selection may be shown. The fact that the focus is on the random selection process does not mean that the results of the process employed to compile the jury roll are irrelevant to whether there has been an acceptable process of random selection. Results that plainly show a significant departure from a properly conducted random selection process should not be ignored.

The [Charter](#) protects against interference by the state with guaranteed rights. In order to establish a breach of the [Charter](#), the claimant must therefore show not only that there has been a limitation of his or her guaranteed rights but that the limitation can be attributed to state action. The question is whether there is a sufficient connection between the conduct of the state and the limitation of the right such that the limitation can fairly be attributed to the state. While the threshold of sufficient connection has been considered mainly in the context of [s. 7](#) of the [Charter](#), a similar causal threshold has been used in respect of other provisions of the [Charter](#) and under provincial human rights legislation, and applies in the context of this case. The starting point is not the state's efforts to comply, but whether the jury roll was representative. If the jury roll was not representative, the question then becomes whether that failure is attributable to state action, namely whether there is a sufficient connection between the limitation of the right and the action — or inaction — of the state. 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. With respect to matters giving rise to the limitation of the right that are wholly or substantially within the state's capacity to address, the connection is evident between the state action or inaction and the limitation of the right in question. In such cases, a "reasonable efforts" test does

not reflect the nature of the state's obligation: compliance with constitutional rights is not optional or (subject to justified limitations) dependent on the degree of effort required. Conversely, the state cannot be held responsible for matters which have the effect of limiting guaranteed rights, but which the state has no ability to address. With respect to matters falling somewhere between those two types of situations, the answer to the question of whether there is a sufficient connection between the limitation of the right and state action will depend on the capacity of the state to address the matters giving rise to the limitation and whether it has made reasonable efforts to do so.

This case concerns a situation in which the jury roll was not representative because its composition was a substantial departure from what random selection among all potentially eligible jurors in the district would produce, in view of the under-representation of Aboriginal on-reserve residents on the jury roll. Of the four factors that contributed to the unrepresentative jury roll, two — the lists and the delivery of jury notices — were the responsibility of the state and complying with that responsibility was within its power. The other two — the poor return rate of notices and Aboriginal disengagement from the criminal justice system — were matters which the state had some capacity to address, but it failed to make reasonable efforts to do so. Therefore, there is a sufficient connection between state action and inaction and the lack of a representative jury roll to find that there was a breach by the state of the accused's right to a representative jury roll as guaranteed under [s. 11\(d\)](#) and (f) of the [Charter](#).

Determining what is an appropriate remedy following the state's failure to provide a representative jury roll requires examination of all the circumstances, including the nature of the breach of the accused's rights and its effect on public confidence in the administration of justice. The point in the proceedings at which the issue is raised is also a relevant consideration. Where, as here, the issue is raised for the first time after verdict, a declaration that the accused's rights were violated may be the appropriate remedy absent the accused establishing that, in light of all the circumstances, a new trial is the only way to restore public confidence in the administration of justice. In this case, the Court of Appeal did not make any reversible error in exercising its remedial discretion to order a new trial. The failure to provide a representative jury roll undermined public confidence in the administration of justice.

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By Moldaver J.

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(1984), 63 C.C.C. (3d) 243; *R. v. Biddle*, [1995] 1 S.C.R. 761; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623; *Pierre v. McRae, Coroner*, 2011 ONCA 187, 104 O.R. (3d) 321.

By Karakatsanis J.

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By Cromwell J. (dissenting)

R. v. Barrow, [1987] 2 S.C.R. 694; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *R. v. Davey*, 2012 SCC 75, [2012] 3 S.C.R. 828; *R. v. Sherratt*, [1991] 1 S.C.R. 509; *R. v. Born with a Tooth* (1993), 81 C.C.C. (3d) 393; *R. v. Williams*, [1998] 1 S.C.R. 1128; *R. v. Yumnu*, 2012 SCC 73, [2012] 3 S.C.R. 777; *R. v. Church of Scientology* (1997), 33 O.R. (3d) 65; *R. v. Biddle*, [1995] 1 S.C.R. 761; *R. v. Kent* (1986), 27 C.C.C. (3d) 405; *R. v. Buckingham*, 2007 NLTD 107, 221 C.C.C. (3d) 568; *R. v. Butler* (1984), 63 C.C.C. (3d) 243; *R. v. Parks* (1993), 15 O.R. (3d) 324; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863; *R. v. Yooya*, [1995] 1 C.N.L.R. 166; *R. v. Teerhuis-Moar*, 2010 MBCA 102, 222 C.R.R. (2d) 207; *R. v. Pan*, 2001 SCC 42, [2001] 2 S.C.R. 344; *R. v. Nahdee*, [1994] 2 C.N.L.R. 158; *Pierre v. McRae, Coroner*, 2011 ONCA 187, 104 O.R. (3d) 321; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176; *Symes v. Canada*, [1993] 4 S.C.R. 695; *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61; *R. v. Askov*, [1990] 2 S.C.R. 1199; *R. v. Morin*, [1992] 1 S.C.R. 771; *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360; *R. v. W.E.B.*, 2014 SCC 2, [2014] 1 S.C.R. 34; *R. v. Clark*, 2005 SCC 2, [2005] 1 S.C.R. 6; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *R. v. Carosella*, [1997] 1 S.C.R. 80; *Morin v. The Queen* (1890), 18 S.C.R. 407; *McLean v. The King*, [1933] S.C.R. 688; *R. v. Bird*, [1984] 1 C.N.L.R. 122; *R. v. Snow* (2004), 73 O.R. (3d) 40; *R. v. Cameron* (1991), 2 O.R. (3d) 633; *R. v. Fiddler*, [1994] 4 C.N.L.R. 99; *Rojas v. Berllaque*, [2003] UKPC 76, [2004] 1 W.L.R. 201; *R. v. Ellis*, [2011] NZCA 90, [2011] 4 L.R.C. 515.

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APPEAL from a judgment of the Ontario Court of Appeal (Goudge, LaForme and Rouleau J.J.A.), 2013 ONCA 389, 115 O.R. (3d) 481, 306 O.A.C. 47, 285 C.R.R. (2d) 77, 4 C.R. (7th) 67, 299 C.C.C. (3d) 48, [2013] 4 C.N.L.R. 273, [2013] O.J. No. 2752 (QL), 2013 CarswellOnt 7938 (WL Can.), setting aside the accused's conviction for manslaughter and ordering a new trial. Appeal allowed, McLachlin C.J. and Cromwell J. dissenting.

Gillian E. Roberts, Deborah Calderwood and Michael Fawcett, for the appellant.

Jessica Orkin, Delmar Doucette, Andrew Furgieuele and Angela Ruffo, for the respondent.

Brian H. Greenspan, Katherine Hensel and Promise Holmes Skinner, for the intervener the Advocates' Society.

Julian N. Falconer, Julian Roy and Marc E. Gibson, for the intervener the Nishnawbe Aski Nation.

Cheryl Milne and Kim Stanton, for the interveners the David Asper Centre for Constitutional

Rights and the Women's Legal Education and Action Fund, Inc. (LEAF).

Mary Eberts, for the interveners the Native Women's Association of Canada and the Canadian Association of Elizabeth Fry Societies.

Christa Big Canoe and Jonathan Rudin, for the intervener the Aboriginal Legal Services of Toronto Inc.

The judgment of Rothstein, Moldaver, Wagner and Gascon JJ. was delivered by

MOLDAVER J. —

I. Introduction

[1] The right to be tried by a jury of one's peers is one of the cornerstones of our criminal justice system. It is enshrined in two provisions of the [Canadian Charter of Rights and Freedoms](#) — the [s. 11](#) (d) right to a fair trial by an impartial tribunal and the [s. 11](#) (f) right to a trial by jury. Yet despite the importance of this right, this is the first time the Court has been called upon to determine what efforts the state must make to ensure that a jury is “representative” of the community. In turn, this raises the related questions of how representativeness should be defined and what role it should play in the rights guaranteed by [ss. 11](#) (d) and [11](#) (f) of the [Charter](#). In answering these questions, it must be remembered that the right to a representative jury is an entitlement held by the accused that promotes the fairness of his or her trial, in appearance and in reality. It is not a mechanism for repairing the damaged relationship between particular societal groups and our criminal justice system more generally — and it should not be tasked with that responsibility.

[2] In my view, representativeness focuses on the process used to compile the jury roll, not its ultimate composition. Consequently, the state satisfies an accused's right to a representative jury by providing a fair opportunity for a broad cross-section of society to participate in the jury process. A fair opportunity will be provided 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. When this process is followed, the jury roll will be representative and the accused's [Charter](#) right to a representative jury will be respected.

[3] I am satisfied that there were no [Charter](#) violations in this case. I would accordingly allow the appeal.

II. Background

[4] Clifford Kokopenace is an Aboriginal man from the Grassy Narrows First Nation reserve in the District of Kenora. He was charged with second degree murder for stabbing his friend to death during a fight. After a trial by judge and jury in 2008, he was acquitted of murder but convicted of the lesser included offence of manslaughter. Prior to sentencing, his trial counsel learned that there may have been problems with the inclusion of Aboriginal on-reserve residents on the jury roll for the District of Kenora, which raised questions about the representativeness of the jury in Mr. Kokopenace's case. The trial judge, Stach J., refused to adjourn the proceedings to hear a mistrial application, as he considered himself to be *functus officio*. The representativeness issue was therefore raised for the first time on appeal to the Ontario Court of Appeal.

[5] Before the Court of Appeal, Mr. Kokopenace alleged that his jury was derived from a jury roll that did not adequately ensure the inclusion of Aboriginal on-reserve residents. Because of the allegedly inadequate process used to prepare the jury roll, he argued that his rights under [ss. 11\(d\)](#), [11\(f\)](#), and [15](#) of the [Charter](#) were violated. Voluminous fresh evidence was introduced regarding the efforts Ontario had made, over a period of several years, in preparing the jury rolls for the District of Kenora.

[6] The Court of Appeal issued three sets of reasons. Two of the judges — LaForme and Goudge J.J.A. — held that Mr. Kokopenace's [ss. 11\(d\)](#) and [11\(f\)](#) rights had been violated and ordered a new trial on that basis. In dissent, Rouleau J.A. held that Ontario had made reasonable efforts to include Aboriginal on-reserve residents in the jury roll. He therefore would have dismissed the appeal. All three judges rejected Mr. Kokopenace's [s. 15](#) claims.

[7] The Crown now appeals to this Court, and Mr. Kokopenace renews his [s. 15](#) claims.

III. The Jury Selection Process in the District of Kenora

A. Overview of the Jury Selection Process in Ontario

[8] To be eligible to serve as a juror in Ontario, individuals must be at least 18 years of age and must be Canadian citizens who reside in Ontario. There are several additional limitations on eligibility, including exemptions related to an individual's profession or prior criminal record: *Juries Act*, R.S.O. 1990, c. J.3, ss. 2 to 4. Drawing from the pool of eligible individuals, jury selection takes place in three stages:

1. The preparation of the jury roll, composed of individuals who are randomly selected from the community in each judicial district throughout Ontario.
2. The selection of names from the jury roll to make up the jury panels (also known as arrays) for court sittings. Jury panels act as the pools from which trial juries are selected.

3. The selection, from the jury panel, of the trial jury (also known as the petit jury) that will serve on a particular criminal trial.

[9] In Ontario, the first two stages are governed by the *Juries Act* and the third stage is governed by the [Criminal Code, R.S.C. 1985, c. C-46](#). The respondent's challenge is to the first stage of the process — the preparation of the jury roll.

[10] The *Juries Act* requires that a jury roll be prepared by provincial officials each year for every judicial district in Ontario. The same roll is used for all trials in a district in a given calendar year. Under s. 6(2) of the *Juries Act*, Ontario compiles its jury rolls based on municipal assessment lists obtained from the Municipal Property Assessment Corporation ("MPAC"). Enumeration by MPAC occurs once every three years, and the MPAC lists are not updated between enumerations.

[11] MPAC data does not capture individuals who reside on First Nations reserves. For that reason, s. 6(8) of the *Juries Act* provides a separate process for including on-reserve residents in the jury rolls. Section 6(8) directs:

In the selecting of persons for entry in the jury roll in a county or district in which an Indian reserve is situate, the sheriff shall select names of eligible persons inhabiting the reserve in the same manner as if the reserve were a municipality and, for the purpose, the sheriff may obtain the names of inhabitants of the reserve from any record available.

[12] The aim of both ss. 6(2) and 6(8) is that each municipality or reserve be sent the number of notices that is approximately proportionate to that municipality or reserve's percentage of the total population in the judicial district.

[13] In practice, the sheriff's duties under s. 6(8) are carried out by various provincial and local employees in each judicial district. Staff in the Court Services Division ("CSD") are responsible for virtually the entire process of selecting on-reserve individuals for the jury roll. They obtain lists of on-reserve residents for use in the jury selection process, calculate the number of jury notices (also known as questionnaires) that are required, randomly select the on-reserve individuals who will receive notices, prepare the notices, and mail them to the selected recipients. The Provincial Jury Centre ("PJC") is responsible for providing each CSD office with the number of questionnaires that is required for the mailouts to the on-reserve population. The PJC receives the completed questionnaires from the selected on-reserve individuals and then enters the eligible names into the jury selection system, used to develop the jury roll.

B. *PDB #563 and the Lists Used for Section 6(8) Purposes*

[14] PDB #563 was the policy directive from the Ontario Ministry of the Attorney General that

provided guidance to CSD staff on the s. 6(8) process at the relevant time. It indicated that CSD staff should

- ascertain, check, and confirm the reserves located in their county or district;
- attempt to obtain band electoral lists, or any other accurate lists of residents, by writing letters, telephoning, or visiting the reserves in the district;
- calculate the number of questionnaires to be sent to on-reserve residents;
- randomly select the required number of individuals to whom questionnaires were to be sent from the best possible list; and
- provide interim and final reports to the PJC at certain points in the process.

[15] PDB #563 encouraged staff to attempt to obtain the best lists of on-reserve residents available. To this end, it directed staff to seek band electoral lists “or any other accurate list of residents”.

[16] PDB #563 also indicated that lists provided by the federal government department known at the time as Indian and Northern Affairs Canada (“INAC”) were not the best possible lists because they included the names of band members who did not reside on the reserve. However, if CSD staff were unsuccessful in their attempts to obtain a better list from the band, the general practice was to use the INAC lists. Until 2001, INAC regularly provided its lists to Ontario for the purposes of s. 6(8). However, in 2001, INAC stopped providing the CSD with band lists, ostensibly because of privacy concerns. From that point on, CSD employees’ attempts to obtain lists directly from the First Nations reserves became increasingly important, as the INAC lists grew more outdated with each passing year.

C. *The Compilation of Jury Rolls in the District of Kenora*

[17] The District of Kenora contains a large number of reserves, which are associated with approximately 46 different First Nations. The on-reserve adult population makes up between 21 to 32 percent of the adult population of the district.

[18] There has been a significant decline in the rates of response to jury notices from on-reserve residents in the District of Kenora over the years. In 1993, the return rate for completed jury questionnaires in the district was approximately 33 percent for on-reserve residents and 60 to 70 percent for off-reserve communities: *R. v. Fiddler*, [1994] 4 C.N.L.R. 99 (Ont. Ct. (Gen. Div.)), at p. 114. Around that time, the Kenora CSD office began including an additional letter with the jury notices sent to on-reserve residents to help recipients understand the jury process. Although the letter was written in English, a translation in Ojibway and Oji-Cree syllabics was also enclosed. Despite the provision of this letter, the response rate

from on-reserve residents did not increase. By 2002, it had dropped to 15.8 percent, and by 2008 (the year at issue in this appeal), it had declined to 10 percent.

(1) The Delivery of Jury Notices to On-Reserve Residents in the District of Kenora

[19] Many of the First Nations communities in the District of Kenora are remote and are accessible only by air. In these communities, individuals typically do not have mailboxes at their place of residence. Some have a community mailbox or an individual box in the post office. For other individuals, mail is held at the post office and they must retrieve it from the postal clerk.

[20] When jury notices are sent to on-reserve residents, they are sent “General Delivery”. Mail delivered in this manner is sent to the community post office, but not to individual or community postal boxes. Post office employees then carry out a practice known as a “knowledge sort”, in which they attempt to deliver the notices to the community mailbox or post office boxes of the recipients. Postal clerks tend to be familiar with the residents in these small communities and, if they know the recipient, they will put the letter in the recipient’s community mailbox or post office box instead of returning it to the sender. Where there is no listed postal box or the postal clerks do not know the recipient, postal clerks put the mail aside and cross-reference the name against the customer list in an attempt to determine the correct postal box. Mail that is not claimed within 30 days and has not been delivered to a community mailbox or post office box is typically returned to the sender by the post office.

(2) The Implementation of Section 6(8) in the District of Kenora

[21] During the time period relevant to this appeal, the sheriff’s s. 6(8) duties in the District of Kenora were carried out by Ms. Laura Loohuizen, the group leader in the local CSD office. Ms. Loohuizen became involved in s. 6(8) work in 2001, at which time she was given the lists of on-reserve residents used by her predecessor. She was provided with INAC lists for 42 of the 43 reserves that she believed fell within the district. There was no list for the 43rd reserve, Neskantaga/Lansdowne House.

[22] Ms. Loohuizen was not provided with training about the boundaries of the district or about how to carry out s. 6(8) work. However, she made inquiries to the PJC about the process for obtaining updated lists. In carrying out her work, she relied on the directions in PDB #563, instructions from her supervisors in the CSD office, directives given by the PJC, and advice provided by Stach J., a respected and long-serving judge of the Ontario Superior Court of Justice in the District of Kenora. Although Ms. Loohuizen relied on PDB #563, the interim and final reports it envisioned were sometimes not completed — or if completed, failed to contain all the required information. Fully completed reports would have detailed the steps taken to obtain updated lists, the success of those efforts, and the number of questionnaires sent to the reserves.

[23] Ms. Loohuizen made repeated and escalating efforts over the years to obtain updated lists from

the reserves. However, she had great difficulty securing cooperation from many of them and often had to carry out her s. 6(8) work based on inaccurate or outdated lists.

D. *Efforts in 2007 for the Preparation of the 2008 Jury Roll*

[24] In 2007, for the first time, the PJC informed Ms. Loohuizen of statistics showing the low rate of response for on-reserve residents. The numbers indicated that in response to the 2006 mailouts (for the 2007 jury roll), the rate of return for on-reserve residents was 10.72 percent compared to an off-reserve response rate of 56 percent. Of the questionnaires that had been sent to on-reserve residents, 72 percent were not returned and 17 percent were returned by the post office as undeliverable — statistics that were markedly worse than those for the off-reserve population.

[25] Ms. Loohuizen communicated these results to Stach J., who had provided advice on the s. 6(8) process from time to time, and it was decided that the number of questionnaires to be sent to on-reserve residents should be increased by almost 50 percent. Her superiors in the Kenora CSD office also decided that Ms. Loohuizen would travel to several reserves in the district to meet with band leadership to discuss jury representativeness issues.

[26] Also in 2007, Ms. Loohuizen inquired about the boundaries of the District of Kenora. Her inquiry was apparently prompted by questions that arose in relation to an upcoming coroner's inquest. After making these inquiries, she discovered that she had inadvertently been excluding two reserves from her s. 6(8) efforts because she had not known that they fell within the district. She also discovered that another reserve on her list, Sandy Lake, had split in two, creating two separate communities. Consequently, there were 46 reserves — not 43 — that should have been included in her s. 6(8) work. She became aware of these errors too late to obtain lists for use in the preparation of the 2008 jury roll. As she still had not succeeded in obtaining a list for Neskantaga/Lansdowne House, that reserve was also excluded from the jury roll process for 2008.

[27] As a result of Ms. Loohuizen's efforts, the 2007 mailouts for the 2008 jury roll were based on the following lists:

- Band lists from 2006 for two First Nations
- Band lists from 2007 for eight First Nations
- INAC lists from 2000 for 32 First Nations
- No lists for four First Nations

[28] Ultimately, only 10 percent of the questionnaires sent to on-reserve residents were returned, and only 5.7 percent of on-reserve residents who returned the questionnaires were eligible to serve as jurors. Mr. Kokopenace's jury was selected from a jury panel of 175 jurors, 8 of whom were on-reserve residents. No

on-reserve residents were selected for Mr. Kokopenace's petit jury.

E. *The Iacobucci Report and Efforts Made After 2008*

[29] Since 2008, Ontario has expanded its efforts to include on-reserve residents in the jury selection process. The province has updated its policies, provided formal training on s. 6(8) work, increased the number of questionnaires sent to on-reserve residents, and started tracking statistics about response and delivery rates for those questionnaires. Significantly, in 2011, Ontario appointed the Honourable Frank Iacobucci as an independent reviewer to study the issue of the underrepresentation of Aboriginal on-reserve residents on juries and to make recommendations for resolving the problem. The report detailing his findings was released in 2013, while Mr. Kokopenace's appeal was under reserve at the Court of Appeal (*First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci* (2013) ("Iacobucci Report")). The Iacobucci Report reveals 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. Since the report's release, Ontario has begun implementing some of its recommendations.

IV. The Decision of the Ontario Court of Appeal, 2013 ONCA 389, 115 O.R. (3d) 481

[30] The Court of Appeal delivered three sets of reasons. Both LaForme and Goudge JJ.A. concluded that Mr. Kokopenace's ss. 11(d) and 11(f) rights were violated; in contrast, Rouleau J.A. held that there was no *Charter* violation. The court unanimously rejected Mr. Kokopenace's s. 15 claims.

[31] All three judges accepted that the test to determine whether Ontario had met its representativeness obligations was whether it had made reasonable efforts to provide a fair opportunity for groups with distinctive perspectives to be included in the jury roll. They held that reasonable efforts must be made at each step of the process, including compiling the lists, sending the notices, facilitating their delivery and receipt, and encouraging responses.

[32] The majority emphasized that the analysis of Ontario's efforts under s. 6(8) of the *Juries Act* must be guided by both the honour of the Crown and the principles in *R. v. Gladue*, [1999] 1 S.C.R. 688. In its view, Ontario was required to consider the estrangement of Aboriginal peoples from the justice system and to work with First Nations governments to fashion a solution to the problem. According to the majority, it was unreasonable for Ontario to delegate its s. 6(8) responsibilities to Ms. Loohuizen, a junior public servant. Senior government officials were required to engage with First Nations in a government-to-government process.

[33] The majority also concluded that Ontario improperly focused all of its attention on efforts to

obtain updated lists. It found that the low response rates required Ontario to investigate the causes of the problem and to actively encourage responses from on-reserve residents. Ontario's failure to do so led the majority to conclude that Ontario had ignored the problem and had failed to make reasonable efforts to provide a fair opportunity for the inclusion of Aboriginal on-reserve residents. It followed that Mr. Kokopenace's rights under [ss. 11\(d\)](#) and [11\(f\)](#) were violated.

[34] In terms of remedy, the majority was satisfied that Mr. Kokopenace received a fair trial and that his jury was not tainted by a reasonable apprehension of partiality or bias. However, the majority found that the violations of [ss. 11\(d\)](#) and [11\(f\)](#) "necessarily undermine[d] public confidence in the integrity of the justice system and the administration of justice" (para. 227). Consequently, it concluded that the only effective remedy was a new trial.

[35] In dissent, Rouleau J.A. found that Ontario's efforts were reasonable in light of what was known at the time. He emphasized that at the time relevant to this appeal, everyone was under the impression that the low response rates were caused by the outdated lists — indeed, the problems with the lists were the main focus of Mr. Kokopenace's arguments before the Court of Appeal. It was only after the Iacobucci Report was released that the complexity of the problem became clear. In his view, the majority's criticisms were misplaced because they were based on information that was unknown to Ontario at the time.

[36] Rouleau J.A. also concluded that the low response rates did not mean that on-reserve residents had a reduced opportunity to participate. In his view, the fact that on-reserve residents had declined the invitation to participate did not lead to the conclusion that Ontario had not provided an opportunity for their inclusion. Ontario's constitutional obligation did not require it to make all efforts or to make fruitless efforts: it was only required to make reasonable efforts to extend an invitation to participate. In his view, Ontario did so. He therefore found that there were no violations of [ss. 11\(d\)](#) or [11\(f\)](#).

[37] With respect to the [s. 15](#) claims, there were two arguments before the court. First, Mr. Kokopenace sought public interest standing to raise an equality argument on behalf of prospective jurors who were on-reserve residents. Second, he claimed that his personal [s. 15](#) rights had been violated. The Court of Appeal unanimously rejected both claims. The court held that it was not an appropriate case in which to grant public interest standing and, with respect to Mr. Kokopenace's personal [s. 15](#) claim, that he had provided no evidence that he suffered a disadvantage because of Ontario's actions. Consequently, neither claim could succeed.

V. Issues

[38] There are four issues before this Court:

1. How is representativeness defined and how does it factor into [ss. 11\(d\)](#) and [11\(f\)](#) of

the [Charter](#)?

2. Did Ontario meet its representativeness obligation in this case?
3. Did Ontario violate the [s. 15](#) rights of Mr. Kokopenace or of Aboriginal on-reserve residents who were potential jurors?
4. If Mr. Kokopenace's [Charter](#) rights were violated, what is the appropriate remedy?

VI. Analysis

A. *How Is Representativeness Defined and How Does It Factor Into Sections 11(d) and 11(f) of the [Charter](#)?*

(1) Defining Representativeness

[39] Representativeness is an important feature of the jury; however, its meaning is circumscribed. What is required is a “representative cross-section of society, honestly and fairly chosen”: *R. v. Sherratt*, [1991] 1 S.C.R. 509, at p. 524. There is no right to a jury roll of a particular composition, nor to one that proportionately represents all the diverse groups in Canadian society. Courts have consistently rejected the idea that an accused is entitled to a particular number of individuals of his or her race on either the jury roll or petit jury: *R. v. Church of Scientology* (1997), 33 O.R. (3d) 65 (C.A.), at pp. 120-21; *R. v. Laws* (1998), 41 O.R. (3d) 499 (C.A.), at pp. 517-18; *R. v. Kent* (1986), 27 C.C.C. (3d) 405 (Man. C.A.), at pp. 421-22; *R. v. Bradley (No. 2)* (1973), 23 C.R.N.S. 39 (Ont. S.C.), at pp. 40-41. As Rosenberg J.A. observed in *Church of Scientology*, at p. 121, “[w]hat is required is a process that provides a platform for the selection of a competent and impartial petit jury, ensures confidence in the jury’s verdict, and contributes to the community’s support for the criminal justice system.”

[40] As this statement indicates, representativeness is about the process used to compile the jury roll, not its ultimate composition. To date, the jurisprudence has discussed two key features of the jury roll process that ensure representativeness: the use of source lists that draw from a broad cross-section of society, and random selection from those sources: *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 20; *Sherratt*, at p. 525; *Church of Scientology*, at p. 121. I would add a third feature to this list, namely, the delivery of notices to those who have been randomly selected. A jury roll is representative when these three features are present, provided that the state has not deliberately excluded members of a particular group. This process aims to ensure that there is an opportunity for individuals with varied perspectives to be included on the jury: *Church of Scientology*, at p. 122. It also seeks to preclude systemic exclusion of segments of the population: *ibid.*, at pp. 122-24.

[41] The first feature — the use of source lists that draw from a broad cross-section of society — aims to capture as many eligible jurors in each district as possible. A perfect source list would capture all eligible jurors and would therefore proportionately represent all eligible groups in the district. However, the [Charter](#) does not mandate a proportionately representative list, nor would such a requirement be feasible. Indeed, it would be virtually impossible to find a source list that meets this requirement.

[42] The second feature — random selection — focuses on the manner in which individuals are selected from the source lists for inclusion on the jury roll.^[1] It ensures that everyone captured on the source lists has an equal chance of being selected for the jury roll. Consequently, representativeness cannot require a jury roll of a particular composition. This would necessitate a selection process that inquired into prospective jurors' backgrounds — a concept that is incompatible with random selection. Indeed, no province requires that its jury rolls proportionately represent the cultures, races, religions, or other individual characteristics of its inhabitants. Requiring that a jury roll proportionately represent the different religions, races, cultures, or individual characteristics of eligible jurors would create a number of insurmountable problems. As the Ontario Court of Appeal held in *R. v. Brown* (2006), 215 C.C.C. (3d) 330, at para. 22:

There are an almost infinite number of characteristics that one might consider should be represented in the petit jury: age, occupation, wealth, residency, country of origin, colour, sex, sexual orientation, marital status, ability, disability and so on. It would be impossible to ensure this degree of representation in any particular jury.

[43] Although these comments were made in the context of a challenge to the composition of a petit jury, they are equally applicable to the composition of the jury roll. Even if a perfect source list were used, it would be impossible to create a jury roll that fully represents the innumerable characteristics existing within our diverse and multicultural society.

[44] This conclusion is reinforced by the many restrictions we accept on the representativeness of our jury rolls. First, a jury roll is compiled for every judicial district, each of which is itself an artificially drawn region. The population of a given district may not be at all representative of Canada's broader population or of the particular community within that district where the offence was committed: *Church of Scientology*, at p. 121. Second, limitations on juror eligibility result in the exclusion of non-citizens, those convicted of criminal offences, and individuals practising certain professions. Finally, in most provinces, the sheriff has the power to exempt individuals from jury service if it poses a hardship. This typically results in the exclusion of the self-employed, those living in remote areas, and low-income individuals. All of these limits have long been accepted despite their impact on representativeness.

[45] The third feature — delivery — is self-explanatory. In short, before the jury roll can be compiled, the state must deliver notices to those who have been randomly selected in order to allow them to respond. The adequacy of delivery must be assessed on the facts of each case, bearing in mind the particular

challenges that this undertaking presents.

[46] Consequently, in defining representativeness as it pertains to the jury roll, the focus is on the process, not the result. If the state has used an adequate process, the jury roll will necessarily be representative even if particular subsets of the population have few individuals on the jury roll.

(2) The Role of Representativeness Within Sections 11(d) and 11(f) of the [Charter](#)

[47] [Sections 11\(d\)](#) and [11\(f\)](#) of the [Charter](#) provide:

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;

Although representativeness is captured by both [ss. 11\(d\)](#) and [11\(f\)](#), it plays a different role in these two guarantees, as I will discuss.

(a) [Section 11\(d\)](#)

[48] Since s. 11(d) focuses on the independence and impartiality of the tribunal, the role of representativeness under this guarantee is necessarily limited to its effect on these concepts. A problem with representativeness that does not undermine independence or impartiality will not violate s. 11(d). The parties in this case focused on the impartiality aspect of s. 11(d). Accordingly, I will limit my comments to this concept.

[49] To determine whether a tribunal is impartial, the question is whether a reasonable person, fully informed of the circumstances, would have a reasonable apprehension of bias: *Valente v. The Queen*, [1985] 2 S.C.R. 673, at pp. 684-91; *R. v. Bain*, [1992] 1 S.C.R. 91, at pp. 101, 111-12 and 147-48. A tribunal must be impartial at both the institutional and individual levels. Even if the petit jury does not appear to be biased, s. 11(d) will be violated if the process used to compile the jury roll raises an appearance of bias at the systemic level: *R. v. Lippé*, [1991] 2 S.C.R. 114, at p. 140.

[50] Representativeness is an important guarantor of impartiality: *R. v. Williams*, [1998] 1 S.C.R. 1128, at para. 46. There are two potential problems with representativeness that may impact on impartiality. 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: *Church of Scientology*, at p. 118. 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 an appearance of partiality: see, e.g., *R. v. Nahdee*, [1994] 2 C.N.L.R. 158 (Ont. Ct. (Gen. Div.)). However, where neither form of conduct exists, a problem with representativeness will not violate s. 11(d).

[51] One important clarification about the relationship between representativeness and impartiality is in order. The narrow way in which representativeness is defined in Canadian jurisprudence means that impartiality is guaranteed through the process used to compile the jury roll, not through the ultimate composition of the jury roll or petit jury itself. A jury roll containing few individuals of the accused's race or religion is not in itself indicative of bias.

[52] My colleague Cromwell J. implies at para. 238 of his reasons that a petit jury drawn from a jury roll that does not include persons who share the same characteristics as the accused — here, Aboriginal on-reserve residency — will be less likely to detect and avoid the “often unconscious effects of racism”. However, there is no empirical data to support the proposition that jurors of the same race as the accused are necessary to evaluate the evidence in a fair and impartial manner: *Laws*, at p. 516. The case at hand attests to this. There has been no allegation of actual bias or partiality in this case, and the Court of Appeal found that there was “no support in the circumstances of this case” for a reasonable apprehension of bias or partiality (at para. 226). Moreover, there has already been a judicial finding that Mr. Kokopenace received a fair trial: *R. v. Kokopenace*, 2011 ONCA 536.

[53] Our criminal justice system has a strong presumption of juror impartiality — and the jury selection process contains numerous safeguards that are designed to weed out potentially biased individuals and ensure that the jurors who are selected for the petit jury will judge the case impartially: *Find*, at paras. 26 and 41-42; *Williams*, at para. 47. Contrary to Cromwell J.'s assertion, these protections have never hinged on the existence of a jury roll that proportionately represents the various groups in our society. Although Canadian courts have held that the jury roll must be representative, they have never held that it must be *proportionately* representative, as my colleague suggests.

[54] Several principles emerge from this discussion. First, the link between representativeness and s. 11(d) is restricted to the effect of representativeness on the impartiality of the tribunal. Second, and by extension, a problem with representativeness does not automatically translate into a s. 11(d) violation: one must always look at whether the state's conduct created an appearance of bias. Finally, representativeness promotes impartiality through the process used to compile the jury roll, not through its ultimate composition.

(b) *Section 11(f)*

[55] In contrast to its limited role in s. 11(d), the role of representativeness in s. 11(f) is broader. Representativeness not only promotes impartiality, it also legitimizes the jury's role as the "conscience of the community" and promotes public trust in the criminal justice system: *Sherratt*, at pp. 523-25; *Church of Scientology*, at pp. 118-20. Representativeness is thus a necessary component of an accused's s. 11(f) right to a jury trial.

[56] To be able to act as the "conscience of the community" as required by s. 11(f), the jury must be representative. For the purposes of s. 11(f), the meaning of representativeness is the same as it is under s. 11(d): it protects the accused's right to an adequate jury selection process.

[57] Although both provisions incorporate the same definition of representativeness, the broader role it plays in s. 11(f) creates an important point of distinction: while a problem with representativeness will not necessarily violate s. 11(d), the same cannot be said about s. 11(f). Because representativeness is a key characteristic of the jury, its absence will automatically undermine the s. 11(f) right to a trial by jury. As this Court held in *Sherratt*, at p. 525:

The perceived importance of the jury and the [s. 11(f)] [Charter](#) right to a jury trial is meaningless without some guarantee that it will perform its duties impartially and represent, as far as is possible and appropriate in the circumstances, the larger community. Indeed, without the two characteristics of impartiality and representativeness, a jury would be unable to perform properly many of the functions that make its existence desirable in the first place. [Emphasis added.]

[58] For these reasons, a problem with representativeness will violate s. 11(f) even if it is not so serious as to undermine impartiality. That said, if a problem with representativeness does undermine impartiality, it will violate both ss. 11(d) and 11(f).

(3) The Legal Test for Representativeness

(a) The Appropriate Test Focuses on the Process Used to Compile the Jury Roll

[59] Representativeness focuses on the adequacy of the jury selection process. It does not require the state to ensure that any particular perspective is represented on the jury roll, nor does it require the state to ensure that its source lists proportionately represent all groups that are eligible for jury duty. It follows that the test to determine whether the state has complied with its representativeness obligation focuses on the process used throughout jury selection as opposed to the ultimate composition of the jury roll.

[60] The Court of Appeal concluded that the test is whether the state made reasonable efforts to provide a fair opportunity for groups with distinctive perspectives to participate in the jury process. With respect, I would frame the test differently. Shining the spotlight on "distinctive perspectives" is problematic and, in my view, improperly focuses on *who* is being included instead of the *process* for their inclusion.

Moreover, it raises thorny questions about what qualifies as a “distinctive perspective” and what characteristics require representation — questions that are not helpful when examining if the process was adequate.

[61] As a result, I would reframe the test as follows. To determine if the state has met its representativeness obligation, the question is whether the state provided a fair opportunity for a broad cross-section of society to participate in the jury process. A fair opportunity will have been provided 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. In other words, it is the act of casting a wide net that ensures representativeness. Representativeness is not about targeting particular groups for inclusion on the jury roll.

[62] Before elaborating on the details of this constitutional requirement, I pause to address my colleague Cromwell J.’s critique of this standard. I should not be misunderstood. There is no question that an accused is entitled, under the [Charter](#), to a representative jury. I take that as a given. In defining the state’s obligation as I have, I am not proposing, as Cromwell J. suggests at para. 249 of his reasons, that an accused is entitled to merely “a ‘fair opportunity’ to have a representative jury”. Nor am I implying that the province need only “make ‘reasonable efforts’ not to [breach an accused’s [Charter](#) rights]” (para. 250). With respect, Cromwell J.’s criticism is based on our differing views of what representativeness means in Canadian law. Because I would focus on the process used to compile the jury roll, the state’s efforts are necessarily important. The reason Cromwell J. concludes that they are not is because he would define representativeness in terms of the jury roll’s ultimate composition.

[63] As for my colleague Karakatsanis J., I agree with her conclusion that it is the process that determines whether an accused’s right to a representative jury has been respected. However, I do not accept her suggestion that the process can be measured against a standard of objective adequacy. Rather, it is the quality of the state’s efforts that will determine if the process is adequate. As the record shows, the compilation of jury rolls is a complex exercise, and many of the factors bearing on the process are not within the state’s control. For example, as I will discuss, Ontario was entirely dependent on cooperation from the First Nations in order to obtain adequate lists of their on-reserve residents. According to Karakatsanis J., if the province fails to obtain adequate lists — even if that failure is due to factors outside its control — there will be a violation of representativeness. I cannot accept a test that would find a violation even when the province has taken reasonable steps to compile the jury roll using random selection from broad-based lists and to deliver the notices to those who have been randomly selected.

[64] Similarly, I cannot accept Cromwell J.’s suggestion that the state must actively encourage responses or that, to this end, the state is obliged to address the distressing history of estrangement and discrimination suffered by Aboriginal peoples. There are good reasons why the state’s representativeness obligation does not rise to this level and only requires a fair opportunity for participation. Efforts to address

historical and systemic wrongs against Aboriginal peoples — although socially laudable — are by definition an attempt to target a particular group for inclusion on the jury roll. Requiring 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.

[65] In coming to this conclusion, I am in no way suggesting that the state should not take action on this pressing social problem. However, an accused's representativeness right is not the appropriate vehicle for this task. This right is held by the accused, not by societal groups. And, because the focus of representativeness is on the process, not the results, the state's constitutional obligation is satisfied by providing a fair opportunity to participate — even if part of the population declines to do so.

[66] That said, if the state deliberately excludes a particular subset of the population that is eligible for jury service, it will violate the accused's right to a representative jury, regardless of the size of the group affected. It is self-evident that the state will not have made reasonable efforts if it deliberately excludes part of the population. Deliberate exclusion undermines the integrity of the justice system and cannot be tolerated. However, if it is a question of unintentional exclusion, it is the quality of the state's efforts in compiling the jury roll that will determine whether the accused's right to a representative jury has been respected. If the state makes reasonable efforts but part of the population is excluded because it declines to participate, the state will nonetheless have met its constitutional obligation. In contrast, if the state does not make reasonable efforts, the size of the population that has been inadvertently excluded will be relevant. A failure to make reasonable efforts in respect of a small segment of the population will not undermine the overall representativeness of the jury roll because there is no right to proportionate representation. When only a small segment of the population is affected, there will still have been a fair opportunity for participation by a broad cross-section of society.

(b) *The Process for Raising a Challenge to the Representativeness of the Jury Roll*

[67] In my view, if an accused intends to challenge the representativeness of the jury roll, the appropriate time to do so is at the outset of the trial. It is a waste of judicial time and resources to conduct an entire trial only to have representativeness challenged after the fact. Although not an exact parallel, I note that this accords with the typical process for raising a challenge to a jury panel (also known as the array) under [s. 629](#) of the [Criminal Code](#). In raising a challenge to the jury roll, the accused should provide an evidentiary basis to show that the province has not met its constitutional obligation. Nevertheless, I recognize that new evidence pointing to serious concerns about the integrity of the jury roll process may on occasion arise in the course of or after the trial. In such cases, I do not foreclose the possibility that a challenge may still be raised: see *R. v. Butler* (1984), 63 C.C.C. (3d) 243 (B.C.C.A.).

[68] The intervener Advocates' Society submits that, in all cases, the Crown should be required to provide pre-trial disclosure about the province's efforts to meet its representativeness obligation. With

respect, I disagree. There will only be a basis to order such disclosure if the trial judge is satisfied that there is an evidentiary foundation for the concern. Absent such foundation, a request for disclosure on this issue amounts to little more than a fishing expedition.

(c) *A Results-Based Test Must Be Rejected*

[69] With respect, I am unable to agree with the results-based test proposed by my colleague, Cromwell J. He would require that the group of individuals on the jury roll be “substantially similar” to a random selection of eligible jurors (paras. 246-47). In other words, he would afford an accused the right to a jury roll that is more or less proportionately representative of the population of eligible jurors in the relevant judicial district. In his view, the representativeness right is not concerned with either the process or with the state’s efforts: he indicates that such factors only become relevant when determining whether a breach of that right is attributable to the state.

[70] I cannot accept that an accused’s right to a representative jury entails an entitlement to proportionate representation at any stage of the jury selection process, including the preparation of the jury roll. Indeed, the recognition of such a right would be unprecedented in Canada. As I have explained, an accused has never been entitled to a jury roll of any particular composition, much less one that proportionately represents the broader population — and with good reason. Put simply, it would be unworkable and would spell the end of the jury system as we presently know it. More than a decade after the [Charter](#) was enacted, McLachlin J. (as she then was) described the problems that would flow from a requirement of proportionate representation. In her concurring reasons in *R. v. Biddle*, [1995] 1 S.C.R. 761, at paras. 56-58, she stated:

Gonthier J., at p. 787, suggests that a jury must be “impartial, representative and competent”. I agree that a jury must be impartial and competent. But, with respect, the law has never suggested that a jury must be representative. For hundreds of years, juries in this country were composed entirely of men. Are we to say that all these juries were for that reason partial and incompetent?

To say that a jury must be representative is to confuse the means with the end. I agree that representativeness may provide extra assurance of impartiality and competence. I would even go so far as to say that it is generally a good thing. But I cannot accept that it is essential in every case, nor that its absence automatically entitles an accused person to a new trial.

To say that a jury must be representative is to set a standard impossible of achievement. The community can be divided into a hundred different groups on the basis of variants such as gender, race, class and education. Must every group be represented on every jury? If not, which groups are to be chosen and on what grounds? If so, how much representation is enough? Do we demand parity based on regional population figures? Or will something less suffice? I see no need to start down this problematic path of the representative jury, provided the impartiality and competence of the jury are assured. Representativeness may be a means to achieving this end. But it should not be elevated to the status of an absolute requirement.

[71] I understand the Chief Justice to be saying that *proportionate representation* is not a constitutional imperative and would be impossible to achieve in practice. These comments are as valid today as they were 20 years ago. I see no reason for departing from them. My colleague attempts to

distinguish *Biddle* on the basis that it dealt with the petit jury stage of jury selection. With respect, this distinction is irrelevant. As I have repeatedly pointed out, there is not a single case in which proportionate representation has been held to be a constitutional requirement at *any* stage of the jury selection process. The practical difficulties the Chief Justice exposed in *Biddle* apply with equal force to both the petit jury and the jury roll.

[72] Justice Cromwell recognizes the problem with defining representativeness broadly. At para. 227 of his reasons, he states:

... there could be endless debates about who and what needs to be represented on the jury Defining all of the relevant senses in which a jury should be representative, let alone going about assembling a jury roll that was representative in all of those ways, would pose insurmountable practical problems.

[73] And yet, my colleague's approach gives rise to the very problems that he himself characterizes as insurmountable. The only way to determine if either the source lists or the ultimate jury roll is "substantially similar" to the broader population is to inquire into the personal characteristics and backgrounds of the individuals on both the source lists and the jury roll, and then compare them to the makeup of the larger population. My colleague recognizes that this would require the province to determine "who and what needs to be represented on the jury". But what would the focus be? Would it be race? Ethnicity? Religion? Age? Economic status? Sexual identity? How closely must the jury roll resemble the makeup of the population in a particular judicial district before it will be considered "substantially similar"? With respect, my colleague provides no answer to these questions.

[74] Inquiring into prospective jurors' identities would be a radical departure from the way jury selection has always been understood in Canada. Source lists typically do not reveal individuals' backgrounds. Nor do jury questionnaires ask individuals to reveal personal characteristics such as race, ethnicity, or religion. To the contrary, the jury selection process has long been based on the respect for juror privacy. Examining potential jurors' backgrounds at the jury roll stage would impermissibly undermine this principle.

[75] Furthermore, granting an accused the right to a proportionately representative jury roll, as my colleague does, would have a drastic impact on the conduct of criminal trials. Because representativeness is not concerned with securing individuals who share the accused's characteristics, it is irrelevant whether the accused is of the same background as the under-responsive group. If, as Cromwell J. suggests, the accused is entitled to a proportionately representative jury roll, defence counsel would presumably be permitted to access the source lists and the jury roll at the outset of every trial. He or she could then argue that the roll is unrepresentative if *any group's* rate of inclusion does not approximate its percentage of the broader population — assuming we could somehow solve the impenetrable problem of what groups we are talking about.

[76] The effect of this is two-fold. First, it would create a procedural quagmire at the outset of jury trials. Second, if a jury roll is found to be unrepresentative, it cannot be used for any trial — and each judicial district has only a single jury roll for a calendar year. Respectfully, adopting Cromwell J.'s expanded view of representativeness risks compromising, if not crippling, the ability to proceed with jury trials throughout the country.

[77] My colleague seeks to allay these concerns. He maintains that his results-based test will not turn the jury selection process on its head because the problem caused by s. 6(8) of the *Juries Act* is unique to Ontario. Section 6(8) makes the problem with the underrepresentation of on-reserve residents visible in Ontario; he would therefore place heightened obligations on that province.

[78] With respect, it is artificial to suggest that the impact of my colleague's test can be confined to the problem that the s. 6(8) process has revealed. There is likely underrepresentation of on-reserve residents in other provinces, although the problem may be less visible. One need only consider the Iacobucci Report to realize this. Either representativeness means actual proportionate representation of the community or it does not. It cannot be the case that the [Charter](#) protects an accused's right to a jury that proportionately represents groups whose numbers on the jury roll are readily identifiable from available data, but provides little or no assurance of proportionality for groups whose numbers on the jury roll are not so apparent. I cannot agree with my colleague's assertion that his test can be confined to situations involving s. 6(8). In my view, it has much broader implications.

[79] My colleague takes a similar approach to the concern that his test will open the floodgates and give rise to regular and persistent challenges to the jury roll on the basis that it is not proportionately representative. He purports to overcome this concern by offering a simple solution. At paras. 228-29, he states:

These policy and practical considerations mean that we must not enlarge the Crown's disclosure obligations or expose potential jurors to intrusions into their privacy. . . .

The practical effect of protecting individual jurors' privacy is that an accused will rarely be in a position to establish the under-representation of a particular group other than by pointing to an inadequate list or some other significant departure from the random selection principle.

[80] I have two comments about this.

[81] First, my colleague's solution is problematic. An accused who does not know that his constitutional right to a representative jury is being breached, and who has no meaningful way of finding out, is left in the unsatisfactory position of having a right without a remedy.

[82] With respect, I find it incongruous to tell an accused in one breath that he has an important constitutional right and, in the next, render it virtually impossible for him to establish that the right has been

infringed. My colleague's approach to jury representativeness rises and falls with the actual makeup of the jury roll: the characteristics of the individuals on the jury roll would determine whether the accused's right has been respected. And yet, the data that bears on this crucial question is information that the state cannot legitimately seek out without obliterating our long-held commitment to juror privacy — a principle that my colleague agrees should be maintained. Any test that contains such an inherent contradiction is one that should be rejected.

[83] Second, if my colleague's test were to prevail, I believe that trial judges would set a low bar for an accused to challenge the representativeness of a jury roll — and it would be far less difficult to meet the required threshold than my colleague suggests. And before long, the jury selection process would become a public inquiry into the historical and cultural wrongs and damaged relationships between particular societal groups and our criminal justice system and the failings of the state to take adequate steps to address them. In turn, this would make it virtually impossible to have a jury trial anywhere in this country — and the administration of criminal justice would suffer a devastating blow.

[84] My colleague responds to this concern by noting that in *Williams*, this Court rejected “slippery slope” arguments that were advanced to oppose efforts to “guard against racism in jury selection” — and yet “the sky has not fallen” (para. 239). He contends that his proposal will have a similarly minor effect on jury trials. With respect, the comparison to *Williams* is flawed.

[85] Unlike my colleague's proposed test, *Williams* did not involve a significant change to the law governing the jury selection process. The issue in *Williams* was whether an accused should be permitted to challenge prospective jurors for cause based on widespread racial bias against Aboriginal people amongst members of the community. The challenge for cause process is a long-standing feature of the Canadian jury selection process. *Williams* simply decided that a particular type of challenge was permissible within the existing challenge for cause framework. Thus, the issue in *Williams* was a narrow one, with limited potential to destabilize our jury system. It must be remembered that a challenge for cause typically involves asking prospective jurors a single question, to which a “yes” or “no” response is required. It does not entail an invasion of privacy or a departure from random selection, nor does it have a significant impact on the jury selection process.

[86] The same cannot be said of my colleague's approach. To require a proportionately representative jury roll, as he does, would be unprecedented. As I have discussed at length, proportionate representation has never been a feature of our jury selection process. Adopting his suggestion would do away with other well-established principles, such as juror privacy and random selection. In their place, we would have an inquisition into prospective jurors' backgrounds and a requirement that the state target particular groups for inclusion on the jury roll. This would entail a complete overhaul of our jury selection process. In short, he proposes a sea change in the law — one with far-reaching effects.

[87] Finally, I wish to address my colleague's assertion that in expressing concerns about his proposed test, I am "oppos[ing] efforts to adapt the jury selection process to guard against racism in jury selection" (para. 239). Nothing could be further from the truth. I firmly believe that the state should do as much as it can to overcome the systemic issues that have led Aboriginal peoples to mistrust and decline to participate in our justice system. Hopefully that process of healing and reconciliation will occur in the foreseeable future.

[88] In the meantime, what are we to do about jury trials? Are we to force Aboriginal people to participate under threat of imprisonment? Are we to carve out special rules allowing Aboriginal people to volunteer for jury duty, and thereby destroy the concept of randomness that is vital to our jury selection process in criminal trials? Are we to say that an Aboriginal on-reserve resident from the District of Kenora facing charges in Toronto or a similar district with no Aboriginal on-reserve population should be entitled to a change of venue? Are we to say that such an individual cannot get a fair trial in Toronto? Are we to say that other marginalized groups that have similarly strong grievances with our justice system can only get a fair trial if the jury roll proportionately reflects their numbers in a given community? These concerns are real, and my colleague provides no answer to them. He states that there are "many obvious concrete and practical steps that could be taken" to address the problem of low response rates from Aboriginal on-reserve residents (para. 240). However, none of these suggestions address the concerns about his proportionate representation requirement that have been raised by myself and many others — including the current Chief Justice in her reasons in *Biddle*. With respect, the criticism that my colleague levels against me — that I am using "slippery slope" arguments as a means of opposing efforts to confront racism in the jury selection process — is both unfair and unwarranted.

(d) *A "Functional Approach" Must Be Rejected*

[89] My colleague Karakatsanis J. concludes that representativeness describes "the functioning of the jury as an institution" (at para. 151) and that an accused's right to a representative jury will be violated only when "society would no longer accept that a jury chosen from it could legitimately act on its behalf" (para. 161). She explains that this will occur where an accused can establish the "[i]ntentional exclusion of certain segments of the population from the jury roll" (para. 173). Alternatively, she states that "[s]ubstantial but unintentional exclusion could conceivably be so extensive that the jury roll would no longer be accepted as acting on behalf of, and representing, society" (*ibid.*).

[90] With respect, I have two concerns with this approach.

[91] First, the test my colleague proposes is amorphous and will prove difficult, if not impossible to apply. It uses vague language, and provides little or no guidance to trial judges. Absent guidance, we are left to ask: When will society no longer accept that a jury chosen from a particular roll could legitimately act on its behalf?

[92] Second, under the guise of broadening the test for representativeness and the state's attendant constitutional obligations, my colleague proposes a test that would hold the state accountable for factors outside of its control. Under her test, the state will not have met its constitutional obligation if a group comprising a significant portion of a judicial district's population refuses to participate in the jury process — even if the state has made reasonable efforts to provide that group with a fair opportunity to do so. With respect, I cannot accept such a test.

B. *Did Ontario Meet Its Representativeness Obligation in This Case?*

[93] In my respectful view, the majority of the Court of Appeal erred in three respects in concluding that Ontario failed to make reasonable efforts. I will discuss each in turn. These three errors of law were central to the majority's reasoning process and undermine their conclusions. Properly analyzed, while not perfect, Ontario's efforts were reasonable.

(1) The Legal Errors in the Majority's Reasons

(a) *The Legal Test*

[94] The principal error in the majority's approach was its reliance on a test that imposed too high a standard. Both LaForme and Goudge JJ.A. required Ontario to go beyond making reasonable efforts to: (1) compile the jury roll using random selection from lists that draw from a broad cross-section of the population, and (2) deliver jury notices to those who have been randomly selected. Rather, they applied a standard that obliged Ontario to actively encourage responses from Aboriginal on-reserve residents by investigating and addressing other causes of the low response rates.

[95] The high standard applied by the majority flowed from their incorrect definition of representativeness. Both judges defined representativeness in relation to the ultimate makeup of the jury roll as opposed to the process used to compile it. Because they defined representativeness in relation to the makeup of the jury roll, the majority concluded that increased efforts were required in the face of low response rates and found that, without such efforts, the jury roll would be unrepresentative. This conclusion does not necessarily follow. To the extent the low rate of return was caused by problems with the source lists or delivery, Ontario was obliged to make reasonable efforts to address the problem. Such problems are part of the process, and are therefore part of Ontario's obligation to provide a fair opportunity. However, Ontario was not required to address any and all causes of the low response rates. It was not required to address systemic problems contributing to the reluctance of Aboriginal on-reserve residents to participate in the jury process. With respect, the majority erred in concluding that Ontario was required to do so.

[96] Moreover, the majority improperly held that Ontario had an obligation to actively encourage responses in order to overcome the low response rates. Ontario's failure to do so was one of the crucial

factors underpinning the majority's conclusion that Ontario "ignored" the problem and failed to make reasonable efforts. However, Ontario was not obliged to encourage responses. Its constitutional obligation was satisfied by providing a fair opportunity to participate.

(b) *The Honour of the Crown and Gladue Principles*

[97] The majority also erred by holding that the analysis of Ontario's efforts must be informed by both the estrangement of Aboriginal peoples from the criminal justice system, as discussed in *Gladue*, and the honour of the Crown. There are two reasons why these considerations should not have been taken into account.

[98] First, the honour of the Crown and *Gladue* principles should not have been considered because neither is relevant to the state's obligation to make reasonable efforts to compile the jury roll using random selection from lists that draw from a broad cross-section of society and deliver jury notices to those who have been randomly selected.

[99] Second, the majority incorrectly held that the honour of the Crown was engaged simply because s. 6(8) of the *Juries Act* calls on the government to treat Aboriginal on-reserve residents differently for the purposes of jury selection. While it is true that s. 6(8) deals specifically with Aboriginal on-reserve residents, at bottom, it is an administrative provision. The typical process for compiling jury rolls under s. 6(2) of the *Juries Act* relies on lists that do not capture on-reserve residents. Section 6(8) therefore provides a mechanism for including individuals residing on reserves. It does not create a particular obligation to Aboriginal peoples, nor does it create a need for consultation between the Crown and Aboriginal groups. In these circumstances, the honour of the Crown is not engaged. As this Court emphasized in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 72, not all interactions between the Crown and Aboriginal peoples engage the honour of the Crown:

. . . the obligation must be explicitly owed to an Aboriginal group. The honour of the Crown will not be engaged by a constitutional obligation in which Aboriginal peoples simply have a strong interest. Nor will it be engaged by a constitutional obligation owed to a group partially composed of Aboriginal peoples. Aboriginal peoples are part of Canada, and they do not have special status with respect to constitutional obligations owed to Canadians as a whole. But a constitutional obligation explicitly directed at an Aboriginal group invokes its "special relationship" with the Crown.

[100] Given that s. 6(8) is an administrative provision governing the creation of the jury roll, it does not meet this criterion. While s. 6(8) is one of the vehicles through which the state fulfils its constitutional obligations under [s. 11](#) of the [Charter](#), it is not itself a constitutional obligation. Moreover, s. 11 rights are held by everyone, not merely by Aboriginal peoples. Section 6(8) therefore does not engage the honour of the Crown, and the majority erred by using this doctrine to inform its analysis.

[101] By relying on the honour of the Crown and *Gladue* principles, the majority transformed the

accused's [s. 11 Charter](#) rights into a vehicle for repairing the long-standing rupture between Aboriginal groups and Canada's justice system. In doing so, it raised the bar Ontario was obliged to meet to satisfy its representativeness obligation.

[102] This higher standard led the majority to conclude that Ontario was required to engage with First Nations on a government-to-government basis to address the low response rates. It therefore held that Ontario failed to live up to its obligation because it delegated its s. 6(8) duties in the District of Kenora to Ms. Loohuizen. This finding was incorrect. Given that the honour of the Crown was not applicable, there was nothing inappropriate about delegating these duties. In fact, the *Juries Act* explicitly contemplates a local "sheriff" carrying them out.

(c) *The Iacobucci Report*

[103] The majority's third error was its use of hindsight reasoning based on the Iacobucci Report. At the relevant time, it was widely believed that the low response rates were caused by difficulties obtaining accurate lists. This belief endured long after the 2008 jury roll was compiled: see, e.g., *Pierre v. McRae, Coroner*, 2011 ONCA 187, 104 O.R. (3d) 321, at paras. 68-69. As Rouleau J.A. noted, the parties' arguments before the Court of Appeal indicated that they also viewed the lists as the principal cause of the low response rates.

[104] The Iacobucci Report was released while the Court of Appeal had this appeal under reserve. Only after the report was released did it become apparent that the cause of the low response rates was highly complex:

... an examination of that problem [the underrepresentation of individuals living on reserves on Ontario's jury rolls] leads inexorably to a set of broader and systemic issues that are at the heart of the current dysfunctional relationship between Ontario's justice system and Aboriginal peoples in this province. It is these broad problems that must be tackled if we are to make any significant progress in dealing with the underrepresentation of First Nations individuals on juries. [para. 15]

[105] The majority relied on these findings to inform its analysis. This was problematic for two reasons. First, in doing so, it did not analyze Ontario's actions in light of what was understood at the time. Second, even if the conclusions of the Iacobucci Report had been known at the time, Ontario's representativeness obligation would not have required it to address the systemic issues revealed by the report.

(2) Ontario's Efforts Were Reasonable

[106] Assessed in light of what was known at the time and against the proper standard, Ontario's efforts were reasonable. The Court of Appeal raised potential issues with three parts of the process — the

lists, the delivery, and the low response rates. I will assess Ontario's efforts against these three markers.

(a) *The Lists*

[107] Two of the judges at the Court of Appeal — Goudge and Rouleau JJ.A. — concluded that Ontario's efforts to address the outdated lists were reasonable. I agree. Although the lists were imperfect, Ontario made reasonable efforts to use updated lists of on-reserve residents. Ms. Loohuizen's attempts to obtain updated lists were persistent and demonstrated a sincere effort to include on-reserve residents.

[108] In 2001, Ms. Loohuizen assumed responsibility for the entire cycle of jury selection and requested updated lists from the 42 reserves for which she had INAC lists from the year 2000. In addition to contacting the chiefs, she also contacted the director of Nishnawbe-Aski Legal Services and, on two occasions, attempted to enlist the help of the Deputy Grand Chief of the Nishnawbe Aski Nation. Thus, even at this early stage, she was exploring various avenues for obtaining lists. However, these efforts were unsuccessful and no new lists were obtained.

[109] Although she did not send another request for lists until 2006, this in itself is not objectionable. It must be remembered that the MPAC lists used for off-reserve residents are only updated every three years. Significantly, in the intervening period, Ms. Loohuizen's efforts to address the problem did not stop. In 2004, she conducted a brainstorming session with Stach J., Justice of the Peace Morrison (an Aboriginal Elder), and two of her superiors in the CSD. The session explored, among other things, ways to obtain better lists. After the meeting, Ms. Loohuizen reached out to Justice of the Peace Morrison to ask for his assistance in contacting the Treaty 3 and Treaty 9 communities in the District of Kenora, but received no response.

[110] When she attempted to obtain updated lists in 2006, Ms. Loohuizen contacted the reserves by fax. If she had difficulty reaching reserves in this manner, she attempted to contact the reserves by letter instead. She obtained four updated lists in response to these attempts. As well, the number of questionnaires sent to on-reserve residents was increased 42 percent beyond their proportionate share in an attempt to offset the problems with the lists. These efforts show a meaningful attempt to obtain updated lists and to provide a fair opportunity for the participation of Aboriginal on-reserve residents.

[111] In 2007 (during preparations for the 2008 jury roll), the PJC calculated the Aboriginal on-reserve response rate for the first time since 1993. The 1993 response rate had been 33 percent; the new statistics showed that the response rate had fallen to 10.7 percent. When Ms. Loohuizen was informed of the results, she raised the problem with both Stach J. and her superiors in the CSD, and she increased her efforts to obtain updated lists. In addition to contacting the 43 reserves to which she had sent requests in the previous year, she visited 15 remote reserves to meet with band leadership to discuss the jury process, the province's desire to include more Aboriginal people on jury rolls, and the difficulties obtaining updated band lists. She received eight new band lists in response to these efforts. Despite follow-up letters and

phone calls to the other seven reserves, no lists were obtained from those communities.

[112] Ms. Loohuizen also attempted to arrange meetings with the chiefs of four reserves that were close to the City of Kenora, and successfully met with two of them. In addition, she tried to arrange in-person meetings or phone calls with 10 other reserves to discuss the jury issue. These efforts did not result in any updated lists. Again, she followed up with these reserves by sending letters and making phone calls to attempt to secure updated lists. With respect to one reserve alone, she made five follow-up phone calls. This can hardly be described as a situation like *Nahdee*, in which the state simply accepted non-response from the reserves. Rather, Ms. Loohuizen's efforts were both diligent and persistent. Furthermore, to compensate for the problems with the outdated lists, the number of questionnaires sent to on-reserve residents was increased by almost 50 percent.

[113] Taken together, these efforts were a reasonable approach to the problems with the lists. Yet despite these steps, the respondent argues that the flaws with the lists rendered Ontario's efforts unsatisfactory. With respect, I do not accept this argument.

[114] First and most importantly, Ontario's constitutional obligation does not depend on obtaining perfect lists. The focus is on the efforts to provide an opportunity for participation. As the evidence shows, Ms. Loohuizen's efforts showed a real awareness of the problem. She did the best she could with the lists she received and made ongoing and escalating efforts over the years to obtain better source lists.

[115] In addition, the respondent overstates the significance of the confusion about the boundaries of the judicial district. Ms. Loohuizen had no lists for four reserves because she was unaware that they fell within the District of Kenora. This was evidently a problem. Ontario should have provided better training so that the reserves in the district could be properly identified. However, this oversight affected a relatively small proportion of the reserves. Meaningful efforts were made to include 42 of the 46 reserves. I cannot say that the absence of lists for four reserves was serious enough to create a breach of Ontario's representativeness obligations.

[116] Finally, I take issue with Cromwell J.'s suggestion that the province is constitutionally required to succeed — as opposed to make reasonable efforts — in obtaining accurate source lists. I do not accept his conclusion that compiling the source lists is “quintessentially a state function” and that reasonable efforts by the province therefore cannot save any deficiencies (para. 266). Respectfully, this suggestion rests on a misunderstanding of what the province can and cannot control.

[117] As the record indicates, although Ontario had a great deal of responsibility for the lists, it could only obtain lists of on-reserve residents from the reserves themselves. It had no independent access to this information. Regardless of Ontario's efforts, if the reserves refused to provide source lists for s. 6(8) purposes, the province had no other way of obtaining them. Laying any and all deficiencies at the province's

feet paints an inaccurate picture. As I have explained, the compilation of source lists is not something over which Ontario had complete control. For that reason, I am of the view that the appropriate test must focus on the state's efforts, not on whether it succeeded in obtaining updated lists.

[118] In sum, Ontario's efforts to obtain updated lists were reasonable. I am therefore satisfied that Ontario met its representativeness obligation in this regard. This accords with the findings of both Goudge and Rouleau JJ.A.

(b) *The Delivery*

[119] At the Court of Appeal, only Goudge J.A. treated delivery as a separate consideration from the lists. In my view, the evidence renders it virtually impossible to do so. The evidence about mail delivery on reserves indicates that the likelihood of notices reaching the intended recipients was directly linked to the accuracy of the lists. The outdated lists increased the likelihood that notices would be sent to individuals who were no longer residing on a reserve. In these cases, the postal clerks would not be able to deliver them and they would be returned as undeliverable by the post office. The comparatively high number of undeliverable questionnaires must therefore be seen as a symptom of the outdated lists. As I have concluded that the efforts to address the lists were reasonable, I need not address this point further.

[120] As with the lists, Cromwell J. concludes that delivery is "quintessentially a state responsibility" (para. 269). Even if that were so, delivery cannot be disassociated from the lists. Moreover, the post office is not within the province's control, and the province cannot force individuals to pick up their mail. Like the lists, delivery is not entirely within the province's control and a reasonable efforts test is all that is required.

[121] In this regard, I note that the province did not simply throw up its hands upon learning of the problems with delivery. Rather, it took an aggressive approach. After consulting with Stach J., it increased the number of notices sent to on-reserve residents by nearly 50 percent. In my view, this was a reasonable response to the delivery problems. To the extent the majority of the Court of Appeal concluded otherwise, as I have said, their factual findings were based on a legal test that imposed too high a standard on Ontario. Accordingly, those findings are not entitled to deference.

(c) *The Low Response Rates*

[122] Ontario's approach to addressing the low response rates was the factor that drew the most serious criticism from the majority at the Court of Appeal. However, to meet its constitutional mandate, Ontario was only required to address the ways in which the problems with the source lists and delivery contributed to the low response rates. As I have described, it made reasonable efforts to do so. It was not obliged to address the systemic factors that the Iacobucci Report indicates are at the heart of this problem.

[123] The respondent argues that Ontario should have investigated the cause of the low response rates earlier. According to the respondent, Ontario's failure to do so renders its efforts to address the low response rates inadequate. I do not accept this argument.

[124] The respondent submits that if the interim and final reports required under PDB #563 had been filed and if the PJC had analyzed the data it was collecting about the rate of response from on-reserve residents earlier, Ontario could have taken action sooner. While it is true that Ontario could have enforced the reporting requirements and run the data earlier, I fail to see how this would have been of assistance. Both of these measures would simply have confirmed what was already known — that on-reserve residents were responding in markedly lower numbers. Neither of these steps would have shed light on the causes of the low response rates. At the time, everyone believed the problem was attributable to the flawed lists. Efforts were being directed to rectifying that problem. Had Ontario known of the precise data about the low response rates, I fail to see how it would have changed the approach. Moreover, even if the province had known about the systemic problems sooner, its constitutional obligations would not have required it to address them.

(3) Conclusion on the Sufficiency of Ontario's Efforts

[125] Ontario made reasonable efforts to include Aboriginal on-reserve residents in the jury process. I therefore conclude that there was no violation of [ss. 11\(d\)](#) or [11\(f\)](#) of the [Charter](#).

[126] As we now know, the problem runs much deeper than flawed lists. The Iacobucci Report concludes, at para. 209, that “the most significant systemic barrier to the participation of First Nations peoples 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 is a serious policy concern that merits attention. But the accused's [ss. 11\(d\)](#) and [11\(f\)](#) [Charter](#) rights are not the appropriate vehicle to redress this concern. The accused's right to be tried by a jury of his peers is a right aimed at securing a fair adjudicative process. It cannot be used to dictate to the government how it should — let alone *must* — resolve important policy questions of this nature. For the purposes of [ss. 11\(d\)](#) and [11\(f\)](#), the state's constitutional obligation stops when it has provided a fair opportunity for a broad cross-section of society to participate in the jury process. It has done so.

[127] In coming to this conclusion, I wish to emphasize that nothing in these reasons should be taken as suggesting that it would be appropriate for Ontario to stall its efforts to address the problem of the underrepresentation of Aboriginal on-reserve residents in the jury system. As this Court has noted on many occasions, the estrangement of Aboriginal peoples from the justice system is a pressing matter. If reconciliation is ever to be achieved, the state's efforts must not only continue; they must increase. But this Court is not a commission of inquiry, and its role is not to dictate to the government how to resolve this issue. The question facing us is whether the accused's [ss. 11\(d\)](#) and [11\(f\)](#) [Charter](#) rights were

violated. Viewed through that narrow lens, the state's efforts were sufficient.

C. *Did Ontario Violate the [Section 15](#) Rights of Mr. Kokopenace or of Aboriginal On-Reserve Residents Who Were Potential Jurors?*

[128] For the reasons given by the Court of Appeal, I would dismiss Mr. Kokopenace's [s. 15](#) claims. With respect to his personal [s. 15](#) claim, he has not clearly articulated a disadvantage. This is fatal to his claim. With respect to his request for public interest standing to advance a [s. 15](#) claim on behalf of Aboriginal on-reserve residents who were potential jurors, I would not accede to this request. As an accused person, Mr. Kokopenace may have different, potentially conflicting interests from those of potential jurors. If a challenge is to be raised on their behalf, there must be an opportunity for their views to be represented. Like the Court of Appeal, I would therefore decline to grant public interest standing and dismiss his claim on behalf of potential jurors.

D. *If Mr. Kokopenace's [Charter](#) Rights Were Violated, What Is the Appropriate Remedy?*

[129] As I have concluded, there were no [Charter](#) violations. Mr. Kokopenace received a fair trial by an impartial and representative jury. Accordingly, it is not necessary to address the question of remedy.

VII. Disposition

[130] For these reasons, I would allow the appeal, set aside the order for a new trial, and reinstate Mr. Kokopenace's conviction.

The following are the reasons delivered by

KARAKATSANIS J. —

[131] Aboriginal people are dramatically overrepresented in our justice system as offenders and victims, but participate at much lower rates than non-Aboriginal people as jurors. Canadian society is deprived and diminished by this reality, the causes of which are deeply rooted and complex. This appeal requires this Court to determine whether the low presence of Aboriginal on-reserve residents on the 2008 jury roll for the District of Kenora violated Mr. Kokopenace's fair trial rights, as protected by [s. 11](#) of the [Canadian Charter of Rights and Freedoms](#).

[132] In answering this question, the Court must decide the scope of the [Charter](#) right to a trial by jury and whether [s. 11](#) is the appropriate constitutional tool for addressing the damaged relationship between Aboriginal peoples and the justice system in Canada.

[133] I conclude that, despite the difficulties I will discuss with its compilation, the 2008 Kenora jury roll met the constitutional standards imposed by [s. 11](#) of the [Charter](#). In so deciding, I respectfully disagree with the approaches to representativeness adopted by each of my colleagues. Unlike Cromwell J., I cannot accept that representativeness requires a jury roll to substantially resemble a random selection of eligible jurors drawn from the community. I view representativeness as primarily concerned with the jury's function rather than the degree to which a jury roll reflects the particular make-up of the community. Understood in light of the jury's history and purpose, a jury represents society in the sense that it acts on its behalf.

[134] Nor can I agree with Moldaver J.'s view that representativeness only requires the state to make reasonable efforts to compile the jury roll through a fair process, without regard for the outcome of those efforts. A *Charter* breach is not defined by the state's efforts, but by the adequacy of the process actually used. Furthermore, unlike my colleague, I leave open the possibility that, even where an appropriate process is used, unintentional but substantial exclusion could undermine the legitimacy, independence and impartiality of a jury roll, thereby rendering it unrepresentative. Thus, I conclude that [section 11](#) requires the state to compile the jury roll through a random process that draws broadly from the community, without deliberate or substantial exclusion. That threshold was met in this case.

I Background

[135] In 2008, Clifford Kokopenace was tried before judge and jury in the Ontario Superior Court of Justice in Kenora, where he was acquitted of second degree murder but found guilty of the lesser included offence of manslaughter. His challenge to the representativeness of the jury roll was raised after conviction but before sentencing. It was argued for the first time on appeal.

[136] Before the Ontario Court of Appeal, Mr. Kokopenace argued that the jury that found him guilty was derived from a jury roll that inadequately ensured representation of Aboriginal on-reserve residents. He argued that this violated his rights under [ss. 11\(d\)](#), [11\(f\)](#), and [15](#) of the [Charter](#). Fresh evidence was admitted on this issue, including *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci* (2013) (Iacobucci Report), released on February 26, 2013, while the Court of Appeal's decision was under reserve.

[137] The Court of Appeal issued three sets of reasons, and divided on both the findings of facts and the ultimate disposition of the appeal. LaForme and Goudge JJ.A., writing separate reasons for the majority, found that the accused's rights under [s. 11\(d\)](#) and [\(f\)](#) were breached. They reached this conclusion on the basis that the state did not make reasonable efforts to provide a fair opportunity for the distinctive perspectives of Aboriginal people residing on reserves to be included in the jury roll from which jurors were chosen. Rouleau J.A., dissenting, adopted the majority's test of representativeness but found that despite imperfections in compiling the jury roll, the state's efforts were reasonable in the

circumstances. All three judges dismissed Mr. Kokopenace's [s. 15](#) claims for want of evidence and lack of standing (2013 ONCA 389, 115 O.R. (3d) 481).

II. Analysis

[138] This appeal highlights a stark reality in Ontario: the low participation rate of Aboriginal people in the province's jury rolls. The evidence in this case is that this problem is serious and worsening: in 2008, only 4.1 percent of those on the District of Kenora jury roll were Aboriginal people residing on reserves, though the on-reserve adult population comprises between 21.5 percent to 31.8 percent of the district's total adult population. This situation is tragic, both in its causes and its effects. The Iacobucci Report found that the negative impact of the criminal justice system on Aboriginal peoples' communities, cultures, laws and lives has left many feeling alienated from this system, and the underrepresentation of Aboriginal peoples on jury rolls is only one manifestation of this much larger problem (para. 209). Unfortunately, lack of participation in the criminal justice system only deepens the divide.

[139] There is no doubt that the long-standing grievances underlying this disengagement should be addressed. The alienation of Aboriginal peoples from the justice system is a problem that runs deep in Canadian society, and is one that may very well have constitutional implications. However, I agree with the Court of Appeal, for the reasons given by my colleague Moldaver J., that this is not a proper case to determine whether the equality rights of Aboriginal people under [s. 15](#) of the [Charter](#) are implicated as a result of this alienation and underrepresentation.

[140] Moreover, in my view, the right of an accused to a fair trial by jury is not the appropriate mechanism to indirectly address the historic and current grievances of First Nations. A challenge to representativeness of a jury roll asks a much narrower question, viewed from the perspective of an accused's fair trial rights: whether a segment of society's low participation on the jury roll undermines a trial by an otherwise independent, impartial, competent jury.

[141] [Sections 11\(d\)](#) and [11\(f\)](#) of the [Charter](#) provide:

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;

[142] The issue in this case is whether the accused's right to a trial by jury was breached. In my view, this right does not entitle an accused to a jury or a jury roll that proportionately reflects all of the various perspectives and characteristics in society. Rather, it requires a jury that can act on behalf of society. In order for the jury to function as a representative of society in the criminal justice system, the jury roll must be compiled through a neutral process in which random selection is applied to source lists that draw broadly from the community, without deliberate or substantial exclusion. Such a process provides a platform for the selection of an impartial and independent jury. That requirement was met in this case. Moreover, there is no real dispute that Mr. Kokopenace received a verdict from a jury that was independent and impartial (C.A. reasons, para. 226). I am satisfied that his fair trial rights protected by [s. 11\(d\)](#) were not breached. As I will explain, I am also satisfied that his right to trial by jury under [s. 11\(f\)](#) was not infringed.

A. *The Essential Features of Trial by Jury*

[143] While the [Charter](#) protects the right to trial by jury, it does not define what exactly this right entails. Thus, it is helpful to return to the historical roots of trial by jury, and to its functions and purposes.

[144] The jury system forms part of the bedrock of the Canadian legal system. It was introduced to Canada as part of the common law of England. The 18th century jurist William Blackstone extolled the virtues of the jury, writing that “the founders of the English laws have with excellent forecraft contrived . . . that the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion” (*Commentaries on the Laws of England* (1769), Book IV, at p. 343).

[145] Blackstone's reference to “equals and neighbours” must be understood in a very limited sense. When Blackstone wrote in the 1760s, this referred to propertied men, or lords where a lord stood accused (*Commentaries of the Laws of England* (1768), Book III, at p. 349). When the jury system was brought to Canada as part of the English common law, the requirements of gender and property persisted (R. B. Brown, *A Trying Question: The Jury in Nineteenth-Century Canada* (2009), at pp. 45 and 135).

[146] Restrictions on gender persisted until the 1970s, when the last Canadian provinces amended their legislation to permit women to serve as jurors. For much of Canadian history, Aboriginal people were systemically excluded from serving on juries due to the combined effects of racism, denial of the franchise to Aboriginal people, and exclusion of reserves from source lists: see, for example, *Report of the Aboriginal Justice Inquiry of Manitoba* (1991), vol. 1, at pp. 378-79.

[147] These exclusions reflect prejudices that have no place in the administration of justice, and that would not be countenanced in the modern jury system. Indeed, they would today be seen as deliberate exclusions that violate an accused's rights under [s. 11\(d\)](#) and (f) of the [Charter](#). As this difficult history illustrates, society has moved away from an identity-based conception of the jury. There are

compelling reasons for so doing. Individuals can have multiple, intersecting identities or characteristics that are not susceptible to simple categorization. The very notion of identity itself is constantly in flux. Thus, selecting prospective jurors on the basis of their identity or characteristics is not a feature of the modern jury. This is not to say that there is not value in Blackstone's vision of a jury composed of "equals and neighbours". It is rather that, properly understood, "equals and neighbours" must refer to society as a whole.

[148] Trial by jury is a trial by lay members of the community, whose job it is to find the facts and return a verdict. *Black's Law Dictionary* (10th ed. 2014) defines a jury as "[a] group of persons selected according to law and given the power to decide questions of fact and return a verdict" (p. 986). This definition focuses exclusively on its fact-finding function, rather than its representative qualities. What are the essential features of a jury that permit it to carry out this function of collective decision-making?

[149] A jury must be independent and impartial, as provided in [s. 11\(d\)](#) of the [Charter](#) (*R. v. Davey*, 2012 SCC 75, [2012] 3 S.C.R. 828, at para. 30). Above all else, these twin requirements are fundamental, explaining in part why trial by jury is part of an accused person's right to a fair trial. Of course, a jury must also be competent, and the process permits the judicial exclusion of those who are unable to carry out their responsibilities: [Criminal Code, R.S.C. 1985, c. C-46](#), [ss. 632](#) and [644](#).

[150] This Court has identified other features of a jury, anchored in [s. 11\(f\)](#) of the [Charter](#). A jury roll must be drawn by means of a neutral, broadly inclusive process favouring neither the prosecution nor the accused. This process supports the independence and impartiality of the jury that will ultimately be selected. As this Court held in *R. v. Sherratt*, [1991] 1 S.C.R. 509, at p. 524:

The modern jury was not meant to be a tool in the hands of either the Crown or the accused and indoctrinated as such through the challenge procedure, but rather was envisioned as a representative cross-section of society, honestly and fairly chosen.

[151] The vision of a representative cross-section of society has been the source of some confusion. As I will explain, representativeness is not about the inclusion or reflection of all groups and perspectives in society. It instead describes the functioning of the jury as an institution, in which laypersons are asked to contribute to the criminal justice process and to provide the crucial link between that system and the larger community. A jury thus serves as a representative of society. A jury is not rendered legitimate because its members reflect the demographics of that community. Nor are jurors expected to represent particular perspectives in the course of their deliberations. Rather, the jury acts on behalf of society. The representative function is assured by the use of a selection process in which random sampling is applied to broad-based source lists, without deliberate or substantial exclusion.

[152] In adopting this functional understanding of representativeness, I depart from my colleague Cromwell J. In his view, a jury roll must mirror what a random sample from the community would look

like — in effect, it must proportionately represent the community from which it is drawn. Nor can I agree with the Court of Appeal's view that representativeness requires the state to make reasonable efforts to include the distinctive perspectives of members of all First Nations reserve communities in the jury roll.

[153] In my view, adopting such an identity-based approach, focused on ensuring that certain perspectives are reflected on the jury roll, would mark a significant departure from both Canadian experience and jurisprudence. It is undisputed that the Canadian jury system has never required that the ultimate jury panel selected for a trial proportionately represent the perspectives and identities within a particular community. As McLachlin J. (as she then was) wrote in *R. v. Biddle*, [1995] 1 S.C.R. 761, at paras. 56-57:

I agree that a jury must be impartial and competent. But, with respect, the law has never suggested that a jury must be representative. For hundreds of years, juries in this country were composed entirely of men. Are we to say that all these juries were for that reason partial and incompetent?

To say that a jury must be representative is to confuse the means with the end. I agree that representativeness may provide extra assurance of impartiality and competence. I would even go so far as to say that it is generally a good thing. But I cannot accept that it is essential in every case, nor that its absence automatically entitles an accused person to a new trial.

[154] Accepting that exclusions based in prejudice have no place in the modern jury system does not require that the jury be chosen from a roll that proportionately reflects the different perspectives and characteristics in society. In my view, the same practical and principled concerns weighing against requiring a proportionately representative jury apply with equal force to the jury roll.

[155] First, society has long accepted that, in principle, governments may exclude many from eligibility for jury service, for example on the basis of their professions, education, criminal history or immigration status: see, for example, *Juries Act*, R.S.O. 1990, c. J.3, ss. 2 to 4; *R. v. Church of Scientology* (1997), 33 O.R. (3d) 65 (C.A.). Requiring proportionality among jurors would completely undermine these long-standing restrictions.

[156] But the problems with this approach run much deeper than mere practicality. Exactly what characteristics would have to be 'represented'? Race, gender, ethnicity, religion, language, education, socio-economic status, urban or rural residency? Rosenberg J.A. of the Ontario Court of Appeal illustrated the conceptual problems with viewing representativeness as a positive right, rather than a prohibition on improper exclusions, in *Church of Scientology*, at p. 121:

To require the sheriff to assemble a fully representative roll or panel would run counter to the random selection process. The sheriff would need to add potential jurors to the roll or the panel based upon perceived characteristics required for representativeness. The selection process would become much more intrusive since the sheriff in order to carry out the task of selecting a representative roll would require information from potential jurors as to their race, religion, country of origin and other characteristics considered essential to achieve representativeness. . . . [T]he right to a representative panel or roll is an inherently qualified one. There cannot be an absolute right to a representative panel or roll.

McLachlin J. discussed the same problems with requiring a representative jury in *Biddle*, and I agree with her conclusion that there is “no need to start down this problematic path of the representative jury, provided the impartiality and competence of the jury are assured. Representativeness may be a means to achieving this end. But it should not be elevated to the status of an absolute requirement” (para. 58).

[157] The respondent points to the important role of the jury as conscience of the community, arguing that this role demands a more robust right to representativeness. It is true that by forging a connection between the broader community and the administration of justice, and by entrusting such a crucial decision-making role to lay community members, the jury serves as a bridge between the public and the justice system, and promotes confidence in both the outcome of individual cases and the functioning of the system more broadly: *Davey*, at para. 30. The jury’s role in educating the public, reinforcing the legitimacy of the justice system and acting as conscience of the community are clearly positive outcomes of our system of trial by jury: see *Sherratt*, at pp. 523-24.

[158] However, it is important not to confuse these important roles or impacts of a jury system with the essential characteristics that permit it to serve these functions. These characteristics flow from the qualities that are constitutionally protected: independence, impartiality, and competence. They are assured by random selection from a broad-based jury roll — drawn from the broader community — without any deliberate exclusion of otherwise qualified jurors, and, at a later stage, the ability to challenge for cause. In this sense, the jury is representative of society.

[159] Thus, although representativeness, understood very generally as representing society, is an essential feature of a jury, it must be understood by reference to the purpose for which it is protected. Instead of guaranteeing particular communities or perspectives a role in the process, jury representativeness ensures the institution’s independence, impartiality and legitimacy by random selection from the broader community. The right to trial by jury does not guarantee that a particular group will be represented, only that the jury roll must be compiled through random selection from broad-based lists, without deliberately or substantially excluding a segment of the population. This accords with this Court’s general statement in *Sherratt* that representativeness is guaranteed by random selection from broadly inclusive source lists: p. 525.

[160] My colleague Moldaver J. says that it is sufficient if the state makes reasonable efforts to use a fair and broadly inclusive process. In my view, however, the process used is either constitutionally acceptable or it is not. The state’s reasonable efforts in meeting its [Charter](#) obligations would no doubt be relevant at the remedy stage. However, it is the adequacy of the process used, rather than the quality of the state’s efforts, which determines whether or not an accused’s [Charter](#) rights were violated.

[161] Unlike Moldaver J., whose test focuses on the state’s reasonable efforts, I leave open the possibility that the state could, in exceptional circumstances, violate an accused’s [Charter](#) rights by

unintentionally but substantially excluding a segment of the population. It may be that such substantial exclusion rises to a level that could leave the jury unable to fulfill its representative function, thereby depriving it of legitimacy in the eyes of society, and undermining its independence and impartiality. Where the jury roll is so deficient that society would no longer accept that a jury chosen from it could legitimately act on its behalf, an accused's rights protected by both [ss. 11\(d\)](#) and [11\(f\)](#) of the [Charter](#) will be violated.

[162] This additional aspect of the representativeness test permits a claimant to establish a [Charter](#) breach in circumstances where, despite an adequate process and the absence of deliberate exclusion, the resulting jury roll is nonetheless fundamentally flawed. This recognizes that although representativeness is primarily achieved through the process by which the jury roll is compiled, the effect of that process on the jury's ability to serve its functions cannot be ignored. Thus, this additional enquiry reflects the importance of representativeness and, in fact, broadens the state's constitutional obligation. However, as I will explain, such substantial exclusion does not arise in this case, and in my view the precise location of the threshold is best left for a future case.

[163] In summary, Canadian law has never defined juries as representative of all the particular characteristics or perspectives in society. The right to a jury in [s. 11\(f\)](#) of the [Charter](#) has never entitled an accused to a jury or jury roll of a particular composition. There are practical and principled reasons why it would be problematic to define any characteristics that ought to be reflected in a jury roll. Indeed, many perspectives are not represented, as individuals are in fact excluded from the jury roll by eligibility criteria and from the jury by being excused where participation would impose hardship. Judges regularly excuse potential jurors who are self-employed or who would not be paid during their absence from employment, are students, or have child-care or other family responsibilities. I conclude that a representative jury guaranteed under [s. 11\(d\)](#) and [\(f\)](#) of the [Charter](#) is not defined by whether the jury roll reflects the perspectives and identities that make up a community. I see the representativeness of a jury as primarily functional, not descriptive. It acts on behalf of, and thus represents, society.

B. *What Does Representativeness Require?*

(1) Source Lists

[164] A representative jury roll is one that is created through a fair and random process, based on broadly inclusive source lists, that does not deliberately or substantially exclude a subset of the community. Such lists lay the foundation for each step that follows in the jury process. Ensuring that these lists are drawn broadly from the community is thus critical.

[165] However, perfection is not required, for many reasons. First, provinces must be given leeway to use a selection process that is practical given the nature of the source lists generally available. Provinces

in Canada have chosen different mechanisms to access the broader community. Some use health records; others use electoral and assessment rolls, municipal directories, motor vehicle registration records, or a combination of multiple sources: Iacobucci Report, at paras. 150-74. Indeed, the use of these alternatives means that in many provinces it is impossible to determine the extent to which Aboriginal people are included in source lists. In Ontario, the statistics relating to the participation of Aboriginal people residing on reserves are only known because the *Juries Act* provides a separate process for individuals living on reserves. Those living outside of reserves are captured by municipal assessment lists, which do not include information about an individual's Aboriginal status.

[166] Second, unintentional exclusion of some segments of the community does not amount to a constitutional defect. Even the best source lists will still exclude some, and that inadvertent exclusion may disproportionately apply to certain groups of people. This alone is insufficient to establish a [s. 11](#) violation. Because there are no perfect source lists, it follows that the state must be accorded flexibility in choosing a source list, recognizing that no list will be perfectly comprehensive, and that each has its own advantages and drawbacks. Such flexibility also recognizes the substantial leeway that governments must be given to define the boundaries of judicial districts, which are established for administrative and practical purposes and are not required to ensure the representation of any particular community or group. Such leeway is restricted only by the requirement that exclusion not rise to such a substantial level that the jury could not fulfill its representative function.

[167] While unintentional exclusion is likely to occur as a result of the practical realities of jury roll compilation, the same cannot be said of intentionally and improperly shutting out certain groups from participating. A jury roll tainted by such deliberate exclusion could hardly be considered to be drawn fairly and randomly from the broader community, nor could it be said to be independent and impartial. An accused will accordingly succeed in her challenge if she establishes deliberate exclusion for the purpose of restricting the representation of certain groups in the jury process.

(2) Delivery of Jury Notices

[168] The state must also ensure that the mechanism used to contact selected potential jurors does not undermine the broad-based and random quality of the jury roll. This does not mean that the state must devise a perfect model for the delivery of jury notices. The state will generally be able to establish that it used an adequate process where it uses the same system by which the individuals or communities in question would normally receive their mail.

(3) Representativeness Does Not Require Addressing Low Response Rates

[169] The accused's [s. 11](#)(d) and (f) rights require a neutral process for identifying and contacting prospective jurors. Those who receive a jury questionnaire are required by law to respond. If they choose

not to, the accused's fair trial rights do not impose a constitutional obligation on the state to assist or encourage individuals to participate, provided that the jury roll meets the standard of being drawn broadly from the community.

[170] Cromwell J. requires that the state must encourage and facilitate the participation of prospective jurors who choose not to participate in the jury system. He reaches this conclusion largely on the basis of the state's responsibility for the estrangement of Aboriginal peoples from the justice system, and writes that "[h]aving played a substantial role in creating these problems, the state should have some obligation to address them" in order to fulfill its representativeness obligations (para. 281). The Court of Appeal also concluded that the state must encourage responses to jury notices.

[171] There can be no doubt that addressing the disengagement of Aboriginal peoples from the jury system is an important step in addressing the larger web of problems — described at paras. 4 and 14 of the Iacobucci Report as a crisis — plaguing the justice system as it is applied to Aboriginal peoples. Nor can there be any doubt that this disengagement is a complex problem with deep roots and no easy answers. It is essential that the correct constitutional tool be brought to bear in addressing this problem. In this case, this Court is asked to decide whether an accused person's fair trial rights are tools suited to this task, and if so, how they should be deployed to remedy Aboriginal peoples' disengagement from the jury system.

[172] In my view, an accused person's fair trial rights do not require the state to encourage jury participation among those who are unwilling to participate. Troubling though such unwillingness may be, it does not mean the accused is deprived of his right to a trial by an impartial and independent jury, acting on behalf of society. In my view, finding otherwise would be inconsistent with the limited scope of representativeness in Canadian law. It is beyond the scope of an accused's fair trial rights as protected by [s. 11\(d\)](#) and (f) of the [Charter](#) to require the state to address issues that may cause segments of the population to disengage from the justice system. Thus, an accused's right to a trial by jury is not breached, and the verdict is not compromised, because the state does not actively facilitate the participation of those who will not or cannot participate. While it may be that such disengagement has implications for other constitutional rights, that question cannot be decided on the record in this case.

(4) Conclusion on Representativeness

[173] To conclude, jury representativeness has a limited meaning in Canadian law. It does not mean that the jury must reflect a cross-section of the community or its different characteristics or perspectives. A jury acts on behalf of and represents society. What is required is a neutral process for compiling the jury roll, in which prospective jurors are randomly selected from lists drawn broadly from the community as it is defined in the relevant legislation. Intentional exclusion of certain segments of the population from the jury roll would render it unconstitutional. Substantial but unintentional exclusion could conceivably be so extensive that the jury roll would no longer be accepted as acting on behalf of, and representing, society.

However, as I shall explain, this does not arise in this case.

III. Application to the Facts

[174] Moldaver J.'s reasons at paras. 8-28 outline how the jury roll was compiled in Ontario and in the District of Kenora.

A. The Findings of the Court of Appeal

[175] The Court of Appeal examined three alleged deficiencies in the compilation of the 2008 jury roll for the District of Kenora. These deficiencies related to the adequacy of the source lists used to compile the jury roll, the adequacy of delivery methods by which prospective jurors were notified of their selection, and the low response rate of prospective jurors who received their jury notice.

(1) Adequacy of Source Lists

[176] Before the Court of Appeal, significant evidence was adduced regarding the poor and diminishing quality of the source lists by which Aboriginal people residing on reserves were included in the jury roll in the District of Kenora. In 2001, Indian and Northern Affairs Canada (INAC, now Aboriginal Affairs and Northern Development Canada) stopped providing Ontario with band lists for the purposes of s. 6(8) of the *Juries Act*, citing privacy concerns. After 2000, Court Services Division (CSD) staff of the Ministry of the Attorney General in the District of Kenora sought to obtain updated lists by contacting the First Nations for which they had received lists from INAC, as well as senior officials at the Nishnawbe Aski Nation. As part of these efforts, CSD staff also travelled to 15 fly-in reserves in 2007 to discuss jury participation with First Nations leadership. The same year, local CSD staff also learned that they had accidentally excluded three First Nations from the jury roll, including the 2008 roll. As a result of these efforts, when questionnaires for the 2008 jury roll were to be mailed out, the Kenora CSD office had band lists from 2007 for eight First Nations; band lists from 2006 for two First Nations; INAC lists from 2000 for 32 First Nations; and no list for any of the three missing First Nations, or for an additional First Nation for which CSD staff appear never to have had a band list.

[177] LaForme J.A. found that the jury that convicted Mr. Kokopenace was drawn from lists so out of date that they failed to adequately represent Aboriginal people living on reserves on the jury roll. In his view, these deficiencies were compounded by Ontario's failure to update its policies in response to this Court's decision in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, which had the effect of expanding band electoral lists to include First Nation members residing both on and off reserves. He found that the failure to respond to these changes rendered band lists far less useful for the purpose of including Aboriginal people residing on reserves on the jury roll. He further found that the state both knew of this problem and did little to rectify it.

[178] The majority on this issue (Goudge and Rouleau JJ.A.) disagreed, finding that the effect of the lists on representation of Aboriginal on-reserve residents was modest. While Goudge J.A. agreed that the lists were dated and incomplete, he found that they nonetheless had significant utility for representativeness purposes because they still permitted the distinctive perspectives of Aboriginal on-reserve residents to be included in the jury roll. He further found that the efforts by CSD staff to obtain better lists were adequate in light of the modest impact that the flawed lists had on representativeness. Rouleau J.A. agreed that the impact of the inadequacies in the band lists was “quite modest”, and noted that the Iacobucci Report shows that obtaining complete and accurate lists will have only a limited impact on the problem of low levels of Aboriginal participation in the jury system (para. 290).

[179] I agree with the majority’s findings on this issue. Ontario compensated for the inadequacies in its lists with efforts to correct them. Although these efforts had limited success, CSD staff, acting with the advice of an experienced judge in the district, also sent out a much higher proportion of jury questionnaires using the band lists they possessed, in order to compensate for what they appreciated was a low response rate. While it is true that some on-reserve residents were unintentionally excluded from jury service because of the inadequacy of the lists, the majority’s finding that this exclusion had only a modest effect means that it does not depart from the requirement that the jury roll be drawn broadly from the community.

[180] For the same reason, the fact that four First Nations were not included does not render the jury roll unrepresentative. The requirement that prospective jurors be drawn from broad-based source lists does not demand perfect inclusion, and the unintentional exclusion of a small community — Aboriginal or non-Aboriginal — does not undermine the representativeness of the jury roll. Although the source lists did not include all eligible jurors or all First Nations, a jury selected from this jury roll could nonetheless find facts, impartially and independently, and render a verdict on behalf of society. As long as the state does not intentionally seek to exclude such communities, such modest exclusions will not amount to a breach of an accused’s rights under [s. 11\(d\)](#) or (f).

(2) Adequacy of Delivery Methods

[181] The Court of Appeal reached differing conclusions on the adequacy of the systems used by Ontario to deliver jury notices to individuals residing on reserves. LaForme J.A. did not directly address this issue in his reasons. Goudge J.A. found serious problems with delivery, and that Ontario was inattentive and did virtually nothing to determine the causes of failed delivery or how it might be remedied. In his view, “inaction by the state in the face of action that it could have taken cannot meet the reasonable efforts standard”: para. 262. Rouleau J.A. disagreed, and saw the problems with delivery as linked to the difficulties with obtaining up-to-date lists of on-reserve residents.

[182] I agree with Rouleau J.A. that any deficiencies in this case are intertwined with the problems the state was experiencing with accuracy of band lists. As discussed above, representativeness requires that

jury notices be delivered to prospective jurors in a manner that does not deliberately or substantially undermine the broad-based and random quality of the jury roll. In this case, the state relied on the same system of mail delivery (general delivery and knowledge sort) that normally serves the reserve communities in question, and indeed which serve many small, remote communities in Canada. No substantial or deliberate exclusion of on-reserve Aboriginal people resulted from any deficiencies in this delivery method. Thus, in my view, the delivery methods used by the state did not violate Mr. Kokopenace's [s. 11\(f\)](#) right to trial by jury, nor did it violate his fair trial rights under [s. 11\(d\)](#) of the [Charter](#).

(3) The Problem of Low Response Rates

[183] Significant evidence was marshalled before the Court of Appeal suggesting that even where the state succeeds in identifying and selecting Aboriginal people residing on reserves to be included in the jury roll, many of those individuals do not return the notices sent to them. The Iacobucci Report explains that this low response rate is not simply a function of difficulties with the mechanics of compiling the jury roll. Rather, it is symptomatic of the much more intractable problem of alienation of Aboriginal peoples from the justice system.

[184] The reasons identified for not participating in the jury process are many, and include conflict between First Nations cultural values and laws and those underpinning the Canadian criminal justice system; systemic discrimination experienced by Aboriginal people in the criminal justice and child welfare systems; the need for education about the justice system, and the jury in particular; negative perceptions of the justice system arising from problems with policing; the desire to assume greater control over community justice issues as part of self-government; and the often troubled relationship between the Ministry of the Attorney General and First Nations in Ontario (Iacobucci Report, at paras. 209-30 and 248-51).

[185] These reasons sit alongside more practical concerns regarding band member privacy, the types of questions asked in juror questionnaires and the logistical challenges faced by many who live in more remote communities (Iacobucci Report, at paras. 231-44). The Iacobucci Report notes that First Nations representatives "uniformly expressed the position that, until significant and substantive changes are made to the criminal justice system, the issue of jury participation will not improve" (para. 209).

[186] At the Court of Appeal, all three judges agreed that the representativeness requirement under [s. 11](#) requires the state to make efforts to address the low response rate among Aboriginal people residing on reserves. LaForme and Goudge J.J.A. found that the state had failed in this obligation, while Rouleau J.A. found the state's efforts to be sufficient. With respect, I cannot agree with these conclusions.

[187] As I stated at the outset of these reasons, there can be no dispute that the problems underlying the disengagement of so many Aboriginal people from the justice system are of fundamental importance. Indeed, they are among the most difficult and pressing problems facing Canadian society, and may very

well have constitutional implications. This importance does not, however, mean that they are appropriately dealt with as part of an accused person's fair trial rights under [s. 11](#) of the [Charter](#). Nor does it mean that the legitimacy of jury verdicts in the District of Kenora should be compromised until such deep-seated problems are resolved.

[188] These fair trial rights entitle an accused person to an independent and impartial jury, drawn from a jury roll that was created through a fair and neutral process of random selection from broad-based source lists without deliberate or substantial exclusion. Understood this way, jury representativeness is a narrow right, aimed at ensuring that the jury can fulfill its important roles as finder of fact and as the link connecting the judicial process to the broader community. [Section 11](#) is not the source of any duty on the state to encourage participation, or to repair damaged relationships that may cause some to disengage from the justice system. It is simply beyond the scope of [s. 11](#) to require that the state address the reasons for this disaffection in order to uphold an accused individual's right to an impartial, independent and representative jury. Other tools must be brought to bear to resolve these problems.

IV. Conclusion

[189] In my view, the respondent has not established that the jury roll from which his jury was drawn was created in a manner that violated his rights under [s. 11](#) of the [Charter](#). I would accordingly allow the appeal, set aside the order for a new trial and restore his conviction.

The reasons of McLachlin C.J. and Cromwell J. were delivered by

CROMWELL J. —

I. Introduction

[190] Selecting a properly constituted jury lays the foundation required for a fair trial and public confidence in the administration of justice: see, e.g., *R. v. Barrow*, [1987] 2 S.C.R. 694, at pp. 714 and 717. Fundamental to our conception of a properly selected jury is that it be drawn from a random sample of eligible people in the district who, by virtue of that random selection, are representative of its population. Randomness is a proxy for representativeness and every accused person in Canada who has a jury trial has a constitutional right to a jury that is representative in this sense: [Canadian Charter of Rights and Freedoms](#), [ss. 11\(d\)](#) and [11\(f\)](#). This appeal tests whether this guarantee is real or illusory for Aboriginal people.

[191] Clifford Kokopenace was tried for second degree murder by a jury in Kenora and was ultimately convicted of manslaughter. He is an Aboriginal man from a First Nation reserve. Aboriginal

people residing on reserves were drastically under-represented on the jury roll from which Mr. Kokopenace's jury was ultimately selected. The provincial officials responsible for compiling the jury roll used sources that were substantially out of date and which included people who ought not to have been included. They entirely excluded four First Nations reserves in the district. The provincial officials had serious problems delivering jury notices to on-reserve residents and those who received them were much less likely to respond than were other prospective jurors. And underlying all of this is the sad history of racial discrimination against Aboriginal peoples and their estrangement from the administration of criminal justice.

[192] When Mr. Kokopenace became aware of problems with the jury roll after his conviction, he appealed. A majority of the Court of Appeal set aside his conviction and ordered a new trial. After considering a mountain of evidence, the Court of Appeal concluded that the substantial under-representation of Aboriginal on-reserve residents on the jury roll undermined the appearance of fairness and public confidence in the administration of justice.

[193] In seeking to have this Court set aside that ruling, the Crown asks us to hold that the right to a representative jury roll means only that the state is prohibited from making improper exclusions and that the focus is not on results but on whether the state made reasonable efforts. As for the broader issues of discrimination against Aboriginal peoples and their estrangement from the justice system, we are told that jury representativeness is an inappropriate legal tool with which to address those issues. The state, we are told, may choose to address these issues as a matter of social policy, but they have nothing to do with the right to trial by jury.

[194] Similarly, my colleague Moldaver J. would find no [Charter](#) violation notwithstanding a 30 percent race-based under-representation on the jury roll. He would conclude that the state, in the context of assembling jury rolls, is under no constitutional obligation to address, in any manner whatsoever, the systemic factors that contribute to this. Indeed, his view is that the state has no obligation beyond providing a "fair opportunity" to those who — as a result of prolonged racial discrimination — have become alienated from the system and whose participation would enhance its legitimacy.

[195] Like the majority of the Court of Appeal, I would reject these contentions. I do not regard compliance with the Constitution as either optional or as a matter of social policy. An 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. This in my view is an affront to the administration of justice and undermines public confidence in the fairness of the criminal process. I would dismiss the appeal.

[196] While there are many deeply seated causes which contribute to Aboriginal under-representation on jury rolls, the [Charter](#) in my view ought to be read as providing an impetus for change, not an excuse for saying that the remedy lies elsewhere.

II. Facts, Issues and Judicial History

A. *Facts and Issues in Overview*

[197] The respondent, Clifford Kokopenace, was convicted of manslaughter on June 17, 2008, by a jury in the Superior Court of Justice in Kenora, Ontario. Not long after his conviction, he became aware of some possible problems with the 2008 jury roll from which the jury that convicted him had been selected. It emerged that only 4.1 percent of the potential jurors on the roll were Aboriginal on-reserve residents even though they made up approximately 30 percent of the adult population of the District of Kenora.

[198] Mr. Kokopenace appealed the conviction on the basis, among others, that the jury roll was not representative and therefore that his rights under the [Charter](#) to a jury trial, to a trial before an impartial tribunal and to equality before the law ([ss. 11](#)(f), [11](#)(d) and 15) had been violated. The Court of Appeal, by a majority, agreed that his rights had been infringed, set aside the conviction and ordered a new trial (2013 ONCA 389, 115 O.R. (3d) 481).

[199] On the Crown's appeal to this Court, there is no dispute that there is such a concept as jury representativeness. However, the meaning and content of a right to a representative jury roll, whether it has been violated and, if so, what remedy should flow from that breach are all contested.

[200] I will address three related issues:

- (a) What is the content of the right to have a representative jury roll?
- (b) Was there a breach of that right in Mr. Kokopenace's case?
- (c) If so, what is the appropriate remedy?

[201] I do not find it necessary to address the equality rights issue ([s. 15](#) of the [Charter](#)) in light of my conclusion that Mr. Kokopenace's rights to a jury trial and to a trial before an impartial tribunal (under [ss. 11](#)(f) and [11](#)(d)) have been violated and that he should have a new trial before a properly constituted jury.

B. *The Jury Selection Process in Ontario*

[202] This case concerns how a jury roll is compiled and the right to have a representative roll. A basic understanding of what a jury roll is and how a jury is ultimately selected to try a case is therefore a useful starting point.

[203] I emphasize that there is no challenge here to the legislation which governs how to assemble a jury roll or to select a jury to try a case. Mr. Kokopenace's complaint is that the effect of the legislation as it was applied in this case infringed his rights, not that there is any constitutional defect in the legislation itself.

[204] There are three phases in the process in Ontario which leads ultimately to the selection of a 12-person "petit" jury to try a criminal case. First, a jury roll is prepared by the sheriff: C. Granger, *The Criminal Jury Trial in Canada* (2nd ed. 1996), at pp. 114-17. Then, at the request of a judge, names from that list are selected by the sheriff to constitute jury panels, sometimes referred to as "the jury array": Granger, at pp. 117-21 and 143. Finally, through the "in-court" jury selection stage, a petit jury is selected from among the members of the jury panel.

[205] Only the third step of this process is governed by the [Criminal Code, R.S.C. 1985, c. C-46](#); the other two stages are governed by provincial statutes: E. G. Ewaschuk, *Criminal Pleadings & Practice in Canada* (2nd ed. (loose-leaf)), vol. 2, at p. 17-2; Granger, at p. 143. The constitutional breach alleged in this appeal occurred at the first stage of the jury selection process and concerns how the jury roll was assembled.

[206] In Ontario, the assembly of the jury roll is governed by the *Juries Act*, R.S.O. 1990, c. J.3. Under s. 5, each year the sheriff determines the number of prospective jurors required for the year and transmits that information to the Director of Assessment. From there, jury service notices and questionnaires are sent out to randomly selected persons: s. 6(1). Everyone who receives a jury service notice is required by law to complete the questionnaire and return it to the sheriff (s. 6(5)); it is an offence punishable by fine or imprisonment not to do so: s. 38(3). Once the jury service questionnaires have been returned, the sheriff prepares a jury roll made of those who returned the questionnaires and who are eligible for jury service and certifies that it is a proper roll: ss. 8 and 9.

[207] When a jury panel is required, a precept is issued to the sheriff by a judge of the Superior Court of Justice in the form prescribed by regulation: *Juries Act*, s. 12. The sheriff must then randomly select the panel from all whose names are on the jury roll: ss. 15 to 18.1. Members of the panel are subsequently summoned by the sheriff and, if not excused for reason of illness or serious hardship, are required by law to attend the court's sitting: s. 19.

[208] When a petit jury is selected for a trial, the clerk of the court randomly draws names of members of the jury panel following the procedure prescribed at [s. 631](#) of the [Criminal Code](#). In turn, the jurors whose names have been drawn and who have not been either excused by the judge, challenged peremptorily or successfully challenged for cause, are sworn in until all of the jurors required to try the case (and alternates if any) have been selected: [Criminal Code](#), [ss. 639](#) to [642](#).

[209] I turn next to the lists from which people are selected at random to get jury service notices and questionnaires. The process for obtaining lists of residents differs depending on the territory. There are three categories.

[210] The first relates to people living in territory with municipal organization, i.e. those who are included in the enumeration under the *Assessment Act*, R.S.O. 1990, c. A.31. Under s. 6(2) of the *Juries Act*, the Director of Assessment is required to send jury service notices to a random selection of persons whose names and addresses have been obtained at the most recent enumeration of the inhabitants of the county under s. 15 of the *Assessment Act*.

[211] The second category is for people who live neither in municipally organized territory nor on reserves. Section 8(6) of the *Juries Act* provides that the sheriff is to “have recourse to the latest polling list prepared and certified for such territory, and to any assessment or collector’s roll prepared for school purposes” and that he “may obtain names from any other record available”.

[212] The third category consists of people residing on reserves. I note that there is no dispute in this case that the overwhelming majority of on-reserve residents are Aboriginal people. Therefore, like the Court of Appeal, I do not see any meaningful distinction between “on-reserve residents” and “Aboriginal on-reserve residents”: para. 11. Aboriginal reserves are not subject to assessments under the *Assessment Act* and as a result the Ontario government does not produce lists of Aboriginal on-reserve residents. Unlike in the first two categories, the *Juries Act* does not refer to any other specific record of Aboriginal on-reserve residents that is to be used by the sheriff for jury purposes. Instead, s. 6(8) simply permits the sheriff to “obtain the names of inhabitants of the reserve from any record available”.

[213] It should be noted that, even though under the *Juries Act* it is the “sheriff” who is responsible for the jury roll process, in practice these responsibilities are carried out by various provincial and local employees. Local court staff is responsible for determining the number of jury service notices to be sent out for both on-reserve and off-reserve residents. The Municipal Property Assessment Corporation is responsible for randomly selecting names from municipal enumeration lists while local court staff is responsible for the random selection and for the mailing of notices to Aboriginal on-reserve residents. In addition, the Provincial Jury Centre (“PJC”) is responsible for preparing the jury notices and questionnaires, which are then provided to local court staff and mailed out. Once the questionnaires have been returned and the roll is ready, the roll is certified by the Director for Court Operations for the West Region, who acts as the sheriff for this purpose. Finally, the PJC is responsible for issuing summons and generating a jury panel on receipt of a precept, using a computerized jury selection system.

C. *Proceedings in the Superior Court of Justice and the Court of Appeal*

[214] Mr. Kokopenace’s concerns with regard to the process leading to the creation of the 2008 jury

roll in the District of Kenora were brought to the attention of the trial judge, Stach J. Since the jury had already rendered its verdict, he declined to adjourn the sentencing proceedings to hear a mistrial application because he considered himself *functus officio*.

[215] The challenge to the representativeness of the jury roll was therefore heard for the first time by a panel of the Ontario Court of Appeal, which considered extensive fresh evidence with respect to this issue. The court was unanimous that, in order to satisfy its obligation to provide a representative jury roll, the test was whether Ontario had made reasonable efforts to provide a fair opportunity for groups with distinctive perspectives to be included. The Court of Appeal also unanimously rejected Mr. Kokopenace's [s. 15](#) claim. The court divided on the outcome of the appeal, however.

[216] LaForme and Goudge JJ.A., in separate reasons, agreed that Mr. Kokopenace's [ss. 11\(d\)](#) and [11\(f\)](#) rights had been breached by the state's failure to make reasonable efforts to provide Aboriginal on-reserve residents with a fair opportunity to be included on the jury roll. The majority of the Court of Appeal found that the state knew or ought to have known that there was a serious problem of under-representation of Aboriginal on-reserve residents in the jury roll; that the state's actions to address the problem were inadequate and largely unresponsive to the problems and that additional steps should have been taken to address the under-representation issue at the material time. A new trial was ordered.

[217] The two judges of the majority diverged in their approaches to the specific areas of state action where Ontario failed to meet its constitutional obligation. According to LaForme J.A., the state was facing, but failed to meaningfully address, two main problems: obtaining accurate up-to-date lists of Aboriginal on-reserve residents and addressing the deteriorating rate of return of the jury questionnaires. Goudge J.A.'s conclusion that Ontario failed to meet its obligations was based on its "failure to make reasonable efforts to facilitate delivery of questionnaires to Aboriginal on-reserve residents and to encourage responses to them": para. 277.

[218] Rouleau J.A., dissenting, concluded that the state's efforts were sufficient to comply with its [Charter](#) obligations and would have dismissed the appeal. In his view, the state's efforts should be assessed by focusing on what was known at the time the jury roll was prepared. It is only after the compilation of the 2008 jury roll, with the publication of a report of the Honourable Frank Iacobucci on the issue of First Nations representation on juries in Ontario, that Ontario was made aware of the complexity of the issue: *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci* (2013) ("Iacobucci Report"). According to Rouleau J.A., viewed in light of the information known at the time, the state's efforts had been reasonable.

III. Analysis

A. *What Is the Content of the Right to Have a Representative Jury Roll?*

[219] This appeal raises specific questions about the representativeness of a jury roll in the District of Kenora. But these issues have to be viewed in the broader context of the place and purpose of jury trials in our system of criminal justice and the special meaning of representativeness in connection with [s. 11 Charter](#) rights.

(1) The Jury Trial in the Criminal Justice System

[220] In the Anglo-Canadian tradition of criminal justice, the jury is seen as a “bulwark of individual liberty” of accused persons and as a “vehicle of public education . . . lending the weight of community standards to trial verdicts”: *R. v. Turpin*, [1989] 1 S.C.R. 1296, at pp. 1309-10; *R. v. Davey*, 2012 SCC 75, [2012] 3 S.C.R. 828, at para. 30. The jury functions as a fact-finder, as the conscience of the community, as the ultimate protection against oppressive laws and oppressive law enforcement and as an educative institution through which members of the public directly participate in an important judicial process: Law Reform Commission of Canada, Working Paper 27, *The Jury in Criminal Trials* (1980), at pp. 5-14. The jury system is intended and ought to enhance the legitimacy of the criminal justice system in the eyes of the public. It puts real power in the hands of the people, giving members of the public both authority and responsibility for how the criminal law is applied in individual cases.

[221] To fulfill these important functions, a jury must be — and be perceived to be — representative of the community, competent in relation to its tasks, impartial and independent. That a jury actually possesses these qualities ultimately depends on who is selected for jury duty. Thus, compilation of the jury roll from which a petit jury is ultimately selected is of fundamental importance to both the fairness in fact and to the perceived fairness of the trial. Selection of a proper jury is the foundation of everything that follows at trial.

(2) The Place of Representativeness Within Section 11 Charter Rights

[222] In Canada, there is no stand-alone [Charter](#)-protected right to a representative jury. But representativeness, in the sense that the jury roll is randomly selected from an appropriate pool of prospective jurors, is a component of the [Charter](#) rights to a jury trial and to be tried by an independent and impartial tribunal. [Sections 11\(d\) and 11\(f\) of the Charter](#), which are engaged with respect to persons “charged with an offence”, provide as follows:

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;

[223] It will be helpful to briefly set out several points about the contours of the right to a representative jury roll.

(a) *Randomness as a Proxy for Representativeness*

[224] Representativeness of the jury, while of fundamental importance, is nonetheless understood in an “inherently qualified” sense: C.A. reasons, at para. 31. The focus of representativeness is on whether the jury roll, from which jurors will ultimately be selected, is as broadly representative of the community as would a group of people selected at random from within that community. When I refer to the requirement of representativeness, I am referring to representativeness in this sense. In the leading case of *R. v. Sherratt*, [1991] 1 S.C.R. 509, at p. 525, L’Heureux-Dubé J. explained that a jury will be sufficiently representative if the initial array (and I would add, the roll from which it is selected) is composed of a random selection made from appropriate sources:

Provincial legislation guarantees representativeness, at least in the initial array. The random selection process, coupled with the sources from which this selection is made, ensures the representativeness of Canadian criminal juries.

[225] O’Leary J. put the same point well in *R. v. Born with a Tooth* (1993), 81 C.C.C. (3d) 393 (Alta. Q.B.), at p. 396:

Representativeness is guaranteed, first, by ensuring that as far as possible and practicable the pool or population from which jury panels are selected is representative of the whole community, and, secondly, by selecting jury panels from that pool on a random basis.

[226] Thus, random selection is a proxy for representativeness. A representative jury roll is one that substantially resembles the group of persons that would be assembled through a process of random selection of all eligible jurors in the relevant community. A petit jury is representative if it is properly selected from that roll. But random selection is only a good proxy for representativeness if the pool of persons to whom a process of random selection is applied to assemble the jury roll is itself broadly based within the relevant community.

(b) *There Are Strong Reasons Supporting This Limited Understanding of Representativeness*

[227] Allowing random selection to be a proxy for representativeness is supported by both practical and policy reasons. If representativeness in this context were given a broader meaning, there could be endless debates about who and what needs to be represented on the jury: race, gender, sexual orientation, marital status, political leanings, age, and economic status are only a few of the possibilities. Defining all of the relevant senses in which a jury should be representative, let alone going about assembling a jury roll that

was representative in all of those ways, would pose insurmountable practical problems. Going down that road would also inevitably lead to serious — and under our legal traditions, unacceptable — intrusions into the privacy of prospective jurors, many of whom would not be willing to reveal the sorts of personal characteristics or opinions included on the brief list I have set out.

[228] These policy and practical considerations mean that we must not enlarge the Crown’s disclosure obligations or expose potential jurors to intrusions into their privacy. While we attach great importance to the right to a representative jury roll, this does not imply, let alone require, that this right must trump all other considerations. We also attach great importance to the right to an impartial jury, yet we place strict limits on how that right may be pursued. We do not allow the parties to have prospective jurors examined by psychologists before trial; indeed, we greatly restrict the scope of questioning of prospective jurors in court, even in the context of a demonstrated cause for challenge: see *R. v. Williams*, [1998] 1 S.C.R. 1128, at paras. 51-56. Any number of other examples may be given from the criminal law where we do not pursue one right at the expense of others. There is nothing unusual, let alone “incongruous”, about holding that the right to a representative jury roll must be balanced with and defined in light of other important rights and values, including other safeguards of jury impartiality. Moreover, protecting juror privacy may be understood as serving, not undermining, juror impartiality. As Moldaver J. wrote in *R. v. Yumnu*, 2012 SCC 73, [2012] 3 S.C.R. 777, at para. 42: “Once selected, jurors become judges of the facts. Their personal lives at that point are no more relevant than that of the presiding judge.”

[229] The practical effect of protecting individual jurors’ privacy is that an accused will rarely be in a position to establish the under-representation of a particular group other than by pointing to an inadequate list or some other significant departure from the random selection principle. But this case is highly unusual. Section 6(8) of the *Juries Act* singles out an obviously distinct group: Aboriginal on-reserve residents. What is even more unusual, the evidence confronts us with the stubborn fact that there are substantially fewer of them — nearly 30 percent fewer — on the jury roll than there would be in a random sample of potential jurors in the judicial district. It does not turn our tradition of jury selection upside down to deal with this; it is inconsistent with that tradition to ignore it.

[230] The rationale of the more limited, “randomness” approach to representativeness was well expressed by Rosenberg J.A. in *R. v. Church of Scientology* (1997), 33 O.R. (3d) 65 (C.A.), at pp. 120-21:

The right to a representative jury roll is not absolute in the sense that the accused is entitled to a roll representative of all of the many groups that make up Canadian society. This level of representativeness would be impossible to obtain. There are a number of practical barriers inherent in the selection process that make complete representativeness impossible. The roll is selected from a discrete geographical district which itself may or may not be representative of the broader Canadian society.

Further, the critical characteristic of impartiality in the petit jury is ensured, in part, by the fact that the roll and the panel are produced through a random selection process. To require the sheriff to assemble a fully representative roll or panel would run counter to the random selection process. The sheriff would need to add potential jurors to the roll or the panel based upon perceived characteristics required for representativeness. The selection process would become much more intrusive since the sheriff in order to carry out the task of selecting a representative

roll would require information from potential jurors as to their race, religion, country of origin and other characteristics considered essential to achieve representativeness. [Emphasis added.]

[231] The right to a representative jury roll therefore does not imply any right to be tried by a petit jury which proportionally represents the population. Nor is there a right to be tried by a jury whose members belong to the same group, race or gender as does the accused: *R. v. Biddle*, [1995] 1 S.C.R. 761, at paras. 55-60, per McLachlin J.; *Church of Scientology*, at p. 121; *R. v. Kent* (1986), 27 C.C.C. (3d) 405 (Man. C.A.), at pp. 421-22; *Born with a Tooth*, at p. 397. (I note that the comments of McLachlin J. (as she then was) in *Biddle* relate to the composition of a *petit* jury; the Court has at least twice affirmed the requirement that the *jury array* be representative: *Sherratt*, at p. 525, per L'Heureux-Dubé J. for the majority; *Williams*, at paras. 45-47, per McLachlin J. (as she then was) for the Court.)

[232] Representativeness as we understand it is thus largely dependent on the jury roll from which potential jurors are selected because a random selection of persons from that roll is deemed to be sufficiently representative.

[233] Let me be crystal clear. The focus of this analysis is on the process of random selection because this is, in our legal tradition, a proxy for representativeness. A flawed random selection may be demonstrated by showing faults in the process, such as the omission of large numbers of eligible jurors from the roll as in *R. v. Buckingham*, 2007 NLTD 107, 221 C.C.C. (3d) 568. But that is not the only way a departure from proper random selection may be shown. The fact that the focus is on the random selection *process* does not mean that the *results* of the process employed to compile the jury roll are irrelevant to whether there has been an acceptable process of random selection. The process used in this case produced results that obviously and significantly departed from any result that could be obtained by a proper process of random selection. Unlike my colleague Moldaver J., my view is that we should not ignore the results when they plainly show, as they do here, a significant departure from a properly conducted random selection process.

(c) *Representativeness and Impartiality Are Distinct But Related Concepts*

[234] Representativeness should not be confused or equated with impartiality. But representativeness is part of an interlocking set of protections which, together, help to assure impartiality and contribute to public confidence. These include instructions from the trial judge, submissions from counsel, challenges to the jury array, the trial judge's authority to screen out partial jurors and the challenge for cause process: see, e.g., *Williams*, at para. 47. As L'Heureux-Dubé J. put it in *Sherratt*:

The perceived importance of the jury and the [Charter](#) right to jury trial is meaningless without some guarantee that it will perform its duties impartially and represent, as far as is possible and appropriate in the circumstances, the larger community. Indeed, without the two characteristics of impartiality and representativeness, a jury would be unable to perform properly many of the functions that make its existence desirable . . . [Emphasis added; p. 525.]

[235] Under ss. 629 and 630 of the [Criminal Code](#), an accused person or the prosecutor may challenge the “array” — i.e. the panel of jurors summoned for jury selection — on grounds of “partiality, fraud or wilful misconduct on the part of the sheriff or other officer by whom the panel was returned”: see also Ewaschuk, at pp. 17-5 and 17-6. This sort of challenge is made before trial. Such challenges have been made, for example, where there was evidence that the sheriff had a policy of not including Aboriginal people in the array and where the array was assembled using long outdated lists which excluded tens of thousands of eligible jurors: *R. v. Butler* (1984), 63 C.C.C. (3d) 243 (B.C.C.A.); *Buckingham*.

[236] The trial judge has considerable discretion to excuse jurors whose impartiality is questioned: [Criminal Code](#), ss. 632 and 633. The parties also have the right to exercise peremptory challenges and the opportunity to challenge for cause, which are provided for by ss. 634 to 638 of the [Criminal Code](#): see also *Williams*, at para. 47; *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.), at p. 334.

[237] These opportunities to assure impartiality in fact work with the requirement of representativeness to ensure an impartial jury whose views and attitudes are anchored in the community in which the trial takes place. The resulting jury is thus a “representative cross-section of society, honestly and fairly chosen”: *Sherratt*, at p. 524.

[238] All of these protections, including the requirement of representativeness, are especially important in the context of potential racial prejudice. As the present Chief Justice wrote in *Williams*, racial prejudice is “insidious”. It is “[b]uried deep in the human psyche” and rests on “preconceptions and unchallenged assumptions that unconsciously shape the daily behaviour of individuals”: para. 21. A jury roll that is representative of the community is more likely to result in a petit jury that can avoid these often unconscious effects of racism. Indeed, our law of challenge for cause is premised on representativeness in this sense: *ibid.*, at para. 42. If that premise is not sound, the interlocking protections of impartiality as a whole are weakened.

[239] *Williams* also teaches us to be sceptical about “slippery slope” arguments used to oppose efforts to adapt the jury selection process to guard against racism in jury selection. It is suggested by my colleague that addressing the race-based under-representation that confronts in this case will make it “virtually impossible to have a jury trial anywhere in this country” so that the “administration of criminal justice would suffer a devastating blow”: Moldaver J., at para. 83. Similar contentions were advanced in opposition to race-based challenges for cause in *Williams*: see paras. 51-56. They were rejected and the sky has not fallen. They should be rejected here as well.

[240] There are many obvious concrete and practical steps that could be taken to address this problem. Some of these, for example, are outlined in the reasons of Goudge J.A. in the Court of Appeal: see, e.g., para. 273. One such obvious step — and one which was not taken — was to make “a concerted effort to determine from Aboriginal on-reserve leaders why the response rates were so comparatively low,

or what the state might do to help”: para. 265. Goudge J.A. concluded that “there are and were things the state could do to alleviate the problem, had it investigated”: para. 274. Or as LaForme J.A. summed it up: “. . . the state’s actions show that it almost entirely failed to inform its approach with an understanding of its special relationship with Aboriginal people There is no evidence that the state took into account the critical estrangement of Aboriginal persons from the criminal justice system . . . in its approach to the jury representation problem” (para. 210).

(d) *Representativeness and [Sections 11\(f\) and 11\(d\) of the Charter](#)*

[241] [Section 11\(f\)](#) — guaranteeing a right to a jury trial for offences punishable by five years in prison or a more severe penalty — enshrines in our Constitution the institution of the jury as a fundamental component of the Canadian criminal justice system. Representativeness is an integral part of that component. L’Heureux-Dubé J. in *Sherratt*, at p. 524, noted that the jury “was envisioned as a representative cross-section of society, honestly and fairly chosen” and that “[a]ny other vision may run counter to the very rationales underlying the existence of such a body.” I touched on these rationales earlier. They include bringing collective wisdom to the task of fact-finding, acting as the conscience of the community, providing a bulwark against oppressive laws or their enforcement, serving as a means by which the public may increase its knowledge of the criminal justice system and through that knowledge increase societal trust in the system as a whole: *Sherratt*, at pp. 523-24.

[242] Representativeness therefore “brings to the jury function . . . the possibility of different perspectives from a diverse group of persons” and “seeks to avoid the risk that persons with these different perspectives . . . will be systematically excluded from the jury roll”: *Church of Scientology*, at p. 122. It follows that representativeness is one of the fundamental characteristics of a properly constituted jury: *Sherratt*, at p. 525. Representativeness, along with impartiality, is essential in order for the institution of the jury to perform its function as the “conscience of the community” and in order for [s. 11\(f\)](#) to be meaningful and effective: see *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. It is therefore seen as an element of that right: *Sherratt*, at pp. 523-25; *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 43, per McLachlin C.J.; *R. v. Yooya*, [1995] 1 C.N.L.R. 166 (Sask. Q.B.); *R. v. Teerhuis-Moar*, 2010 MBCA 102, 222 C.R.R. (2d) 207, at paras. 132-43; *Church of Scientology*, at p. 119.

[243] In addition to the role that representativeness plays in actualizing the right to a jury trial under [s. 11\(f\)](#) of the [Charter](#), it is also one of the components which ensure that the jury is “an independent and impartial tribunal” under [s. 11\(d\)](#). In *Williams*, this Court included a “representative jury pool” as one of the “essential safeguard[s] of the accused’s [s. 11\(d\) Charter](#) right to a fair trial and an impartial jury”: para. 47; see also *R. v. Pan*, 2001 SCC 42, [2001] 2 S.C.R. 344, at para. 42; *Davey*, at para. 30; *Parks*, at p. 336. Thus, defects in the formation of the jury that affect its representative character will be taken into account in order to determine whether there is a breach of [s. 11\(d\)](#). For example, in *R. v. Nahdee*, [1994] 2 C.N.L.R. 158 (Ont. Ct. (Gen. Div.)), the court found that the sheriff’s complete failure to obtain lists of

Aboriginal on-reserve residents resulted in a jury roll that was not representative and, relying on [s. 11\(d\)](#) of the [Charter](#), declared the selection process for the array to be fatally flawed *ab initio*. In the context of a coroner's inquest, the Ontario Court of Appeal also stated that the effective exclusion of Aboriginal people could be fatal to the jury roll: *Pierre v. McRae, Coroner*, 2011 ONCA 187, 104 O.R. (3d) 321.

[244] As it is guaranteed under [ss. 11\(d\)](#) and [11\(f\)](#), the right to representativeness of the jury roll is the right of persons "charged with an offence", not of particular groups or the community at large. Thus, to the extent that the representativeness is an aspect of the rights guaranteed by [ss. 11\(d\)](#) and [11\(f\)](#) of the [Charter](#), it does not follow that there is a corresponding right, under these provisions, of the community at large or of any particular group, to be included on a jury roll, jury array, or petit jury.

(3) When Does a Defect in the Representativeness of the Jury Roll Constitute a Breach of [Sections 11\(f\)](#) and [11\(d\)](#)?

[245] Generally, in order to achieve a representative jury roll that will satisfy the requirement of representativeness under [ss. 11\(d\)](#) and [11\(f\)](#) of the [Charter](#), two things are necessary.

[246] First, the lists from which random selection will be made must be substantially representative of the district. As was said in *Born with a Tooth*, "as far as possible and practicable the pool or population from which jury panels are selected [should be] representative of the whole community": p. 396. The jury roll can only properly be representative of the population of the district if the list of people to whom notices may be sent is as complete and accurate as possible and is substantially similar to a random selection among all potentially eligible jurors in the district.

[247] Second, the group of eligible persons who return the questionnaires must be substantially similar to a random sample of the list. This requires the state to look at elements such as the proportion of notices and questionnaires that are in fact received and factors which could affect the return rate. If the group who in fact returns questionnaires does not substantially resemble a random sample of the persons on the list, then the whole foundation of representativeness is at risk because randomness can no longer serve as an appropriate proxy for representativeness.

(4) The Court of Appeal's Test

[248] The Court of Appeal set out a test to determine whether the state had complied with its constitutional obligations to ensure that jury trials are conducted before representative juries. The court held that what is required is "reasonable efforts to seek to provide a fair opportunity for the distinctive perspectives of Aboriginal on-reserve residents to be included": para. 50, per LaForme J.A. I respectfully disagree with two aspects of this approach.

[249] First, and unlike my colleague Moldaver J., I would not express the test in terms of the state providing a “fair opportunity” for particular perspectives to be included. This approach skews whose right is at stake and whose obligation it is to comply. Speaking of a “fair opportunity” to be included takes the focus off the fact that under [ss. 11\(d\)](#) and [11\(f\)](#) of the [Charter](#), the 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](#).

[250] Second, I would not adopt the “reasonable efforts” standard for determining whether a limitation of the right has occurred proposed by the Court of Appeal and adopted by Moldaver J. In my opinion, this approach is disconnected from a proper analysis of the [Charter](#) right at stake. 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.

(5) Representativeness and State Action

[251] The [Charter](#) protects against interference by the state with guaranteed rights: [s. 32](#). In order to establish a breach of the [Charter](#), the claimant must therefore show not only that there has been a limitation of his or her guaranteed rights but that the limitation can be attributed to state action. The question is whether there is a sufficient connection between the conduct of the state and the limitation of the right such that the limitation can fairly be attributed to the state: see, e.g., *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras. 73-78; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176, at paras. 126 and 131-34. This does not require that the state action be “the only or the dominant cause” of the limitation provided that there is a “real, as opposed to a speculative, link” between the alleged limitation and the state action: at *Bedford*, para. 76. While the threshold of sufficient connection has been considered mainly in the context of [s. 7](#) of the [Charter](#), a similar causal threshold has also been used in respect of other provisions of the [Charter](#) and under provincial human rights legislation and, in my view, this threshold applies in the context of this case.

[252] For example, in *Symes v. Canada*, [1993] 4 S.C.R. 695, an equality case under [s. 15](#) of the [Charter](#), Iacobucci J. explained that claimants must demonstrate that the state either “wholly caused, or contributed to”, the adverse effects: pp. 764-65. More recently, in *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, Abella J. took a similar approach to the causal link, stating that “[i]f the state

conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory”: para. 332. Importantly, she also rejected an approach which would internally limit equality rights by looking at the reasonableness of state action, concluding that this was a matter best left for the justification analysis under [s. 1](#) of the [Charter](#): para. 333.

[253] A similar requirement of sufficient connection also underlies this Court’s jurisprudence on the [s. 11\(b\) Charter](#) right to be tried within a reasonable time. In these cases, any action of the Crown which contributes to delay, including systemic problems, such as limits on institutional resources, will be weighed against the Crown: *R. v. Askov*, [1990] 2 S.C.R. 1199; *R. v. Morin*, [1992] 1 S.C.R. 771, at pp. 795-96. In other words, every delay which has a sufficient connection to state action will be taken into consideration when deciding whether the state has breached the accused’s right to be tried within a reasonable time.

[254] A similar approach is also evident under provincial human rights legislation. In *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360, an adverse effects discrimination case under British Columbia’s *Human Rights Code*, R.S.B.C. 1996, c. 210, this Court stated that a *prima facie* breach exists when state action had the result of denying a student meaningful access to the mandated objectives of public education based on a protected ground: para. 36. Whether the claimant has established the necessary link between the state action and the limitation of a [Charter](#) right is essentially a question of fact.

[255] As I see it, the starting point is not the state’s efforts to comply, but whether the jury roll was representative in the sense that I have described. If the jury roll was not representative, the question then becomes whether that failure is attributable to state action; in other words, is there a sufficient connection between the limitation of the right and the action — or inaction — of the state? In my view, 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.

[256] With respect to matters giving rise to the limitation of the right that are wholly or substantially within the state’s capacity to address, the connection is evident between state action or inaction and the limitation of the right in question. In such cases, a “reasonable efforts” test does not reflect the nature of the state’s obligation: compliance with constitutional rights is not optional or (subject to justified limitations) dependent on the degree of effort required. Conversely, the state cannot be held responsible for matters which have the effect of limiting guaranteed rights, but which the state has no ability to address. With respect to matters falling somewhere between these two types of situations, the answer to the question of whether there is a sufficient connection between the limitation of the right and state action will depend on the capacity of the state to address the matters giving rise to the limitation and whether it has made reasonable efforts to do so. As I see it, it is only in this sense that a “reasonable efforts” notion has a role to play in considering whether a sufficient connection to state action exists. The basic question is whether the

claimant has established a sufficient connection between state action and the limitation of the right.

(6) The “Negative Prohibition” and “Unintentional Exclusion” Approaches Must Be Rejected

[257] In light of this analysis, I respectfully reject the Crown’s submission that the right to a representative jury roll simply means that the state cannot improperly exclude groups from the jury roll. Similarly, I cannot accept my colleague Karakatsanis J.’s position that “the unintentional exclusion of a small community . . . does not undermine the representativeness of the jury roll”: para. 180. The premises underlying both propositions are inconsistent with basic [Charter](#) principles. The state is not only responsible for its purposeful conduct that limits rights but also for the unintended and undesired effects of its acts or omissions. Courts have always looked at the purpose *and* the effect of state action in order to determine its constitutionality: “. . . both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation” (*Big M Drug Mart*, at p. 331). In my view, accepting the proposition that a [Charter](#) breach occurs only if the state’s conduct is intentional or otherwise improper would be a significant and unwelcome departure from this Court’s [Charter](#) jurisprudence.

[258] Moreover, these “negative prohibition” and “unintentional exclusion” standards would do little to provide the accused with the jury he or she is entitled to in cases where there are systemic problems with the inclusion in the jury roll of certain groups in the judicial district where the accused is tried. It would mean that, as long as the state does not improperly or intentionally exclude a group such as Aboriginal on-reserve residents, it has no other obligation to provide a representative jury roll. This is not, in my view, consistent with the [Charter](#) right to a representative jury roll.

B. *Was There a Breach of That Right in Mr. Kokopenace’s Case?*

(1) Was the Jury Roll Representative?

[259] The first question, as I see it, is whether the jury roll assembled for use in this case met the standard of representativeness required by the [Charter](#). This case does not require us to pronounce comprehensively on what constitutes a sufficiently representative jury roll. This case concerns a situation in which, by anyone’s reckoning, the jury roll was not representative because its composition was a substantial departure from what random selection among all potentially eligible jurors in the district would produce. In the particular and exceptional facts of this case, we know this because (i) on-reserve residents are overwhelmingly Aboriginal people; (ii) on-reserve residents constitute about 30 percent of the adult population of the judicial district; and (iii) on-reserve residents constitute about 4 percent of the jury roll. Thus we have a substantially different jury roll than would be produced by a proper process of random selection because of the under-representation of Aboriginal on-reserve residents on the jury roll. If that does not constitute a failure to assemble a representative jury roll, I have difficulty understanding what would.

(2) Is the Lack of Representativeness Attributable to State Action?

[260] The more challenging question is whether the lack of representativeness is sufficiently linked to state action or inaction. What is required is not a strict causal connection but rather a sufficient connection, as outlined earlier.

[261] There were four matters that potentially contributed to the jury roll's lack of representativeness and I will consider each in turn.

[262] We should remember that the Ontario Court of Appeal was the court of first instance on the issue of representativeness. In these circumstances, the factual findings of the majority of the Court of Appeal, like those of a court of first instance, are entitled to deference: *R. v. W.E.B.*, 2014 SCC 2, [2014] 1 S.C.R. 34, at para. 2; *Yumnu*, at para. 17; *Davey*, at paras. 64-65. It follows that this Court “may not interfere with the findings of fact made and the factual inferences drawn . . . unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable”: *R. v. Clark*, 2005 SCC 2, [2005] 1 S.C.R. 6, at para. 9; see also *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 10, 19 and 21-25; *Bedford*, at paras. 48-56.

(a) *The Lists of Aboriginal On-Reserve Residents*

[263] There were a number of concerns with the lists of on-reserve residents from which names were selected at random to receive jury notices and questionnaires. While Goudge J.A. was of the view that these problems, on their own, would not sufficiently undermine representativeness, he shared the view of LaForme J.A. in relation to the nature of the problems.

[264] The lists, of course, are not required to be perfect. But they are required to be substantially representative of the community in the district because these lists are the foundation that allows randomness to be a proxy for representativeness. The degree of representativeness is assessed in accordance with the goal of using random selection as a proxy for representativeness. The lists will be defective if they are significantly different than a random selection of potentially eligible jurors in the district.

[265] In the fall of 2007, there were no lists at all for four First Nations in the district and out-of-date lists for 32 First Nations. These out-of-date lists were the 2000 band lists provided by the federal government for the last time in that year. As LaForme J.A. concluded, these lists included only persons 18 years of age or over, and therefore became increasingly inaccurate with the passage of time. This, he noted, was a special problem for populations residing on reserves, which are generally disproportionately young. There were more current lists available for the remaining 10 First Nations, but they too were defective. The lists used for several of the reserves included off-reserve band members even though the s. 6(8) process is supposed to reach only potential jurors on reserves.

[266] Compiling these lists is quintessentially a state function. It is a core state function to know how many inhabitants it has and where they live. Moreover, under provincial legislation — the *Juries Act* — the sheriff has a duty to obtain lists of on-reserve residents as otherwise they would be completely excluded from the jury roll. I therefore think that the “reasonable efforts” approach is not relevant here. While the state does not have to prepare perfect lists, the lists must be broad-based and substantially representative of the district. The accused does not have to show that the defective lists, on their own, were the only or even a substantial cause of the lack of representativeness in this jury roll. Because it applied the “reasonable efforts” approach, the Court of Appeal did not address the issue of a sufficient connection between state action and the lack of representativeness. In my view, the accused here has shown a sufficient connection because the inadequacy of the lists inevitably contributed in some degree to the lack of representativeness of the jury.

[267] The Crown argues, in effect, that the defective lists had no impact on representativeness in this case. The problems with this assertion are that (i) it is based on a conception of representativeness that is restricted to improper exclusion, and (ii) it assumes the lists have to be the only cause in order to conclude that they are linked to the lack of representativeness. When applying the proper standard of sufficient connection, the Crown’s argument fails. The many inaccuracies in the outdated lists as well as the complete omission of four Aboriginal reserves had more than a theoretical or speculative connection with jury representativeness.

(b) *The Delivery of the Jury Notices and Questionnaires*

[268] My colleague Moldaver J. concludes that the state has a duty to make reasonable efforts to deliver the jury notices, but concludes that such efforts — which he characterizes as an “aggressive approach” — were made: para. 121. My colleague’s conclusion, however, is contrary to the factual findings of the majority of the Court of Appeal which are entitled to deference.

[269] Goudge J.A. found that the delivery of the jury notices and questionnaires was a significant problem. LaForme J.A. also noted that the state’s failure to evaluate the number of notices and questionnaires returned “undelivered”, along with the response rate, “blinded [the state] to evidence of what was actually occurring”: para. 89. It seems to me that the delivery of notices and questionnaires to prospective jurors is also quintessentially a state responsibility. I cannot think of who else’s responsibility it would be. And once again, complete success is not required. What is required is sufficient delivery that ensures that the randomness of the sample is not undermined by defective delivery. That standard was not met here.

[270] In 2008, nearly 28 percent of the notices mailed to on-reserve residents in the District of Kenora were returned by the post office undelivered. This compares with an overall provincial rate of under 6 percent for the same year. Goudge J.A. found that the delivery rates were “markedly worse” for Aboriginal

on-reserve residents and that notices to those persons were “significantly less likely to be delivered”: para. 258. He also found that the government’s response to this challenge was “inattention” and “inaction” and that over the years, including for the 2008 jury roll, “virtually nothing was done” to determine the causes of this problem or to formulate potential solutions: para. 260. He concluded that none of the state’s efforts from 2001 to 2008 addressed the delivery problem. I see no reason to question Goudge J.A.’s finding that “[t]he delivery problem therefore presented a challenge that the state had to address”: para. 258 (emphasis added). To the same effect, LaForme J.A. concluded that despite the state being well aware of the low response rate (to which, of course, non-delivery contributes) “[its] causes were never investigated so that different modalities of engagement could be undertaken”: para. 208.

[271] I conclude that the state is responsible for defective delivery and that there is a sufficient connection between defective delivery and lack of representativeness.

(c) *The Return Rates of Aboriginal On-Reserve Residents*

[272] The third problem related to rates of return of the jury questionnaires. This problem seems to me to raise a distinct sort of issue in relation to whether it is sufficiently linked to state action.

[273] The return of the jury questionnaires requires the individuals to complete and mail back the forms that they have received. While the state has some capacity to address this matter, the low rate of returns cannot be attributed solely to the state. Individuals also have a responsibility to comply with their legal obligation to respond to the notices. It follows that in assessing the connection between state action and the lack of representativeness in relation to the return rate, we must take into account “the practical limits of the system of justice”: *Find*, at para. 28, citing *R. v. O’Connor*, [1995] 4 S.C.R. 411, at para. 193. As I have explained above, in this context, the reasonable efforts approach of the Court of Appeal is useful, not in defining the constitutional standard, but as a factor in assessing whether there is a sufficient connection between the limitation of the right and state action or inaction. If the state has taken all reasonable steps in relation to matters which it has the capacity to address, judged in light of all of the circumstances, it cannot be held responsible for the unsuccessful result.

[274] This does not mean that the state can simply wash its hands of the problem. As Goudge J.A. put it, the state’s obligation extends beyond compiling lists and sending out notices; it also includes encouraging responses to them. The Ministry’s own policy underlines the importance of monitoring return rates, stating that evaluating this aspect “is of extreme importance to the management of our jury system”: LaForme J.A., at para. 88, citing PDB #563, 1996 Ministry of the Attorney General policy directive.

[275] It follows that I respectfully disagree with the contention of the Crown and the views of my colleague Moldaver J. that there is little responsibility on the state in relation to returns. The Crown argues that the province’s efforts to address the low return rates were reasonable but failed to solve the problem

because “the factors contributing to the low response rates are varied, complex, and reach beyond the immediate control of the state”: A.F., at para. 78. My colleague Moldaver J. agrees and would hold that the state “was not required to address systemic problems contributing to the reluctance of Aboriginal on-reserve residents to participate in the jury process”: para. 95. Therefore, as long as the state has provided a “fair opportunity for a broad cross-section of society to participate” (para. 2), it has fulfilled its constitutional obligation.

[276] In my respectful opinion, these views do not give sufficient weight to the accused’s [Charter](#) rights. We are concerned here with the right of an accused to a representative jury roll and with the state’s obligation to provide one. Even with respect to matters not fully under the state’s control, state responsibility is engaged when it fails to take reasonable steps to overcome the factors contributing to the lack of representativeness. The majority of the Court of Appeal found that those reasonable steps were not taken.

[277] The facts in relation to the return rate problem are canvassed comprehensively in the reasons of LaForme J.A. and I need not repeat all of the detail that he provides. Those facts abundantly support the conclusion that, as Goudge J.A. put it, “[b]y 2008, therefore, the comparatively low rate of return from Aboriginal on-reserve residents had been well known by the state for a number of years as a significant contributing cause of the under-representation of Aboriginal on-reserve residents on the annual jury roll for the Kenora District”: para. 249. Goudge J.A. also found that “[o]ff-reserve [return] rates were typically four or five times higher than for on-reserve residents. . . . [T]he state knew of this discrepancy for a number of years. Its impact on the under-representation of Aboriginal on-reserve residents on the annual jury roll is obvious”: para. 263. I cannot improve on the way Goudge J.A. summed up his assessment of the state’s efforts:

. . . the state left the serious challenge of low response rates with a junior employee. Through her, the state response, repeated year after year up to and including the 2008 jury roll, can only be described as a failure. No attempts to engage with Aboriginal leaders appear to have been undertaken to determine the causes of prior response rates or what other ameliorative efforts might be undertaken by the state to encourage responses.

I do not think that a failed response, coupled with a failure to explore other steps the state might have taken to help, can be said to constitute the reasonable efforts required of the state to address this problem . . . The challenge of low response rates was serious. It required more from the state. [paras. 275-76]

[278] I conclude that the low response rate was attributable in part to the state’s lack of reasonable efforts to address it and that the response rate is sufficiently connected to the lack of representativeness.

(d) *The Estrangement of Aboriginal Peoples From the Canadian Criminal Justice System*

[279] Finally we come to broader, systemic factors that undoubtedly contribute to the under-

representation of Aboriginal on-reserve residents on jury rolls. There is no doubt that underlying all of the facts and numbers about lists, deliveries and return rates, much broader factors are in play. These include the dissonance between traditional Aboriginal approaches to conflict resolution and the approaches of the criminal justice system, the historic discrimination in that system experienced by Aboriginal peoples and their lack of understanding of the system: C.A. reasons, at para. 272, per Goudge J.A.; Iacobucci Report, at paras. 209-30.

[280] As the Iacobucci Report states, “the most significant systemic barrier to the participation of First Nations peoples 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”: para. 209. Despite the fact that this is perhaps the most important factor responsible for the under-representation of Aboriginal on-reserve residents on jury rolls, until very recently there have been no concerted efforts to engage with Aboriginal leaders in order to determine the cause of the problem and what the state could do.

[281] The Crown would have us ignore these considerations because the [Charter](#) right to a representative jury roll is not an appropriate tool to address them. My colleague Moldaver J. agrees. Again, my colleague believes that the state is not required to address systemic problems contributing to the estrangement of Aboriginal peoples from the criminal justice system in order to achieve its representativeness obligation. These views, as I see it, overlook the state’s responsibility for these factors and thus its responsibility to make reasonable efforts to address them. Having played a substantial role in creating these problems, the state should have some obligation to address them in the context of complying with an accused’s constitutional right to a representative jury roll.

[282] We must first be clear what the phrase “systemic problems” in this context refers to. It is a euphemism for, among other things, racial discrimination and Aboriginal alienation from the justice system. In *R. v. Gladue*, [1999] 1 S.C.R. 688, and *Williams*, this Court recognized the problem of systemic bias and discrimination against Aboriginal people in the criminal justice system.

[283] This Court in *Gladue* accepted the findings of the Royal Commission on Aboriginal Peoples and of the Aboriginal Justice Inquiry of Manitoba to the effect that the criminal justice system in Canada has failed to take account of the “substantially different cultural values and experiences of aboriginal people”: paras. 62-63. In *Williams*, this Court accepted that there is widespread bias against Aboriginal people and noted that there is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system: para. 58. Moreover, as LaForme J.A. observed, *Gladue* and *Williams* recognized that the overrepresentation of Aboriginal people as accused was “only the tip of the iceberg in terms of the ways in which the criminal justice system was failing Aboriginal peoples. The under-representation 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”: para. 144.

[284] 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 *Gladue*, for example, the overrepresentation of Aboriginal people in correctional institutions was recognized to be a “sad and pressing social problem” which sentencing innovation, on its own, could not address: para. 64; see also paras. 58 and 65. The Court nonetheless stressed the importance of following Parliament’s direction to take the circumstances of Aboriginal offenders into account. In *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, the Court directly addressed the contention that sentencing is not an appropriate means of addressing overrepresentation: para. 64. The Court flatly rejected this stance, citing the Aboriginal Justice Inquiry of Manitoba:

Despite 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. [para. 69]

(Citing *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (1991), at pp. 110-11.)

The Court concluded that “[t]he sentencing process is . . . an appropriate forum for addressing Aboriginal overrepresentation in Canada’s prisons”: para. 70.

[285] In the same way, in 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.

[286] In my view, the state has contributed to these broadly systemic problems and, failing reasonable efforts to overcome them in the context of jury under-representation, the state action or inaction is sufficiently linked to the under-representativeness of the jury roll in respect of Aboriginal people. There is no doubt that this is the case here. LaForme J.A. concluded that “[t]here is no evidence that the state took into account the critical estrangement of Aboriginal persons from the criminal justice system and the administration of justice . . . in its approach to the jury representation problem”: para. 210. Similarly, Goudge J.A. concluded that “the fundamental estrangement of Aboriginal people from the justice system is a relevant consideration. . . . The need to address this estrangement simply enhances the importance of the state’s efforts to provide Aboriginal on-reserve residents with the opportunity to be included in the annual jury roll”: para. 241. He noted, as well, that “[n]o attempts to engage with Aboriginal leaders appear to have been undertaken to determine the causes of prior response rates or what other ameliorative efforts might be undertaken by the state to encourage responses”: para. 275.

(e) *Conclusion on the State's Responsibility*

[287] To conclude on this point: of the four factors that contributed to the unrepresentative jury roll, two (the lists and delivery) were the responsibility of the state and complying with that responsibility was within its power. The other two (the poor return rate and Aboriginal disengagement) were matters which the state had some capacity to address, but it failed to make reasonable efforts to do so. The majority in the Court of Appeal also found that, prior to 2008, additional steps could and should have been taken to address the under-representation issue if proper attention had been paid to the problem and appropriate steps taken to investigate in a timely way. I see no basis upon which we could interfere with these findings on appeal.

[288] For these reasons, I cannot accept the view of my colleague Moldaver J. that the majority of the Court of Appeal engaged in “hindsight” reasoning. The reasons of both LaForme and Goudge JJ.A. meticulously record their assessment of the evidence about what the state knew or ought to have known at the relevant times. It is not open to us to choose to read the record differently than they did.

[289] I am not suggesting that the state will fail in its representativeness obligation until the day that Aboriginal estrangement from the criminal justice system has completely disappeared. But 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.

[290] I conclude that there is a sufficient connection between state action and inaction and the lack of a representative jury roll to find that there was a breach by the state of the accused's right to a representative jury roll as guaranteed under [ss. 11\(d\)](#) and [11\(f\)](#) of the [Charter](#).

C. *What Is the Appropriate Remedy in This Case?*

[291] [Section 24\(1\)](#) of the [Charter](#) grants courts a wide discretion to craft remedies that are “appropriate and just in the circumstances”: see *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at paras. 55-57; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at paras. 30-33. In approaching the exercise of the remedial discretion exercised by the majority of the Court of Appeal, we may only intervene if it misdirected itself on the law or if the decision is so clearly wrong as to amount to an injustice: *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 117; *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at para. 48; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 87; *R. v. Carosella*, [1997] 1 S.C.R. 80, at para. 48.

[292] Determining what is an appropriate remedy following the state's failure to provide a representative jury roll requires examination of all the circumstances, including the nature of the breach of the accused's rights and its effect on public confidence in the administration of justice. The point in the

proceedings at which the issue is raised is also a relevant consideration. If the breach is raised at the time of jury selection, an order directing that a new roll be prepared may be the appropriate remedy. Where, as here, the issue is raised for the first time after verdict, a declaration may be the appropriate remedy absent the accused establishing that, in light of all of the circumstances, a new trial is the only way to restore public confidence in the administration of justice.

[293] In this case, for three reasons, I conclude that the Court of Appeal did not make any reversible error in exercising its remedial discretion to order a new trial. In all of the circumstances here, the failure to provide a representative jury roll undermined public confidence in the administration of justice. In my view, courts have traditionally been slow to excuse serious problems in jury selection as mere technicalities and we should not do so here; the failure of the state here resulted in a drastic under-representation on the basis of race; and, finally, the accused person shares the race of those excluded from appropriate representation on the jury roll.

(1) A Properly Constituted Jury Is Not a Technicality

[294] A properly constituted jury is the foundation of a fair trial and of a trial that will enhance the respect in the community for the administration of justice. For this reason, the courts have repeatedly been very reluctant to dismiss errors in the jury selection process as mere “technicalities”. For example, in the old case of *Morin v. The Queen* (1890), 18 S.C.R. 407, Ritchie C.J. (dissenting in the result but in the majority with respect to jury selection) said this:

... the objection taken [to the process of jury selection] is not raised on a mere technicality but is that the jury to whom the prisoner shall be given in charge shall be legally selected, chosen and sworn

Believing then as I do, that the prisoner has not had a legal trial I cannot by my voice send him to the gallows. [pp. 425-26]

[295] In *McLean v. The King*, [1933] S.C.R. 688, the Court stated that: “. . . in the administration of criminal justice nothing is more important than that the constitution of the jury should be free from all objection and that the accused should have the full advantage of every safeguard which the law has provided to enable him to secure this right, which is of the very essence of a fair trial” (p. 692 (emphasis added)).

[296] In *R. v. Bird*, [1984] 1 C.N.L.R. 122 (Sask. C.A.), in a very succinct judgment, the Saskatchewan Court of Appeal expressed a similar sentiment, holding that “[a] process that systematically excludes, either by design or unwittingly, an identifiable group from serving on a jury may be a sufficient ground for vacating a conviction made by a jury selected by that process”: p. 122. This view was subsequently reiterated by the British Columbia Court of Appeal in *Butler*, in the context of allegations that the sheriff deliberately excluded Aboriginal people from the jury roll. The court held that such conduct could be illegal and result in an improperly constituted jury which would then have no jurisdiction. Since

the trial judge had failed to investigate the jury selection issue, a new trial was ordered: pp. 259-60.

[297] In *Barrow*, Dickson C.J. once again emphasized the fundamental importance of jury selection. He explained that “selection of an impartial jury is crucial to a fair trial”; that the accused, the Crown and the public all have the right “to be sure that the jury is impartial and the trial fair” and that on this “depends public confidence in the administration of justice”: p. 710. He also emphasized another key point: the importance — the “crucial” importance — of the appearance of justice, namely “the public perception of the fairness of the proceedings”: p. 715.

[298] Thus, it is not a full answer to an objection to how the jury was selected to say that the accused has not shown that the trial was in fact unfair. To treat this as a full answer ignores the important consideration of the appearance of fairness. Any significant failure of the jury selection process has the potential to “reflec[t] on the fairness of the entire trial”: *Barrow*, at p. 719.

[299] Most recently, the Court in *Yumnu* confirmed that conduct within and surrounding the jury selection process may constitute a miscarriage of justice even if the accused has otherwise had a fair trial. Conduct which constitutes “a serious interference with the administration of justice” and offends “the community’s sense of fair play and decency” constitutes a miscarriage of justice and demands that a new trial be ordered: para. 79. If the breach “is so serious that it destroys the appearance of justice and fairness of the trial”, it is unnecessary to enquire into whether the accused suffered an actual prejudice: *R. v. Snow* (2004), 73 O.R. (3d) 40 (C.A.), at para. 39; see also *R. v. Cameron* (1991), 2 O.R. (3d) 633 (C.A.), at pp. 638-39.

[300] The Crown submits that the failure of counsel to raise the issue before trial should be relevant to the appropriateness of the remedy: defence counsel was aware of the low representation of Aboriginal on-reserve residents and testified that he was familiar with the decision of Stach J. in *R. v. Fiddler*, [1994] 4 C.N.L.R. 99 (Ont. Ct. (Gen. Div.)), which dealt with the issue of representativeness of Aboriginal on-reserve residents. The Crown says that there is an inconsistency between this testimony and the respondent’s submission that counsel was not made aware of the issue until after conviction.

[301] I reject this submission for two reasons. First, responsibility for complying with [ss. 11\(d\)](#) and [11\(f\)](#) of the [Charter](#) belongs to the state, not to defence counsel. It was the state’s duty to provide a representative jury roll, not the accused’s obligation to catch its failure to do so. Second, in any case, the Court of Appeal concluded that defence counsel learned for the first time of the potential problems with the 2008 Kenora jury roll after conviction and the Crown did not oppose this issue being raised for the first time on appeal. As pointed out by LaForme J.A., it was not unreasonable for the respondent to assume that the state was complying with its constitutional obligations. It was only on September 12, 2008 — almost three months after the jury had rendered its verdict against Mr. Kokopenace — that counsel learned for the first time that there was evidence of irregularities in the jury roll process. On that date, he received a letter with

an attachment consisting of an affidavit sworn by Rolanda Peacock, Acting Supervisor of Court Operations for the territorial district of Kenora, which summarized the state's efforts in respect of the 2007 Kenora jury roll. I see no error on the part of the Court of Appeal, in the unusual circumstances here, in refusing to deny an otherwise just and appropriate remedy on the basis that the issue was raised late.

(2) The Under-Representation Was on the Basis of Race

[302] A second important consideration, in my opinion, is that the under-representation in this case was on the basis of race. As former Justice Iacobucci put it in his report:

The public is more likely to perceive trials, and by extension the legal system as a whole, as being fair if prospective jurors are representative of the wider community from which they are drawn. Conversely, the wholesale exclusion of particular groups from the jury pool risks undermining public acceptance of the fairness of the criminal justice system. A jury cannot act as the conscience of the community unless it is viewed favorably by the society that it serves.
[para. 116]

[303] As the Privy Council stated in *Rojas v. Berlaque*, [2003] UKPC 76, [2004] 1 W.L.R. 201, at para. 14, “a non-discriminatory method of compilation of the jury lists is an essential ingredient of a fair trial by jury”. This view was also adopted by the New Zealand Court of Appeal: *R. v. Ellis*, [2011] NZCA 90, [2011] 4 L.R.C. 515, at paras. 50-60. I recognize that discrimination may occur not only as the result of intended effects of conduct, but also through the unintended effects of conduct. That the effect (although certainly not the intention) of the state conduct led to a substantial under-representation based on a prohibited ground of discrimination in my opinion considerably exacerbates the seriousness of the breach and its impact on confidence in the administration of justice.

(3) The Accused Is an Aboriginal Man

[304] Finally, we should not, in my view, be blind to the fact that the accused in this case is a member of the race that was wrongly excluded from adequate representation on the jury roll. This Court has repeatedly referred to the systemic discrimination against Aboriginal people in the criminal justice system. The unintentional yet substantial under-representation of members of that race from the jury roll inevitably, in my view, casts a long shadow over the appearance that justice has been done. It seems to me that the Court should not, on one hand, direct other courts to take these social realities into account while, on the other, choosing to ignore these same realities when they confront us in an awkward context. In my view, it could not be clearer that, as a result of state action and inaction, persons of the accused's race were substantially under-represented on the jury roll.

[305] The 2008 jury roll for Kenora consisted of 699 potential jurors of whom 29 were Aboriginal on-reserve residents. Thus, 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. This significant under-

representation, not surprisingly, was transmitted to the jury panel summoned for Mr. Kokopenace's trial. It consisted of 175 jurors, 8 of whom — 4.6 percent — were on-reserve residents. In the event, four of the eight were excused and two did not respond to the summons.

(4) Conclusion Respecting Remedy

[306] I see no reviewable error in the conclusion of the majority of the Court of Appeal that the failure to provide a representative jury roll in the circumstances of this case undermined public confidence in the integrity of the justice system and the administration of justice. As a result, I would affirm the Court of Appeal's decision to order a new trial.

IV. Disposition of the Appeal

[307] I would dismiss the appeal.

Appeal allowed, McLACHLIN C.J. and CROMWELL J. dissenting.

Solicitor for the appellant: Attorney General of Ontario, Toronto.

Solicitors for the respondent: Sack Goldblatt Mitchell, Toronto; Doucette Boni Santoro Furgiuele, Toronto.

Solicitors for the intervener the Advocates' Society: Greenspan Humphrey Lavine, Toronto; Hensel Barristers, Toronto; University of Toronto, Toronto.

Solicitors for the intervener the Nishnawbe Aski Nation: Falconers, Toronto.

Solicitors for the interveners the David Asper Centre for Constitutional Rights and the Women's Legal Education and Action Fund, Inc. (LEAF): University of Toronto, Toronto; Women's Legal Education and Action Fund, Inc. (LEAF), Toronto.

Solicitors for the interveners the Native Women's Association of Canada and the Canadian Association of Elizabeth Fry Societies: Law Office of Mary Eberts, Toronto.

Solicitors for the intervener the Aboriginal Legal Services of Toronto Inc.: Aboriginal Legal

Services of Toronto, Toronto.

[\[1\]](#) The selection process for juries that serve in criminal jury trials differs in many respects from the selection process for coroners' juries under the *Coroners Act*, R.S.O. 1990, c. C.37. These reasons pertain only to the jury selection process for criminal trials, and I make no comment on the jury selection process under the *Coroners Act*.

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