The *Kokopenace* Judgment: A Case of Mistaken Identity

by Julian N. Falconer[1]

This article is offered as an expression of concern about the direction of our nation's highest Court in its role as ultimate arbiter of Aboriginal rights. The author recognizes that the commentary of lawyers who are unsuccessful before the Supreme Court of Canada invariably runs the risk of being perceived as a self-indulgent exercise by counsel frustrated with the removal of the Privy Council as an avenue of further appeal. While clients who have entrusted their case to a lawyer rightly see vindication of their cause as the sole objective, the experience of arguing before the Supreme Court transcends winning or losing for any advocate who has had the honour of doing so. It is therefore with great respect for the Supreme Court as an institution that the author argues that the primary cause for concern arising from the Kokopenace *ruling is the tone of the majority opinion. There is a troubling absence in the ruling of any recognition of the distinct standing of Canada's First Peoples in the Canadian justice system. The author concludes that, if a more careful approach to dialogue with First Nations is not adopted in future judgments, the Supreme Court runs the risk of being dismissed as irrelevant in the eyes of those whose rights are at stake.*

Introduction

For over a century, the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada. The establishment and operation of residential schools were a central element of this policy, which can best be described as "cultural genocide."

Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada, June 2, 2015, page 1

On May 28, 2015, five days before the Truth and Reconciliation Commission of Canada released the summary of its final report, Canada's Chief Justice became the highest ranking official in the country to use the term "cultural genocide" in relation to Canada's historical relationship with First Nations peoples. "The most glaring blemish on the Canadian historic record," stated Chief Justice McLachlin in a public lecture, "relates to our treatment of the First Nations that lived here at the time of colonization."[2] A national debate quickly erupted surrounding the terminology of "cultural genocide." However, just one week before the Chief Justice's speech, the Supreme Court of Canada issued its ruling in the case of *R. v. Kokopenace*, which considered an accused's right to a representative jury in the context of the drastic underrepresentation of First Nations reserve residents on jury rolls in Northern Ontario.[3] As Canada seeks to reconcile a colonial past with a multicultural future, the decision found the Supreme Court stepping backward and seemingly seeking to remove itself from the conversation altogether.

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While Chief Justice McLachlin joined a pointed dissent by Justice Cromwell, a majority of their colleagues in *Kokopenace* found that neither the historical record nor the present circumstances of First Nations have any bearing on a First Nations reserve resident's right to a trial by representative jury. The majority decision thus represents a glaring retreat from the Court's jurisprudence since at least the inception of the *Canadian Charter of Rights and Freedoms* ("the *Charter*"). Absent is the Court's prior recognition that "the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions."[4] In circumstances where estrangement of Aboriginal peoples from the justice system directly affects procedural rights, the Court sent a strong message that the burden lies on First Nations alone to reconcile differences with an externally-imposed process.

After *Kokopenace*, it is almost inconceivable that a jury roll challenge on the basis of minority underrepresentation could ever succeed without evidence of bad faith on the part of the state. Eliminating the disruptive effects of such challenges certainly appears to have been a goal of the Court. However, the implications for Aboriginal peoples may run deeper than that. In its meticulous separation of legal rights from social context, the majority decision minimizes the judiciary's constitutional role in government-to-government dialogue with First Nations. To make matters worse, it also eliminates any legal incentive for other branches of government to address Aboriginal justice issues. The Supreme Court's ruling is particularly counterproductive given the tentatively positive engagement with First Nations that has occurred in Ontario as a direct result of lower court decisions on the jury roll issues. These decisions are now all overruled.

If the nation's highest Court persists in its current course of action, it runs the risk of becoming irrelevant to societal efforts to address the estrangement of Aboriginal peoples from the mainstream justice system.

The *Kokopenace* Ruling

The narrow issue in *Kokopenace* was the underrepresentation of First Nations reserve residents on the 2008 jury roll for the District of Kenora. After admitting fresh evidence on the issue, the Court of Appeal for Ontario made a number of striking findings in concluding that Ontario had violated the rights of the accused under ss. 11(d) and (f) of the *Charter*. Among other things:

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- There were 46 First Nations within the district. The officials in charge of compiling the jury roll were only aware of 43 of them.
- Ontario did not have band lists for four First Nations, including the three First Nations it was unaware were in the district. It had band lists from the year 2000 (by then eight years out of date) for 32 others, and band lists less than two years old for only 10 First Nations.
- Of 600 jury questionnaires mailed out, more were returned by the post office (166, or 27.7%) than by the recipient (just 60, or 10%). The off-reserve response rate was 55.6%.
- Ultimately, only 4.1% of individuals on the jury roll were reserve residents, despite an on-reserve adult population that was between 21.5 and 31.8% of the total adult population in the district.[5]

In an opinion rendered by Justice Moldaver, the majority of the Supreme Court overturned the Court of Appeal. The majority found that Ontario had provided reserve residents with a "fair opportunity" to participate in the jury process, but that reserve residents had effectively declined to do so.[6] The majority also emphasized that there is no right to proportionate representation on a jury roll, meaning that representativeness is instead ensured by random selection "from a broad cross-section of society."[7] The majority expressly rejected any constitutional obligation for the state to encourage responses from potential jurors after a "fair opportunity" to participate had been provided.[8]

The more troubling message sent by the majority opinion is that the alienation of First Nations peoples from the justice system is not actually a legal problem.

A number of issues may be raised with a test that purports to rely on "random" selection while expressly allowing "small segment[s] of the population" to be non-randomly omitted from the selection process.[9] Under the *Kokopenace* test, any minority, including reserve residents or other Aboriginals, may be *entirely* absent from the state's source lists as long as the state does not "deliberately" exclude them from the process and makes "reasonable efforts" to use a "broad" list. However, the larger issue for First Nations is not the legal test or the failure to find a *Charter* violation on the facts. The more troubling message sent by the majority opinion is that the alienation of First Nations peoples from the justice system is not actually a *legal* problem.

Application of the *Kokopenace* Test to Aboriginal Peoples

The following excerpts from the majority opinion illustrate the rationale for ignoring historical context in the test for jury representativeness. Aboriginal peoples are variously referred to as a "particular" or "societal group," or simply "part of the population:"

> . . .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.
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> 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.
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> . . .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.[10]

In contrast, the dissent recognized that failure to consider the state's historical relationship with Aboriginal peoples, including the distressing social issues that many First Nations communities now face as a result, detracts significantly from any analysis of Aboriginal rights in the justice system. Justice Cromwell stated that the majority's views:

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> . . .overlook the state's responsibility for these [historical] 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. . .
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> To ignore racial discrimination against Aboriginal people in the context of assembling a jury roll would be in marked contrast to the approach that this Court has taken to racial discrimination against Aboriginal people in relation to sentencing Aboriginal offenders. . .
>
> In the 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.[11]

First Nations have Unique Legal Rights and Political Identity

As the quoted passages illustrate, the majority reasons rely on a form of numbers game. The constitutional analysis is dominated by the theme that on-reserve First Nations populations in Northern Ontario really amount to a small number of people compared to the general population across the province, and therefore *Charter* protections should not enure.

The suggestion that any individual's rights may be less important because he or she represents only "a small segment of the population" is a significant departure from democratic principles with respect to minority rights. In a constitutional democracy, courts are an essential counterbalance to the whims of majority rule precisely because they enforce the legal rights of individuals

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regardless of the politics of the day or the relative size of the interests at stake. It is the nature of democracy that groups with relatively small numbers are often the most in need of protection from the courts. In Canada, courts also have an exceptional role to play with respect to First Nations peoples. The simple fact is that Aboriginal peoples have unique rights that are legally distinct from those of other "societal groups." All pre-existing Aboriginal and treaty rights were recognized and affirmed by s. 35 of the *Constitution Act, 1982*. These legal entitlements arise from the historical context and its ongoing consequences, which the majority opinion omits from its analysis.

The negotiation of nation-to-nation treaties with First Nations occurred because even colonial political leadership recognized the unique legal position of Canada's First Peoples, who have rightly been understood as being more significant than numbers alone might suggest. Practically speaking and as a matter of law, First Nations are not simply a "small segment" of society. The First Nations were never conquered in battle, but entered into strategic legal arrangements to trade and cohabit the country with colonial settlers. The Europeans depended on alliances with the First Nations for both economic and military purposes. For example, the Royal Proclamation of 1763 stated that the protection of First Nations land rights "is just and reasonable, and essential to Our Interest and the Security of Our Colonies." The Royal Proclamation also set out a clear demarcation between British subjects, who were governed by colonial trade regulations, and the "Indians," who were not.[12] Although often mistakenly referred to as a bi-juridical legal system, Canada is in fact *tri-juridical*.[13] Prior to the establishment of English common law and French civil law institutions in Canada, First Nations had independent legal traditions and political identity, and still do. It was only in 1956 that First Nations members were legally recognized as Canadian citizens,[14] which is a label that some First Nations people still justifiably reject.

The recognition of our colonial past is essential to understanding the status of First Nations under Canadian law. The state has a fiduciary duty towards First Nations that is represented by the Honour of the Crown. The express purpose of recognizing Aboriginal rights and the Honour of the Crown is to reconcile the pre-existence of Aboriginal societies with the declaration of sovereignty by the Crown.[15] However, the majority in *Kokopenace* held, without explanation, that the Honour of the Crown was simply "not relevant" to the state's obligation to ensure a representative jury.[16] Contrary to the majority assertion, it is difficult to imagine how an expectation of government-to-government consultation on justice issues that disproportionately affect First Nations can be seen as "rais[ing] the bar" on the Crown's legal obligations.[17] The fact that such conversations should occur would appear to be a matter of respectful protocol and simple common sense.

While the contents of the Crown's duty to First Nations people in the context of the justice system are open to debate, the struggles of Canada's First Peoples against a historically oppressive system are well documented and have previously been recognized by the Supreme Court.[18] That the colonial justice system supported the Crown's agenda of assimilation and ultimately shares responsibility for the staggering numbers of First Nations individuals

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who are currently imprisoned is beyond debate. The Chief Justice of Canada characterized the state's attempts at assimilation and willful dismissal of the independent rights and traditions of Canada's First Peoples as "cultural genocide." The Truth and Reconciliation process has illustrated that the effects of the state's oppression are still deeply felt. It is understandable if many individuals still do not trust, respect, or understand an externally-imposed system of "justice" that is still an ongoing cause of harm. But no justice system worthy of acceptance should allow negative views of the system to negatively affect individuals' rights.

For First Nations members who are subject to Treaty #3, such as the accused in *Kokopenace*, unique legal rights include the right to reside on a reserve and the right to participate in the Canadian justice system while residing on reserve.[19] The very existence of reserves is an artifact of histor-

ical legal arrangements with the Crown. The exclusion of reserve residents from a foundational institution of the justice system is thus not simply a problem faced by "a small segment of the population" for which the state and its courts bear no responsibility.

In a telling exchange during the oral hearing, Justice Rothstein asked counsel for the accused, with all apparent sincerity, why many First Nations governments had failed to respond to a faxed form letter from Her Majesty the Queen. These letters, generically addressed to "Dear Chief," had predictably low response rates. "When I get a letter," said Justice Rothstein, "I answer it." Community leadership,

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many of whom face social issues including horrific numbers of child suicides, disproportionate addiction rates, and the absence of basic services such as clean drinking water, are left to ponder the stark contrast between a Supreme Court judge's life experience and the deplorable conditions that plague their communities.

Regrettably, there is simply no sense from the majority judgment that its reasons were informed by the realities of Aboriginal struggles with our mainstream justice system. We can only hope that the *Kokopenace* judgment becomes an anomaly in the context of a Court which, in recent years, has a well-earned reputation for adjudicating Aboriginal rights claims in a sensitive and respectful fashion.

It bears repeating that respectful dialogue can occur regardless of the outcome of the merits of a specific case. To make the point, there is a clear difference between the majority of the Supreme Court and Justice Rouleau's dissenting opinion for the Court of Appeal. Both rejected the existence of a *Charter* violation on the facts of the case. However, Justice Rouleau acknowledged that the issue of First Nations underrepresentation on juries "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."[20]

A Dangerous Precedent from the Courts

This is not to say that all the solutions to First Nations issues can or should lie in a courtroom. But in the case of exclusion from juries, that is literally where the problems crystallize. There is a clear difference between preferring a political resolution and actively being part of the problem. By attributing the exclusion of reserve residents from jury rolls to disinterest in participation and thereby absolving the state of legal responsibility, the majority opinion in *Kokopenace* is much more likely to contribute to Aboriginal estrangement from the justice system than it is to facilitate any kind of progress. As Justice Cromwell stated in dissent, "[w]hile 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 the remedy lies elsewhere."[21]

Again, it is useful to contrast the majority opinion with the dissent from the Court of Appeal, which also ruled that there was no *Charter* violation. Justice Rouleau's conclusion that the state had made reasonable efforts turned on a finding that "government was still struggling to better understand the complex problem of low and declining return rates in 2007-2008. It would take considerably more time and study if it was to be effectively addressed."[22]

In Justice Rouleau's opinion, the underrepresentation of reserve residents remained a legal issue situated within the realm of state responsibility. This is the only effective way to vindicate an accused's procedural rights. It is not the accused who does not participate in the jury process, but it is the accused who suffers the loss of a distinct perspective of Canadian society.[23] Indigenous legal traditions are part of the fabric of Canadian law and all participants in the justice system are cheated by the absence of First Nations participation.

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through the absence of reserve residents is that of their own community members. The result may well be perpetuation of the problems that have led to Aboriginal underrepresentation on jury rolls and overrepresentation in the correctional system in the first place. The Supreme Court has previously recognized the state's historical role in the systemic estrangement of Aboriginals from the justice system, and its corresponding duties to address those systemic issues, especially in the context of sentencing.[24] The deliberate refusal to apply the same principles in the context of jury participation is mystifying, and does not auger well for future efforts to address Aboriginal justice issues through the courts.

Justice Moldaver emphasized that the majority opinion should not be taken to suggest "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."[25] However, the majority expressly states that such efforts are not constitutionally required. Its ruling eliminates the possibility of any legal remedy if Ontario does "stall" its efforts to any degree short of deliberately excluding reserve residents from the selection process. Any efforts to address the underlying issues are thus legally gratuitous and discretionary.

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An Encouraging Precedent from the Government

The good news is that Ontario has made significant efforts since 2008. As a result of lower court decisions on the issue of First Nations underrepresentation on juries, Ontario commissioned an independent review from former Supreme Court of Canada Justice Frank Iacobucci, whose report was released in 2013.[26] The Iacobucci Report was based on extensive consultations, including Justice Iacobucci's personal attendance at more than a dozen First Nations communities. The Report gave thoughtful consideration to the complex historical, cultural, and socio-economic factors that are at the root of First Nations justice issues. It recommended government-to-government partnerships between Ontario and First Nations to resolve those issues:

> To my mind, the model relationship between the two groups should be partners rather than what history reveals as adversaries. First Nations do have governments, and this Independent Review has reinforced my belief in the importance of emphasizing a government-to-government relationship that incorporates an underlying respect for cultural, traditional, and historical values that are different. It is this government-to-government relationship that must underlie the relationship between Ontario and First Nations going forward in dealing with justice and jury representation issues.[27]

Ontario has since struck a committee of Aboriginal and government leaders to implement Justice Iacobucci's recommendations. The resulting government-to-government partnerships have been hard at work. Based on a recommendation of the committee, the Nishnawbe Aski Nation ("NAN"), supported by Ontario, led a pilot project over the past year to solicit reserve residents to volunteer for jury duty for coroners' inquests. Following the engagement process established by Justice Iacobucci's review, NAN teams visited 22 communities and signed up 473 volunteers. The volunteer list is now being used to supplement the regular jury roll for coroners' inquests. Grand Chief Alvin Fiddler of NAN told the *Toronto Star* that "the collaborative nature of the project, both NAN and the provincial government working on this, I think is paying huge dividends for both sides."[28]

Conclusion

The jury volunteer initiative, led by First Nations government, should put to rest any notion that First Nations People are unwilling to engage with the Canadian justice system when approached respectfully. However, the fact remains that progress only occurred once the issues were addressed and found to be unacceptable by a number of lower courts. With the *Kokopenace* decision, the Supreme Court has sent the counterintuitive message that the historical estrangement of First Nations from the court system is not a matter for the courts to consider in vindicating individual rights under their processes. To make matters worse, it has also absolved the legislature of any future responsibility for taking the kinds of steps that led to 473 volunteer First Nations jurors within two years of the Iacobucci Report.

This constitutes, at best, a problematic failure in dialogue. If the Court continues to write decisions that minimize state responsibility for its colonial actions, it risks losing the confidence of First Nations peoples and abdicating its constitutional role in upholding the rights of a protected minority. It risks making itself irrelevant. At worst, history has shown that courts can easily become tools of continuing oppression when meaningful efforts are not made to include Aboriginal peoples in their processes.

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NOTES:

[1] Julian is grateful to Marc Gibson for his assistance in preparing this paper.

[2] Sean Fine, "Chief Justice says Canada attempted 'cultural genocide' on aboriginals" (May 28, 2015), *The Globe and Mail*, online: <http://www.theglobeandmail.com/news/national/chief-justice-says-canada-attempted-cultural-genocide-on-aboriginals/article24688854/>.

[3] 2015 CarswellOnt 7168, 20 C.R. (7th) 1, 2015 SCC 28 (S.C.C.) [*Kokopenace*].

[4] *R. v. Gladue*, 1999 CarswellBC 778, 23 C.R. (5th) 197, [1999] 1 S.C.R. 688 (S.C.C.) at para. 67. See also *R. v. Sparrow*, 1990 CarswellBC 105, 46 B.C.L.R. (2d) 1, [1990] 4 W.W.R. 410, [1990] 1 S.C.R. 1075 (S.C.C.); *R. v. Williams*, 1998 CarswellBC 1178, 56 B.C.L.R. (3d) 390, 15 C.R. (5th) 227,

[1999] 4 W.W.R. 711, [1998] 1 S.C.R. 1128 (S.C.C.); *R. v. Ipeelee*, 2012 SCC 13, 2012 CarswellOnt 4375, 91 C.R. (6th) 1, [2012] 1 S.C.R. 433 (S.C.C.).

[5] *R. v. Kokopenace*, 2013 CarswellOnt 7938, 4 C.R. (7th) 67, 2013 ONCA 389 (Ont. C.A.) at paras. 109-120 [*Kokopenace ONCA*].

[6] *Kokopenace, supra* at paras. 65-66, 87, 126.

[7] *Ibid* at paras. 61-66.

[8] *Ibid* at para. 96.

[9] As Justice Cromwell observed in dissent, "random selection is only a good proxy for representativeness if the pool of persons to whom a process of random selection is applied is itself broadly based within the relevant community": see *ibid* at paras. 190, 224-226.

[10] *Ibid* at paras. 64-66.

[11] *Kokopenace, supra* at paras. 281, 284, 285.

[12] For a judicial examination of the historical context of the Royal Proclamation, see *Leclaire c. Québec (Agence du revenu)*, 2013 CarswellQue 14802, 2013 QCCS 6083 (C.S. Qué.) at paras. 187-216.

[13] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 23.

[14] *Canadian Citizenship Act*, S.C. 1946, c. 15, s. 9.

[15] E.g. *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, 2014 CarswellBC 1814, [2014] 2 S.C.R. 256, [2014] 7 W.W.R. 633 (S.C.C.) at para. 119; *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 CarswellMan 61, 27 R.P.R. (5th) 1, [2013] 4 W.W.R. 665, 2013 SCC 14 (S.C.C.) at para. 66.

[16] *Kokopenace, supra* at para. 98.

[17] *Ibid* at para. 101.

[18] See *supra* note 4.

[19] Treaty No. 3 promises to set aside land for use as reserves and provides that the Indians governed by the Treaty "shall have the right to pursue their avocations of hunting and fishing." In addition, the Treaty specifically states that the same Indians shall be subjects of the Queen, obey the law, and "assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty or infringing the laws in force in the country so ceded."

[20] *Kokopenace ONCA, supra* note 5 at para. 329.

[21] *Kokopenace, supra* at para. 196.

[22] *Ibid* at para. 284.

[23] As noted by Justice Cromwell, "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:" *Kokopenace, supra* at para. 249.

[24] See e.g. *Gladue* and *Ipeelee, supra*.

[25] *Kokopenace, supra* at para. 127.

[26] *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci* (February, 2013).

[27] *Ibid* at 85.

[28] Donovan Vincent, "340 aboriginals volunteer for inquest jury rolls in northern Ontario" (March 4, 2015), *Toronto Star*, online: <http://www.thestar.com/news/queenspark/2015/03/04/340-aboriginals-volunteer-for-inquest-jury-rolls-in-northern-ontario.html>.