IN THE MOOT COURT OF FLAVELLE

(ON APPEAL FROM THE FALCONER COURT OF APPEAL)

B E T W E E N

THE QUEEN

Respondent

-and-

GLADYS CAROL

Appellant

RESPONDENT'S FACTUM

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PART I – OVERVIEW

1. In Flavelle juries are the "conscience of the community," acting neither for the defendant nor the state. Falconer's laws and efforts seek as much as is reasonably possible to ensure that juries are impartial, through random selection from a broad cross-section of society.

2. In Falconer, the proportion of Indigenous people on jury rolls is lower than in the population. The reasons for this are complex, and include Indigenous people's reluctance to participate in a system of justice that conflicts with their values. Falconer has ensured complete and proportionate mailing and delivery to reserves and municipalities, and monitors its jury efforts yearly. Further, in Lenora, Falconer has sent disproportionately high numbers of questionnaires to on-reserve residents, and letters inquiring into the low response rates to First Nations Chiefs.

3. Sections 11(d) and 11(f) of the *Charter* guarantee Ms. Carol a right to trial by an independent and impartial jury. She has access to such a trial. Representativeness in the jury roll gives the defendant the right to the input of society, writ large, in the progress of her trial against the state. The appellant is mistaken in requiring the jury roll to reflect the demographic composition of the community. The state made reasonable efforts to facilitate the participation of Indigenous people on the Lenora jury roll. These efforts are sufficient for Ms. Carol's trial to be fair.

4. The government's efforts regarding jury rolls do not violate section 15. It is up to the executive, not the courts, to create an ameliorative scheme. There is no distinction created on the basis of an enumerated or analogous ground, and any distinction does not perpetuate disadvantage. If Falconer's laws and practices regarding jury rolls violate section 15, the infringement is justified under section 1.

5. If the Court finds that there has been a Charter violation that cannot be saved by section 1, the appropriate remedy is a suspended declaration with no time limit, or for at least three years.

PART II – STATEMENT OF FACTS

1. The government made efforts to, and achieved, complete mailing of jury notices

6. Throughout Falconer, the proportion of Indigenous people on jury rolls is lower than in the population. To address the low response rates from Indigenous people living on-reserve, Falconer dedicated substantial resources to ensuring that it had up to date and accurate lists of on-reserve residents. By 2017, mailing addresses and residency lists for on-reserve residents were as accurate as those used off-reserve. In Lenora, the response rate for on-reserve jury notices increased from 10% in 2008 to 15% in 2010, and the number of Indigenous jurors on Lenora's jury roll increased from 5.7% in 2008 to 10% in 2010.[1]

2. The Yak Report demonstrates that the reasons for low response rates are complex

7. Falconer commissioned Edward Yak, Dean of the law school at the University of Jackman, to conduct a report (the "Yak Report") on the underlying causes of low response rates to jury notices from First Nations reserves. The Yak Report made several findings.[2]

8. The Yak Report identified that one of the main reasons Indigenous people in Lenora did not respond to jury notices was cultural. In Lenora, Indigenous conceptions of justice centre around concepts of reconciliation and healing between perpetrator and victim, and exclude ideas of punishment and judgment. Many Indigenous persons told Yak they refused to participate in a "foreign system" that conflicted with their values.[3]

[1] Grand Moot 2018 Official Problem, paras 20, 32.
[2] Grand Moot 2018 Official Problem, paras 21, 22.
[3] Grand Moot 2018 Official Problem, paras 23-24.

3. The government implements a Jury Review Implementation Committee

9. In response to the Yak Report, Falconer funded a Jury Review Implementation Committee ("Jury Committee"), which operated for over two years. The Province ultimately decided to allocate the funds for the Jury Committee to other public services.[4]

4. Falconer and Lenora continue to make efforts to engage prospective Indigenous jurors living on-reserve

10. Since 2007, Stephanie Moon, the officer responsible for administering the *Juries Act* in Lenora, has continued to increase the number of jury service questionnaires sent out. If all randomly selected recipients responded to the questionnaires, 484 questionnaires should be sent to reserves to ensure a third of Lenora's jury roll is Indigenous. However, given the low response rates, Ms. Moon has sent out 600 questionnaires each year from 2008 to 2012, 800 questionnaires each year from 2012 to 2016, and 1000 questionnaires each year from 2016 to 2018.[5]

11. Each year, Ms. Moon also sends letters to First Nations Chiefs and community leaders in Lenora, inquiring into the low response rates. These letters have been met with either silence or requests for the Jury Committee to be reimplemented.[6]

12. Falconer has monitored its jury engagement efforts from 2008 to 2018. It maintains up to date statistics about the response rates for on-reserve and off-reserve residents every year.[7]

5. Procedural history

13. The Respondent agrees with the facts of Gladys Carol, the Appellant's jury roll, and the procedural history of this Charter action, as set out by the Appellant in their factum.

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[4] Grand Moot 2018 Official Problem, paras 31-33.
[5] Grand Moot 2018 Official Problem, para 40.
[6] Grand Moot 2018 Official Problem, para 39.
[7] Grand Moot 2018 Official Problem, para 41.

PART III – STATEMENT OF POINTS IN ISSUE

1. Do the government's efforts regarding jury rolls infringe section 11(d) or 11(f) of the *Charter*?

14. No. The government made sufficient efforts to ensure that the jury roll in Lenora was representative of society. Sections 11(d) and 11(f) confer on Ms. Carol the individual right to a fair trial with the input of society. The appellant concedes that a petit jury selected from this roll will be independent and impartial and is not required to reflect her demographics. It will ensure a fair trial with the input of society.

2. If the answer to question 1 is yes, is the infringement demonstrably justified in a free and democratic society under section 1 of the *Charter*?

15. The Respondent agrees that if the Court finds a violation of section 11(d) or 11(f), such a violation cannot be saved by section 1.

3. Do the government's efforts regarding jury rolls infringe section 15 of the *Charter*?

16. The Court cannot order the executive to create an ameliorative scheme under section 15. The government's efforts regarding jury rolls do not create a distinction on the basis of an enumerated or analogous ground, and do not impose a burden or deny a benefit to Indigenous people living on-reserve.

4. If the answer to question 3 is yes, is the infringement demonstrably justified in a free and democratic society under section 1 of the *Charter*?

17. If the Court finds that the government's efforts regarding jury rolls infringe section 15 of the *Charter*, the infringement is justified under section 1.

5. If the answer to either question 2 or question 4 is no, what is the appropriate and just remedy pursuant to section 24(1) of the *Charter*?

18. The appropriate and just remedy is a suspended declaration with no time limit, or for at least three years. A temporary stay of proceedings is not warranted.

PART IV – ARGUMENT

Issue 1: Ms. Carols' ss. 11(d) and 11(f) rights to a fair trial were respected

a) Nature of the s. 11 rights to a jury trial

19. The institution of the jury has been integral to the common law criminal justice system for hundreds of years.[8] It is established in other common law jurisdictions besides Flavelle, including the United States, England and Canada.[9] Given its long history, the jury is a multifaceted institution with political, democratic, procedural and constitutional dimensions. What is at issue in this appeal is the scope of the constitutional purposes and requirements of the jury.

20. An accused person's right to a trial by jury is protected by sections 11(f) and 11(d) of the *Charter.*[10] These, respectively, guarantee the right to a trial by jury, and by an impartial and independent tribunal. These are fundamentally individual rights that protect against the power of the state.[11] The Constitution requires that jury trials are fair. The procedures of selecting the jury roll, array and petit jury must guarantee a fair trial for any individual accused.[12]

21. The jury selection process in Flavelle includes a number of protections of trial fairness. These are: the ability of either party to challenge a potential juror for cause, and to exercise a limited number of peremptory challenges; the random selection of potential jurors; the oath or affirmation required from the juror; and instructions from the trial judge on the duty to decide fairly and impartially. Further, there is a well-established presumption of juror impartiality.[13]

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[8] *R v Turpin* [1989] 1 S.C.R. 1296 at 14 ["*Turpin*"]; Canada Law Reform Commission Working Paper (1980) at pp. 1, 19; *R v Find*, [2001] S.C.R. 863 at 1 ["*Find*"].
[9] See for example Sir William Blackstone *Commentaries on the Law of England*, Book 4: Philadelphia, 1803 at pp 349-359; US Const amend VI.
[10] *R. v. Kokopenace*, 2015 SCC 28 at 1 [*Kokopenace*] , *Canadian Charter of Rights and Freedoms* ss. 11(d) and 11(f), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[11] *Turpin*, *supra* note 8 at 18, *Mills v R* [1986] 1 S.C.R 863 at p. 917 (dissenting but not on this point).
[12] Grand Moot Official Problem at 8-14.
[13] *R v Parks* [1993] 15 O.R. (3d) 324 (C.A.) at 335 and 338 ["*Parks*"]; *R v Sherratt*, [1991] 1 S.C.R. 509 at 41 ["*Sherratt*"].

22. The appellant's claim that s. 11 entitles Ms. Carol to a representative jury, where representativeness means her jury roll reflects the demographic composition of her community, is incompatible with many fundamental tenets of the Flavellian jury system. It relies on the premise that the demographic identity of a juror will influence their impartiality or the perceived fairness of a trial. This premise undermines the entire process of jury selection in Flavelle. Compiling jury rolls from judicial districts is not a guarantee of demographic representativeness. Random selection will never guarantee any particular demographic composition of a jury array. No juror can be presumed impartial if their characteristics dictate their decision.

23. However, the appellant does not ask the Court to overhaul the entire jury system, as would be logically required by her position. Instead, she asks for an interpretation of ss. 11(d) and 11(f) that would leave the criminal justice system internally conflicted and unable to guarantee a fair trial to an accused person. The Court should reject an interpretation that leads to such a result.

b) Safeguards in the trial system alleviate concerns about demographic representativeness

24. Many of the Appellant's concerns about the effects of the unrepresentativeness attributed to the Lenora jury roll are protected against by other aspects of the trial process. These include the presumption of juror impartiality and the procedures supporting it, and the availability of challenges for cause and peremptory challenges for both parties. These processes provide several layers of protection for the independence and impartiality of the jury and ensure the fulfillment of the accused's s. 11(d) and 11(f) rights.

i. Presumption of Juror Impartiality

25. The presumption of juror impartiality in Flavelle is well-established.[14] A proper consideration of the presumption of impartiality, and the institutional safeguards in the trial process

[14] *Ibid.*

that justify it, alleviates much of the Appellant's concern about the effect of a demographically unrepresentative jury roll on the rights of the accused.

26. An individual's ability to fulfill the duties of fact-finding and collective deliberation entrusted to the juror does not depend on his or her race, sex, religion, or any other demographic characteristic. All jurors are required to swear an oath or affirmation that they will perform their duties impartially.[15] Jurors are presumed to do their duties in accordance with this oath.[16] They are screened for partiality through challenges by the parties, both peremptory and for cause, and are instructed by the judge in their duty to adjudicate on the facts presented at trial.

27. Partiality includes both an attitudinal and a behavioural component: a potential juror must both hold a bias and allow that bias to influence his or her deliberation on the verdict.[17] The presumption of impartiality does not require that all potential jurors are presumed free from all unconscious bias; rather, it presumes that where such biases exist they are "cleansed by the trial process" and jurors are capable of setting them aside when confronted with their explicit duty to decide impartially.[18]

28. The trial process further protects against the risk that the jury will be unable to understand the situation of the accused, or a particular defense raised, because of cultural divergence. As Curtis J noted in *R v West*, it is the role of the accused's counsel to provide the jury with the relevant context and information it needs to make a fair decision.[19]

29. The assumption that, despite these safeguards, a juror would be more sympathetic or understanding to an accused based on a shared characteristic such as race has been rejected in the

[15] *Criminal Code,* R.S.C 1985 c. C-46 s. 631(4).
[16] *Supra* note 13.
[17] *Parks, supra* note 13 at 364-65; cited in *Find, supra* note 8 at 32.
[18] *Find, supra* note 8 at 40.
[19] *R v West*, [1992] B.C.J. No. 2958 at 11 (B.C.S.C.) cited in *R v F(A)*, [1997], 30 O.R. (3d) 470 (C.A.).

jurisprudence, and often relies on unsupported stereotypes. Similarly, the assumption that a juror will be less understanding because he or she does not share such a characteristic is not supported as a generalization. Furthermore, the Court has recognized that the accused's right to a representative jury roll "is not a right to a roll that shares any distinctive characteristics that she may possess."[20]

30. For example, in the case of *R v Biddle*, the Court considered an appeal on three grounds, one of which was that the Crown's use of stand-aside powers to empanel a jury entirely of women was an abuse of process or created a reasonable apprehension of bias.[21]

31. Justice L'Heureux-Dubé in dissent upheld Doherty J's analysis at the lower court that "it is dangerous and contrary to our concepts of equality and individuality to make findings of partiality on the basis of assumed stereotypical reactions based on gender."[22] Justice McLachlin (as she then was) in concurrence noted that she saw "no reason to suppose that an all-woman jury cannot be as impartial as all-male juries have been presumed for centuries."[23]

32. This case is not a direct parallel to *Biddle*: that case discussed the gender rather than the Indigenous identity of potential jurors, and the concern raised about the jury composition was that women jurors would be disposed to be unsympathetic towards the male accused in an assault case. However, the principle that, in general, the Court requires more than a comparison (or contrast) between a characteristic of the accused and of the potential juror in order to suspect partiality applies to this case as well.

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[20] *R v Church of Scientology of Toronto*, [1997] 33 O.R. (3d) at 146 ["*Scientology*"].
[21] *R v Biddle*, [1995] 1 S.C.R. 761 ["*Biddle*"]: Justice Sopinka in the majority upheld the appeal on a different ground – that the Crown had called inadmissible reply evidence – and did not address the issue of the jury composition. Justices L'Heureux-Dubé , Gonthier and McLachlin all wrote separate reasons addressing the jury issue. L'Heureux-Dubé J dissented in the result. McLachlin and Gonthier JJ concurred in the result but separately addressed the jury issue.
[22] L'Heureux-Dubé J in dissent at para 39, quoting Doherty J at the Ontario Court of appeal at p. 770.
[23] *Biddle, supra* note 21 at 60.

ii. Challenges for cause, including for racial bias

33. The unlimited right of the accused to challenge potential jurors for cause during the selection of the petit jury protects against the risk that jurors who do not share characteristics of the accused will be biased because of discriminatory attitudes.[24] This includes challenges on the basis of racial bias. McLachlin J (as she then was) explicitly acknowledged the risk that a jury may reflect racial biases that are prominent in the community from which it is drawn in *Williams*.[25] The threshold for raising such a challenge is low, and requires only that there be an "air of reality" to the allegation of partiality.[26] Where there is any doubt about such prejudice, trial judges ought to "err on the side of caution and permit prejudices to be examined."[27] This procedure safeguards juries from the reasonable risk of racial prejudice.

iii. Role of Peremptory Challenges

34. The accused and the prosecutor are each entitled to a limited number of peremptory challenges of potential jurors.[28] This is an additional safeguard against partiality in the jury. A party "might wish to challenge prospective jurors peremptorily because he believes that the juror might not be impartial because of his reactions to the facts of the case or because he believes the juror might not be impartial towards the accused himself."[29] Even when the suspicion of

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[24] *Criminal Code,* R.S.C 1985 c. C-46 s. 638(1).
[25] *R v Williams*, [1998] 1 S.C.R. 1128 ["*Williams*"].
[26] *Sherratt*, *supra* note 13 at 63*;* cited in *Parks, supra* note 13 at 31.
[27] *Williams, supra* note 18 at 22.
[28] *Criminal Code,* R.S.C 1985 c. C-46 s. 634(2) prescribes the different numbers of challenges available depending on the nature of the offence and of the sentence – under 634(2)(a) each party is entitled to twenty peremptory challenges if the charge is high treason or first degree murder; under 634(2)(b) to twelve peremptory challenges if the accused is charged with any other offence for which the imprisonment term could exceed five years; and under 634(2)(c) to four challenges for any other offence.
[29]Canada Law Reform Commission Working Paper (1980) at 55.

impartiality would not justify a challenge for cause, peremptory challenges allow a party to exclude a limited number of jurors to ensure the appearance of impartiality.

c) Honour of the Crown and the Unique Position of Indigenous People in the Justice System

35. The Honour of the Crown is not engaged in this case. It is an important doctrine informing the actions of the government in its specific dealings with Indigenous people, but does not apply where the government is performing "constitutional obligations owed to Canadians as a whole."[30] Sections 11(d) and 11(f) of the *Charter* enshrine rights that are held by all citizens of Flavelle.[31]

36. The Appellant argues that the Honour of the Crown applies to fair trial rights because: Indigenous peoples are disengaged from the justice system as a result of the imposition of Crown sovereignty; and because s. 6(8) of the *Juries Act* specifically applies to Indigenous on-reserve peoples.[32]

37. The Appellant is alleging a violation of the *Charter* and not of the *Juries Act*. The obligation at issue is the government's duty to provide a fair jury trial to Ms. Carol and other accused. This is a constitutional obligation that is owed to Flavellians in general, such as discussed by the Court in *Manitoba Metis*.[33] Furthermore, the effects of ss. 6(8) and 6(2) are equivalent – there is no difference in how the *Juries Act* treats Indigenous on-reserve citizens and all other citizens. As noted by the Supreme Court of Canada in *Kokopenace*, this is "at bottom, an administrative provision" that is a "vehicle[] through which the state fulfils its constitutional obligations under s. 11 of the *Charter*."[34]

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[30] *Manitoba Metis Federation Inc v Canada (AG)* [2013] 1 S.C.R. 623 at 72 ["*Manitoba Metis*"].
[31] Exercised only by those who are accused of a crime
[32] Factum of the Appellant at paras 42 and 43.
[33] *Supra* note 30.
[34] *Kokopenace, supra* note 10 at 99 and 100.

38. While the Honour of the Crown is aimed at reconciliation and addresses the harmful legacy of the colonial imposition of Crown sovereignty, this does not support its application to every aspect of the justice system broadly, as the Appellants argue. It is correct that the Yak Report identifies systemic issues, resulting from the complex and disturbing history of colonialism, that have led to the alienation of many Indigenous people from the justice system.[35] The Appellant concludes that challenges to the justice system therefore engage this history and the Honour of the Crown.[36]

39. This broad argument could apply to all facets of the justice system, any of which are linked to colonial history insofar as they are imposed by the sovereign. The Court has been clear that the Honour of the Crown doctrine applies more narrowly to contexts in which the government is dealing specifically with Indigenous people, such as in the Crown assumption of discretionary control over an Aboriginal interest, in the interpretation of s. 35 of the *Constitution*, in making and implementing treaties and statutory grants.[37] In the case of s. 11, by contrast, the right to a fair trial and the corresponding duties of the state apply uniformly to all citizens of Flavelle.

d) The Representativeness Requirement

40. It is common ground between the appellant and respondent that sections 11(d) and 11(f) of the *Charter* confer on Ms. Carol a right to representativeness on the jury roll, and that this right is limited. The disagreement centres on the interpretation and extent of this right. Representativeness is important to ss. 11(d) and 11(f) insofar as it furthers their guarantees of a trial by an independent and impartial jury. This demands that society, writ large, have input in a trial and guard against the

[35] Grand Moot Official Problem paras 5-7 and 16-22.
[36] Factum of the Appellant at 41.
[37] *Manitoba Metis, supra* note 30 at 73.

misapplication of the power of the state: it does not relate to the demographic composition of the jury roll.

i. Representativeness is guaranteed only as far as it serves the purposes of the *Charter*

41. Representativeness is not directly required by the *Charter*. It is unlike the features of impartiality and independence which are explicitly guaranteed. It has been introduced as a Constitutional requirement through case law, which identifies that representativeness has a very narrow and specific meaning which is tailored to accomplish the goals of ss. 11(d) and 11(f).[38] With respect to the jury roll, it requires that the roll be compiled "from a broad cross-section of society, honestly and fairly chosen."[39]

42. In *R v Biddle,* McLachlin J (as she then was) observed, in reference to the end of impartiality and independence, that "[r]epresentativeness may be a means to achieving this end. But it should not be elevated to the status of an absolute requirement."[40] Gonthier J, while disagreeing about the effect of the alleged representativeness in that case, agreed that "[w]hile representativeness is not an essential quality of a jury, it is one to be sought after."[41]

ii. The s. 11(f) right to a jury trial

43. Representativeness in s. 11(f) requires the participation of society, broadly, in the trial of the accused. Section 11(f) is an individual right that belongs to an accused person. The accused is entitled to the benefit of a trial by jury because this offers a "prophylactic against the exercise of arbitrary power."[42] The accused has the right to engage the citizenry as the final arbiter of justice and a check on the power of the state. The appellant proposes that 11(f) is broader and protects the

[38] *Sherratt, supra* note 13 at 31 and 35; *Find, supra* note 8 at 43; *Kokopenace, supra* note 10.
[39] *Sherratt, supra* note 13 at 31.
[40] *Biddle, supra* note 21 at 58.
[41] *Biddle, supra* note 21 at 53.
[42] Justice White in *Taylor v Louisiana* cited in *Scientology, supra* note 20 at pp. 85-86.

"societal purposes" of the jury.[43] This is inconsistent with the statements of the Supreme Court of Canada and with the principles underlying the fair trial rights.

44. Section 11 "protect[s] the interests of the individual and not of society."[44] This section of the *Charter* is "in its nature, an individual right and has no collective rights dimension."[45] These s. 11 rights to a fair trial protect the accused who is faced with the most adversarial application of the power of the state, in which the government "plays the role of the singular antagonist of the individual".[46] It is essential that an individual who is subject to the full extent of the state's power be specifically protected against its misapplication. This is the purpose of the individual right to a fair trial.[47] S. 11 does not "deputize" an accused at his or her most vulnerable to accomplish broad societal ends.[48] It protects the accused for her own sake.

45. In light of this individual purpose, s. 11(f) demands that the jury be representative in the sense that it can represent the input of the community writ large; that it can act as a democratic check against the power of the state to ensure a just outcome for the accused. The jury roll must be drawn from the citizenry, and petit juries must be able to act as the "conscience of the community."[49] This function does not depend on the demographics of the jury roll: the responsibility of ensuring justice rests on the Flavellian community as a whole. Representativeness in the context of s. 11(f) requires, straightforwardly, that the citizenry be present in the justice system.

46. The appellant claims that "representativeness" requires demographic reflection because the social benefits of s. 11(f) should be available to all groups in Flavelle. It is simply not the case that

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[43] Factum of the Appellant at 26.
[44] *Turpin, supra* note 8 at 18.
[45] *Mills v R*, [1986] 1 S.C.R. 863 at 917: Lamer J (as he then was) discussing s. 11(b).
[46] *Libman c. Quebec (Procureur general*), [1997] 3 S.C.R. 569 at 59.
[47] *Find, supra* note 8 at 28: "The ultimate requirement of a system of jury selection is that it results in a fair trial."
[48] Factum of the appellant at 26.
[49] *Sherratt, supra* note 13 at 30.

these social benefits are constitutionally protected by s. 11(f). There is no requirement of demographic proportionality because it is not relevant to the individual guarantee in s. 11(f).

The jury has social benefits, but s. 11 does not protect society's interests

47. The appellant has correctly observed that there are social interests in conducting trials by jury.[50] However, the appellant is wrong to interpret these interests as part of the Constitutional guarantee of the right to a jury trial. As Wilson J explained in *R v Turpin* "[t]he state can legitimately advance its interests in jury trials through legislation… but those interests are not embraced in a section of the *Charter designed to protect the individual*."[51] While it is true that social interests may be "incidentally satisfied" by an accused person's exercise of his or her right to a trial by jury, social interests are not protected by section 11.[52]

48. The appellant's reliance on L'Heureux-Dubé J's comments in *R v Sherratt* is misplaced.[53] During her discussion of the historical development of the jury, L'Heureux-Dubé J cited "rationales" for the jury, including its collective decision-making power, representative character, and tool for educating and increasing the trust of the public in the justice system.[54]

49. This analysis neither states nor implies that s. 11(f) protects social purposes. L'Heureux-Dubé J recognizes societal benefits of the institution of the jury, and contextualizes the modern jury in its historical roots. The discussion of these social benefits does not automatically mean they are protected by s. 11. The appellant's reading of *Sherratt* conjures an interpretation of the *Charter*, directly contradicting that of Wilson J in *Turpin*, from a discussion that makes no mention of 11(f).

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[50] Factum of the Appellant at 24.
[51] *Turpin, supra* note 8 at 18 (emphasis added).
[52] *Ibid.*
[53] Factum of the Appellant at 24.
[54] *Sherratt, supra* note 13 at 30 citing Canada Law Reform Commission Working Paper (1980).

50. L'Heureux-Dubé J states "The perceived importance of the jury *and* the *Charter* right to jury trial is meaningless without some guarantee that it will perform its duties and represent, *as far as is possible and appropriate in the circumstances*, the larger community."[55] She distinguishes between the *importance* of the jury and the *right* to the jury. Representativeness, in the qualified sense in which she introduces it, is important to both – but its role in supporting the individual *Charter* right is still distinguished from its broader social value.

51. *Sherratt*, like *Turpin*, recognizes the right to a trial by jury as an individual right which belongs to the accused. The vital importance of this right to our justice system comes from its protection of the accused against any abuse of the vast power of the state in trying its citizens. The scope of representativeness in s. 11(f) must be interpreted in light of its purpose of protecting the individual. This requires only that the accused have access to the input of society in ensuring a just trial. It does not prescribe the demographic composition at any stage of the jury selection process.

iii. The s. 11(d) right to an impartial and independent tribunal

52. Ms. Carol does not allege that the lack of Indigenous jurors on the petit jury at her trial is likely to result in a partial jury or a biased verdict. Indeed, such an argument could only proceed on the unacceptable premise that the demographic composition of the petit jury will influence the verdict, and that the presence of one or more Indigenous jurors would change the outcome of the jury deliberation. The jurisprudence soundly rejects this proposition.

53. Despite this, the appellant asks the Court to interpret s. 11(d) as requiring that the jury roll reflect the demographics of the community, although this does not need to translate into a representative petit jury for any accused. With respect, this is a self-contradictory position. If demographic congruency between the jurors and the accused is either a requirement for

[55] *Sherratt, supra* note 13 at 35 (emphasis added).

impartiality or even just a benefit, it would be unjust that it is unequally distributed amongst accused persons. However, demographic congruency must be unequally distributed in the system the appellant proposes, because of the mechanism of random selection and the composition of judicial districts, as detailed below.

54. The appellant also argues that the proportional underrepresentation of Indigenous people on the Lenora jury roll leads to a reasonable apprehension of bias, or appearance of "institutional partiality", that undermines the accused's 11(d) right. A reasonable apprehension of bias must rest on some action or omission of the state. In this case, the state took reasonable efforts to encourage the participation of all groups in Flavellian society, and there is no state action which could be reasonably understood as biased. Reasonable apprehension of bias should not be used as a tool to impose positive obligations on the state to enact certain policies which the *Charter* would not otherwise require.

Impossibility of Demographic Proportionality on Petit Juries

55. If the jury's impartiality depends on its demographic composition, all juries would be biased in some way. It is not possible that any twelve people could represent the diversity of all Flavellian society.

56. Almost any jury will "skew" in some direction demographically: it will not represent all races, religions, sexual orientations, socioeconomic situations, or other perspectives in Flavellian society. The purpose of the jury is not to hold a referendum in which any conceivable identity group may have input, nor is it to "average out" the biases amongst the twelve individuals to approximate the position of Flavellian society in general.

57. Even if it were possible to compose petit juries that reflected the proportions of all identity groups in Flavelle, there is no reason to believe this would be just. A member of a minority group

composing 1/12th of the population would then be entitled to one juror who shares that characteristic, where a member of a majority would be entitled to the majority of jurors sharing a characteristic. If the Court accepted the premise that there is an advantage in a juror sharing the characteristic of the accused, this is clearly unfair. There is no ideally just demographic composition which the jury can emulate.

A representative jury roll is not a tool for a "chance" at a proportionate jury

58. Representativeness in the jury roll is also not intended to give the accused a "chance" that someone on the jury will share his or her characteristics. Either the demographic identity of a juror is significant for the trial outcome or it is not. The case law has established that it is not.

59. The appellant argues that the jury process is "impugned at the institutional level" where the roll is not proportionally representative, in which case "the petit juries selected from that roll are guaranteed not to include distinct perspectives."[56] This argument still relies on the composition of petit juries as the ultimate source of the significance of the representativeness right.

60. If juror characteristics were important for the fairness of a trial, it would not make sense that the accused is afforded only a "chance" at this advantage. Indeed, that would subject the rights of the accused to a random selection process that would afford different degrees of justice to different trials. This is arbitrary. As Cromwell J noted in his dissent in *Kokopenace*, it is "inconsistent with the principles of *Charter* rights to speak of a 'fair opportunity' to have a representative jury."[57]

Appearance of Partiality in the Institution

61. The appellant argues that although there is no requirement that her petit jury include jurors with any particular characteristics, the absence of proportional representativeness in the jury roll

[56]Factum of the Appellant at 20.
[57] *Kokopenace, supra* note 10 at 249.

will create an appearance of "institutional bias" that violates her 11(d) right. This is not the case. The jury roll must be representative only to the extent necessary to protect the individual rights in ss. 11(d) and (f). A jury chosen from a roll that is a "broad cross-section of society, honestly and fairly chosen" will be able to perform its deliberative function without bias or the reasonable perception of bias. The Falconer jury selection process meets this threshold.

62. In some cases a disparity between the demographics of a region's jury roll and population would create a reasonable apprehension of bias in the jury selection process. It is possible that even in situations where the procedural safeguards of trial ensure against *actual* bias on juries, such disparity may still create a reasonable perception of bias in the process.[58] More, however, is required to support a perception of bias than mere numerical disparity.

63. A reasonable perception that the state is biased in the jury selection process must be grounded in some action or omission of the state. It would be unreasonable to perceive bias where the state has not demonstrated it in either of these ways. The appellant correctly notes that state action which intentionally excludes certain groups from the jury roll would create a reasonable apprehension of bias.[59] There is no submission that the state intentionally excluded any group in this case.

64. Some unintentional exclusions of distinct groups from the jury roll may still create a reasonable apprehension of bias. This may be the case if such exclusions amounted to willful blindness or negligence on the part of the state, reflected in insufficient efforts to include a particular group. Where the state has omitted some group from its efforts to compile the jury roll, it may be required to take "positive action" to account for the omission. That was not the case in the government's treatment of Indigenous residents in Lenora.

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[58] *Biddle, supra* note 21 at 50, concurrence of Gonthier J.
[59] Factum of the Appellant at 53; *Scientology*, *supra* note 20.

e) The State was not required to take further steps to actively encourage Indigenous participation in the jury process

65. The state did not omit Indigenous jurors from the Lenora jury roll. Ms. Moon, the officer responsible for administering the relevant section of the *Juries Act*, made active and sustained efforts to include Indigenous people on the roll. Indeed, to the extent that the low response rate from on-reserve residents was caused by difficulty obtaining lists of residents and delivering notices, Ms. Moon's efforts solved these problems. The government has taken active steps to facilitate the inclusion of Indigenous jurors and address logistical barriers to their participation. These efforts do not give rise to a reasonable apprehension of bias.

66. The appellant equates its allegation that the state did not take enough positive steps to encourage Indigenous response rates with the "active exclusion" of particular groups from the jury roll. The state's obligation extends no further than to facilitate the participation in the jury process of all of society equally. The Court recognized this in *Kokopenace*, in which the claimant alleged that the state's effort to compile lists of Indigenous potential jurors and to deliver jury notices on reserves were inadequate, and additionally that the state had a responsibility to encourage responses. Moldaver J held that the state's positive efforts to facilitate participation were sufficient, and that there was no additional responsibility to encourage participation.

67. In this case, the state's efforts go further than those disputed in *Kokopenace*. Through the diligent work of Ms. Moon, Flavelle has fixed the logistical problems of compiling lists and delivering notices to on-reserve Indigenous potential jurors. The only potentially culpable omission of the state the appellant identifies is that the government did not actively encourage Indigenous potential jurors to participate more than it does the rest of society.

68. Democratic processes do not require the state to actively encourage its citizens to participate. The government, for example, has no obligation to encourage citizens of any particular

identity to vote, only to ensure that every eligible citizen has an opportunity to vote. Omissions that impede this opportunity may violate the right to vote. But the government is not obliged to catalogue each identity group and ensure they are participating.

f) Conclusion on s. 11

69. Ms. Carol's ss. 11(d) and 11(f) rights to trial by representative jury were respected. Her limited right to a representative jury roll extends only as far as is required to ensure the jury is impartial, independent and drawn from a broad cross-section of society in a fair manner. The Lenora jury roll meets this threshold. The state is not required to actively encourage the participation of any particular group in the jury selection process, just as it is not required to encourage any distinct group to vote or to exercise any other aspect of collective deliberation that is assigned to society writ large.

Issue 2: If there is a violation of section 11(d) or 11(f), the infringement is not demonstrably justified under section 1 of the *Charter*

70. The Respondent agrees that if the Court finds a violation of section 11(d) or 11(f), such a violation cannot be saved by section 1.

Issue 3: the government's laws and efforts regarding jury rolls do not violate section 15 of the *Charter*

71. The test for section 15 is outlined in *Kahkewistahaw v. Taypotat*, and has two stages. First, the law must, on its face or in its impact, create a distinction on the basis of an enumerated or analogous ground. Second, the law must perpetuate arbitrary disadvantage – that is, the law must fail to respond to the actual capacities and needs of the members of the group and instead impose a burden or deny a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage.[60]

[60] *Kahkewistahaw v. Taypotat*, [2015] 2 SCR 548 at paras 19, 20, 2015 SCC 30.

72. In the Respondent's view, the government's jury efforts do not discriminate under section 15; but *if* there is discrimination under the test, the requisite points of government improvement are nuanced. Our argument under section 15 has three prongs. First, the government's efforts regarding jury rolls do not infringe the section 15 rights of prospective Indigenous jurors according to the *Taypotat* test. Second, the government's jury roll efforts do not infringe the section 15 rights of the Appellant under *Taypotat*. Third, section 15 has not and should not be used to compel the government to create ameliorative schemes.

a) The government's jury laws and efforts do not infringe the section 15 rights of prospective Indigenous jurors living on-reserve

73. The government's jury roll efforts do not discriminate against prospective Indigenous jurors living on-reserve. They do not create a distinction, as there is equivalent mailing and delivery of jury notices to individuals on-reserve and off-reserve. The efforts are also not discriminatory, as they do not impose a burden or deny a benefit, but rather extend the opportunity to participate on the jury to all residents in the Province, and respond to the circumstances of Indigenous people on-reserve through a number of ameliorative steps.

i. There is no distinction on an enumerated or analogous ground

74. Falconer law and policy regarding juries does not create a distinction between Indigenous people living on-reserve and other people in Falconer. Falconer provides an equivalent opportunity to all its residents to participate in the jury process. Falconer has dedicated substantial resources to ensuring that it has up to date and accurate lists of on-reserve residents. By 2010, these efforts resulted in mailing lists as accurate as those used off reserve.[61]

75. The Respondent agrees with the Appellant that Falconer must take responsibility for its role in Indigenous people's disadvantage. Indigenous people have been uniquely mistreated by the

[61] Grand Moot 2018 Official Problem, para 20.

Falconer government. However, acknowledging that *Falconer at large* is responsible for Indigenous people's disadvantage does not mean that *Falconer's jury laws* are responsible for Indigenous people's disadvantage.

76. In *Symes v. Canada*, the Supreme Court of Canada stated about section 15, "If the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved. We must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision."[62] Falconer's disadvantaging of Indigenous people has resulted in social circumstances for which it must take responsibility. However, Falconer's jury laws and efforts are not the source of that disadvantage.

77. While response rates from Indigenous people living on-reserve are low, the reasons for this are complex. The Appellant has not demonstrated that the low return rates are caused by insufficiency in the government's efforts to the extent required to find a distinction. The Yak Report found that among other reasons, Indigenous people in Lenora were hesitant to participate in Flavelle's justice system because in Lenora, Indigenous conceptions of justice are centred around reconciliation and healing, while Falconer's are centred around punishment.[63] As stated in *Symes*, the Court should not find a distinction where it is not clear government law or action creates one.

78. Acknowledging that the executive should make efforts to improve the general position of Indigenous people does not require the executive must address a *particular* issue – in this case, the representation of Indigenous people on-reserve on jury rolls. Discretion as to which issues merit ameliorative programs are best left to the executive.

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[62] *Symes v. Canada*, [1993] 4 SCR 695 at para 134, 1993 CanLII 55 (SCC).
[63] Grand Moot 2018 Official Problem, para 23-24.

ii. The government's jury laws and efforts do not impose a burden or deny a benefit to prospective Indigenous jurors living on-reserve

79. Falconer's efforts to engage Indigenous people as jurors do not deny a benefit or impose a burden in a way that perpetuates their disadvantage. Whether jury membership is a duty or a benefit, Falconer's jury laws do not impose a burden, nor deny a benefit. The opportunity to participate in jury rolls is evenly extended to municipalities and reserves through effective mailing and delivery.

80. The Appellant cites *Eldridge v. British Columbia*.[64] However, *Eldridge* does not state that the government is required to target groups for inclusion. Rather, *Eldridge* states that when the government does provide a benefit, it is obliged to do so in a non-discriminatory manner. This means that in many circumstances, governments must extend the scope of a benefit to a previously excluded class of persons.[65] The resolution of the previous issues with mailing lists for on-reserve residents extends the benefit to all residents of Falconer.

81. Because the reasons for Indigenous underrepresentation on juries are complex, there is not enough specific evidence that the government's efforts perpetuate disadvantage. The Yak Report found for instance that in Lenora, Indigenous conceptions of justice were centred around reconciliation and healing, and that this led some to not to act as jurors.[66] It is not clear that the lack of participation by Indigenous people living on reserve would be considered by Indigenous people on-reserve as a disadvantage.

82. At this stage of the section 15 analysis, the Court may also consider whether the laws already in place respond to the circumstances of the claimant group.[67] The Court should consider

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[64] Factum of the Appellant, para 80.
[65] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 73, 151 DLR (4th) 577.
[66] Grand Moot 2018 Official Problem, para 23-24.
[67] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 105, 1999 CanLII 675 (SCC).

the ameliorative steps that the government has already taken beyond equivalent mailing and delivery. In Lenora, the executive has sent out a disproportionately high number of questionnaires to on-reserve residents compared to off-reserve residents. The executive in Lenora has also written letters to First Nations Chiefs each year, inquiring into the low response rates. The Province also maintains yearly monitoring of its jury roll efforts, demonstrating that it is staying informed of the effectiveness of its jury laws and actions.

b) The government's jury laws and efforts do not infringe the section 15 rights of the Appellant as an Indigenous defendant

83. The government's jury roll efforts do not discriminate against the Appellant as an Indigenous defendant. There is no distinction between how the Appellant's on-reserve community and other communities are engaged. The efforts are also not discriminatory. There is no evidence that increased government efforts to encourage Indigenous people to join juries would affect the outcome of the Appellant's or other Indigenous defendants' trials. The Appellant's dignity is respected by the government's considerable efforts to engage her community.

i. There is no distinction on an enumerated or analogous ground

84. From the perspective of an Indigenous defendant, the government's efforts to engage Indigenous people on-reserve on juries do not create a distinction on an enumerated or analogous ground. There is no distinction between the government's jury efforts regarding the defendant's community and the communities of other defendants. Falconer provides an equivalent opportunity to all its residents to participate in the jury process, by ensuring that Indigenous people living on-reserve receive jury questionnaires at a proportionate rate.

85. The government should generally address social disadvantage it has caused for Indigenous people; however, the Court should not find a distinction within an area of law where it is not clear

such a distinction exists. While the reasons for the low response rates are complex, the Yak report demonstrates a key reason for this is cultural difference between Indigenous conceptions of justice in Lenora and conceptions of justice in Falconer.

ii. The Appellant as an Indigenous defendant is not disadvantaged by the government's jury roll laws and efforts

86. There is no proof that if the government increased its efforts to engage Indigenous people living on-reserve on jury rolls, this would affect the outcome of the defendant's trial. The Appellant has not described a tangible disadvantage.

87. The government has respected the Appellant's dignity in its efforts to compile the jury roll. As stated in *Law*, "The determination of whether a legislative provision infringes a claimant's dignity must in every case be considered in the full context of the claim."[68] The full context of this claim includes the government's *efforts* to compile jury rolls, which is logical to focus on because the Appellant does not ask for proportionality in the composition of the jury roll. In its efforts, the government has respected the Appellant's dignity by its engagement of her community, through its equivalent mailing, and further ameliorative steps taken in both Lenora and Falconer.[69]

c) Section 15 should not be used to compel the government to create an ameliorative scheme to encourage Indigenous people living on-reserve to participate in jury rolls

88. The Court should not compel the government to take positive actions to encourage Indigenous people living on-reserve to join jury rolls. If it does so, the Court may firstly, upset the balance of other programs within other areas in its jurisdiction that Falconer has engaged to ameliorate the position of Indigenous people in the province. Secondly, in the Court's reasons on the jury system specifically, it risks outlining steps that should be taken or forgone without full

[68] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 105, 1999 CanLII 675 (SCC).
[69] See above at paragraph 82 for a summary of these ameliorative steps.

knowledge of how they fit together. Thirdly, the Supreme Court of Canada has only recognized adverse effects discrimination in two cases, both of which are distinguishable from the case at bar.

89. Successful section 15 cases have involved striking down identifiable laws, regulations, or government actions that discriminate against an enumerated or analogous group. Section 15 has not been used to require the government to create ameliorative schemes. This is not just jurisprudential; it is for good reason. The legislature and executive are better positioned than the courts to create policy.[70] This is especially true for a complex issue such as this.

90. We emphasize the powers of both the legislature and the executive, in comparison to the courts. Although the Appellant submits that the *executive* has not engaged in sufficient efforts to engage Indigenous people, she does not attribute the discrimination to a specific point of inaction. If the Court finds that the government must take action to remedy systemic discrimination in its jury roll efforts, it is likely both the executive and the legislature will be implicated, whether the Court orders legislative action or not. In reality, there is "a considerable degree of integration between the Legislature and the Government…it is the Government which, through its majority, controls the operations of the elected branch of the Legislature on a day to day basis."[71] The "executive" that the Appellant implicates is likely that which controls the legislature, as delegated officials such as Stephanie Moon do not have the resources or studies to make nuanced change.

i. Courts should not compel the legislature and executive to create an ameliorative program on a particular issue, given the government's broad policy mandate

91. The Court should not require the government to create an ameliorative program to encourage Indigenous people to join jury rolls, because doing so may upset other ameliorative programs. Representation on juries is not the only issue facing Indigenous people in Falconer.

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[70] *Vriend v. Alberta*, [1998] 1 SCR 493 at para 136, [1998] SCJ No 29.
[71] *Wells v. Newfoundland*, [1999] 3 SCR 199 at para 53, 1999 CanLII 657 (SCC).

92. Falconer creates policy on a broad number of issues that concern its residents including Indigenous people, such as health, commerce, education, family, and aspects of criminal law (for example, the *Juries Act*). The Province of Ontario, in Canada, has invested in the Indigenous Economic Development Fund for Indigenous businesses,[72] and in health initiatives such as cultural safety training programs for medical workers and culturally appropriate midwifery programs.[73] If this Court orders the government to actively encourage Indigenous people to participate in the jury system, it risks upsetting the balance of other programs Falconer has taken to serve Indigenous people and the public at large.

ii. Courts identifying valuable or problematic policies in their reasons, even if not ordering them, could upset the balance of the government's policies on juries

93. Even if it does not order a specific remedy, the Court could in its reasons identify several laws or programs as discriminatory, or several laws or programs as capable of remedying the discrimination, without full knowledge of how those items fit together. The executive and legislature, in seeking to conform with the Court's reasonings, may well be forced to shuffle without effect, or even deter, the effectiveness of its jury roll efforts.

94. "Courts are not the most appropriate institutions to design affirmative action programs. There are usually too many variables involved, too much supervision required, and too many financial implications, to suit the judicial process."[74] Encouraging Indigenous people on-reserve to participate in the jury system is a policy initiative that, if taken, should be left to the government.

[72] "Funding for Indigenous economic development," online: Ontario.ca, https://www.ontario.ca/page/funding-indigenous-economic-development.
[73] "Ontario Investments in Indigenous Health and Wellness," online: Ontario.ca, https://news.ontario.ca/mohltc/en/2018/02/ontario-investments-in-indigenous-health-and-wellness.html.
[74] *Ferrell v. Ontario (Attorney General)*, [1998] OJ No 5074 at para 68, 116 OAC 176, quoting Professor Gibson's *The Law of the Charter: Equality Rights (1990)*.

95. A suspended declaration is of even greater concern, as it at the least imposes unrealistic haste on the executive and legislature to solve this complex social issue.

iii. The Supreme Court of Canada recognized adverse effects discrimination under section 15 in only two cases, which are distinguished from this one

96. The Supreme Court of Canada has recognized adverse effects discrimination under section 15 in only two cases, *Vriend* and *Eldridge.* These cases are distinguishable from this one, and do not require the Court to take ameliorative steps; at least, not on an issue as nuanced as this one.

97. In *Vriend*, the Court found the omission of sexual orientation under an Alberta human rights statute violated section 15. This did not require an ameliorative program; rather, it recognized that the exclusion of a commonly protected ground from a list of protected grounds amounts to discrimination. The remedy, notably, was reading sexual orientation into the statute.[75]

98. In *Eldridge*, the Court found British Columbia had to provide sign language services to patients who were deaf or hard of hearing, because a majority of these patients could not access basic medical services without them.[76] There is not enough evidence specifically pleaded that shows Indigenous people face a barrier to access the jury notices. The language matter is a hypothetical exception, but the evidence does not provide whether the percentage of individuals within any or all First Nations that does not speak English or French is 5% or 50%. Again, there are not enough specific facts pleaded to ground this remedy.

Issue 4: any breach of section 15 of the *Charter* by the government's laws and efforts regarding jury rolls is justified under section 1

99. Any infringement of section 15 is balanced under section 1, by the government's efforts to address the pressing and substantial objectives of making reasonable efforts to ensure an impartial jury, while respecting juror privacy.

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[75] *Vriend*, *supra* note 70 at paras 3, 97, 179.
[76] *Eldridge*, *supra* note 65 at para 82, 95-96.

a) The government's jury roll laws and efforts have pressing and substantial objectives

100. The objective of Falconer's jury laws and efforts is to create an impartial jury from a broad cross-section of society, honestly and fairly chosen. The jury should perform its duties "impartially and represent, *as far as is possible and appropriate in the circumstances*, the larger community" [emphasis mine].[77] Representativeness is not an absolute requirement, but may be a means to achieving the ends of jury impartiality and competence.[78] Random selection is a means for achieving representativeness[79] and impartiality.[80]

101. Juror privacy is another objective of the government's jury laws and efforts. As stated in *R v. Davey*, "the privacy interests of prospective jurors should be protected, except as necessary for the administration of the criminal justice system."[81]

b) A deferential approach is appropriate

102. A deferential approach is appropriate for assessing the government's efforts to compile jury rolls, as this is a complex social task. Deference is owed as there may be many ways to approach a particular problem, and no certainty as to which will be the most effective.[82]

c) The government's jury roll laws and efforts are rationally connected to their purpose

103. At the rational connection stage, it is sufficient for the government to demonstrate it had a reasonable basis for believing a rational connection exists.[83] The government's random selection from complete lists for municipalities and reserves is rationally connected to the purpose of compiling impartial juries, and also respects juror privacy.

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[77] *Sherratt*, *supra* note 13 at paras 30-31, 35.
[78] *Biddle*, *supra* note 21 at paras 56-58.
[79] *Sherratt*, *supra* note 13, at para 35.
[80] *Find*, *supra* note 8 at para 20.
[81] *R v. Davey*, [2012] 3 SCR 828 at para 8, 2012 SCC 75.
[82] *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 SCR 610 at para 43, 2007 SCC 30.
[83] *RJR-MacDonald Inc. v. Canada*, [1995] 3 SCR 199 at para 82, [1995] SCJ No 68.

d) The government's jury roll laws and efforts are minimally impairing on the s. 15 right

104. The government's efforts to compile jury rolls fall within a range of reasonable alternatives, and thus discharge the minimal impairment requirement as articulated in *Alberta v. Hutterian Brethren of Wilson Colony*.[84] The government has up to date and accurate lists of people both on and off reserve who are eligible to serve as jurors, and jury notices and questionnaires are sent to people randomly selected from these lists. In Lenora, Falconer has engaged in progressively increased mailing efforts and inquired into low response rates through letters to First Nations Chiefs. These are reasonable efforts to compile juries that are impartial and respect juror privacy.

105. Many alternative legislative schemes would not achieve the government's objectives in a real and substantial manner.[85] Volunteer juror lists would disrupt the randomness that is "vital to our jury selection process," and would compromise the impartiality of the jury.[86] Targeted efforts to include Indigenous people living on-reserve on jury rolls may interfere with juror privacy, by leading to invasive questions about what qualifies as "on-reserve." While greater efforts can conceivably be made, the Court should not engage in this type of line-drawing exercise.

e) The government's jury roll laws and efforts are proportionate in their effects

106. The salutary effects outweigh the deleterious effects. The government's laws and practices of having complete mailing lists, and mailing questionnaires to prospective jurors randomly selected from these lists, are reasonable efforts to compile an impartial jury. They also respect juror privacy. While juror choice is not an objective of the government's jury laws, the Supreme Court of Canada acknowledged that prospective jurors may choose not to participate.[87] The government's laws thus also have the salutary effect of respecting each juror's individual choice.

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[84] *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567 at para 37, 2009 SCC 37.
[85] *Hutterian Brethren*, *supra* note 84 at para 37.
[86] *Kokopenace*, *supra* note 10 at paras 88, 127.
[87] *Kokopenace*, *supra* note 10 at paras 169-170, 127.

107. The deleterious effects to prospective jurors, or the defendant, are minimal. Prospective jurors who are Indigenous and live on-reserve are not denied opportunity to participate in the jury, they are only denied ameliorative efforts beyond those already taken. The Appellant has not proven that extra efforts would affect the outcome of trials. Any "dignitary" harm is limited considering the Appellant is concerned with government efforts, which have been considerable.

Issue 5: the appropriate remedy is a suspended declaration without a specified time limit, or for at least three years

a) A suspended declaration is the appropriate remedy

108. The appropriate remedy is a suspended declaration for the executive and legislature to increase efforts to engage Indigenous people living on-reserve on juries. This remedy allows the government craft an appropriate response, [88] and meaningfully vindicates the Appellant's rights while respecting the relationship between the executive, legislature, and judiciary in accordance with the principles of a just remedy outlined in *Ward* and *Doucet-Boudreau*.[89]

109. The Court should not put a time limit on the suspended declaration. Should the Court feel it necessary to place a time limit, at least three years are required for the executive to decide how it will create Constitutionally-compliant legislation and policy. The Appellant's references to the various Yak recommendations demonstrate just how complex this area of law is. At this stage, these recommendations are not sufficiently specific to determine what the government must do. Reforms will require considerable thought and resources.

b) A temporary stay of proceedings for one year is not warranted

110. A one year stay of proceedings is inappropriate, as it would likely result in a permanent stay of proceedings which is not necessary to vindicate the Appellant's rights, is an unusual form

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[88] *Schachter v. Canada*, [1992] 2 SCR 679 at para 80, [1992] SCJ No 68.
[89] *Ward v. Vancouver (City)* 2010 SCC 27 at para 20, [2010] 2 SCR 28; *Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62 at paras 55-58, [2003] 3 SCR 3.

of remedy in this context, and would open the floodgates to actions for a stay for all Indigenous defendants who live on-reserve and whose appeals are in the system.

111. Following the Supreme Court's decision in *R v. Jordan*, a one-year stay of proceedings may well result in a permanent stay of proceedings.[90] A permanent stay of proceedings is only appropriate in the rare cases where there has been a significant abuse of process that causes prejudice to the conduct or outcome of trial.[91] There is no evidence that increased government efforts would affect the outcome of the defendant's trial. A temporary stay of proceedings is therefore not necessary. A suspended declaration would vindicate the dignity of the Appellant.

112. The Appellant cites *R v. Wabason*.[92] To the Respondent's knowledge that is the only case, besides the overturned trial ruling here, that has granted a temporary stay of proceedings for the purpose of obtaining a new jury roll. This case has little precedential value given it was based on the Ontario Court of Appeal's *Kokopenace* decision, which was overturned by the Supreme Court.

113. The Appellant's request for a temporary stay of proceedings would open the floodgates for all Indigenous defendants who live on-reserve and whose appeals are in the system, and expend significant judicial resources. Given the scope of the Appellant's s. 11 arguments, it may even open such a remedy to any accused who alleges a violation of the guarantee of representativeness, which is not dependent on the race of the accused. This would be unjustified expenditure that would contravene the principle of judicial economy.[93] It is not clear when, if at all, the state's efforts might result in the proportional representation of Indigenous people on jury rolls. If the government must execute all suggestions in the Yak Report before its efforts meet the standard of

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[90] *R v. Jordan*, 2016 SCC 27 at para 105, [2016] 1 SCR 631, under which over 18 months from charges to trial in provincial court violates 11(b) and results in a permanent stay of proceedings.
[91] *R c. Piccirilli*, 2014 SCC 16 at paras 31-33, 2014 CSC 16; *R v. O'Connor* [1995] 4 SCR 411 at paras 66-69, [1995] SCJ No 98.
[92] *R v. Wabason* (aka *R v. W.(S.)*), 2014 ONSC 2394 at para 34, [2014] OJ No 2469, which followed the Ontario Court of Appeal's decision in *Kokopenace*, but preceded the Supreme Court of Canada's *Kokopenace* decision.
[93] *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342 at paras 34-39, [1989] SCJ No 14.

"reasonableness", the Appellant asks the Court to legislate from the bench by requiring the government to implement specific policy that may take years to achieve.

114. Finally, the Appellant presumes the government will have fully implemented such legislation within a less than a year, in suggesting that the full scope of remedial changes will be completed by the time the 2019 jury roll is compiled. This is impractical; the state requires more time to craft effective legislation backed by research and consultation with Indigenous populations, as the Appellant suggests is necessary. This task likely demands at least three years.

PART V – ORDER SOUGHT

115. The Respondent requests that this appeal be dismissed. In the alternative, if the Court finds a violation of section 11(d), 11(f), or 15 that cannot be demonstrably justified in a free and democratic society under section 1, the Respondent requests that the Court order a suspended declaration with no time limit or of three years. The Respondent requests that the Court not order a temporary stay of proceedings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of September, 2018.

University of Toronto
Julia Kirby and Meena Sundararaj for
the Respondent

SCHEDULE A – TABLE OF AUTHORITIES

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Ward v. Vancouver (City) 2010 SCC 27 at para 20, [2010] 2 SCR 28	20
Wells v. Newfoundland, [1999] 3 SCR 199 at para 53, 1999 CanLII 657 (SCC)	53

LEGISLATION	**SECTIONS**
Juries Act	6(2), 6(8)
Criminal Code, R.S.C 1985 c. C-46	631(4), 634(2), 638(1)
Canadian Charter of Rights and Freedoms), Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.	11(d), 11(f), 15
United States Constitutional Amendment	VI

OTHER SOURCES	**PARAGRAPHS**
Canada, Law Reform Commission Working Paper 27 (1980)	1, 55
Sir William Blackstone, *Commentaries on the Law of England*, Book 4: (Philadelphia, 1803)	349-359
"Funding for Indigenous economic development," online: Ontario.ca, https://www.ontario.ca/page/funding-indigenous-economic-development.	92
"Ontario Investments in Indigenous Health and Wellness," online: Ontario.ca, https://news.ontario.ca/mohltc/en/2018/02/ontario-investments-in-indigenous-health-and-wellness.html.	92

OFFICIAL GRAND MOOT SOURCES	PARAGRAPHS
Grand Moot 2018 Official Problem	5-7, 8-14, 16-22, 26, 29, 30, 36, 37, 38,
Factum of the Appellant	20, 24, 26, 41, 42, 43, 53,

SCHEDULE B - RELEVANT STATUTES

Juries Act, s. 6(8)

In the selection of persons for entry into the jury roll in a county or district in which an Indigenous reserve is situated, 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.

Criminal Code, R.S.C 1985 c. C-46

Empanelling Jury

Names of jurors on cards

631 (1) The name of each juror on a panel of jurors that has been returned, his number on the panel and his address shall be written on a separate card, and all the cards shall, as far as possible, be of equal size.

To be placed in box

(2) The sheriff or other officer who returns the panel shall deliver the cards referred to in subsection (1) to the clerk of the court who shall cause them to be placed together in a box to be provided for the purpose and to be thoroughly shaken together.

638 (1) A prosecutor or an accused is entitled to any number of challenges on the ground that

(a) the name of a juror does not appear on the panel, but no misnomer or misdescription is a ground of challenge where it appears to the court that the description given on the panel sufficiently designates the person referred to;

(b) a juror is not indifferent between the Queen and the accused;

(c) a juror has been convicted of an offence for which he was sentenced to death or to a term of imprisonment exceeding twelve months;

(d) a juror is an alien;

(e) a juror, even with the aid of technical, personal, interpretative or other support services provided to the juror under section 627, is physically unable to perform properly the duties of a juror; or

(f) a juror does not speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or both official languages of Canada, where the accused is required by reason of an order under section 530 to be tried before a judge and jury who speak the official language of Canada that

is the language of the accused or the official language of Canada in which the accused can best give testimony or who speak both official languages of Canada, as the case may be.

Charter of Rights and Freedoms

Proceedings in criminal and penal matters, ss. 11(d), (f)

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;

Equality before and under law and equal protection and benefit of law, s. 15(1)

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

United States Constitutional Amendments

(VI)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.