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

APPELLANT'S FACTUM

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PART I - OVERVIEW

1. Ms. Carol, the Appellant, is an Indigenous woman who lives on a First Nations reserve in the district of Lenora. While 35% of Lenora's population resides on a First Nations reserve (the vast majority of whom are Indigenous), only 3.3% of the 2018 Lenora jury roll from which the Appellant's petit jury was selected were on-reserve residents. The Appellant is now slated to be tried for murder before a jury without a single member who lives on a reserve or is Indigenous.

2. For at least a decade, Falconer has known about the dramatic and persistent under-representation of Indigenous people on Lenora's jury rolls and has been aware of the root causes of this problem. Nonetheless, in 2010, Falconer chose to dismantle its plans to work with reserve communities to address their low jury notice response rates and encourage jury participation. It now continues to rely exclusively on a junior bureaucrat to fulfil its representativeness obligations.

3. Falconer failed to take reasonable steps to include the distinct perspective of Indigenous people living on reserves on the 2018 Lenora jury roll. This failure breached the Appellant's right to a representative jury roll and caused an appearance of institutional partiality, resulting in breaches of her ss. 11(f) and 11(d) *Charter* rights. Falconer's inaction also breached Ms. Carol's s. 15(1) right to equality, as well as the s. 15(1) rights of potential jurors of Indigenous descent.

4. The appropriate remedy is a temporary one-year stay of proceedings and a declaration that Falconer failed to fulfil its constitutional obligations with respect to the 2018 Lenora jury roll. This allows Ms. Carol to be tried before a properly constituted jury while respecting the public's interest in prosecuting criminal matters. Falconer must take meaningful steps to facilitate and encourage jury notice responses, responding to the underlying causes identified in the Yak Report. Falconer cannot rely exclusively on a low level bureaucrat. The Appellant does not ask this Court to prescribe the exact steps that Falconer must take to discharge its constitutional obligation.

PART II - STATEMENT OF FACTS

Jury selection in Falconer

5. Jury selection in Falconer occurs in three stages. First, every year, the local sheriff prepares a jury roll in each judicial district. This involves mailing jury service notices to residents, which include questionnaires recipients must return. Every eligible juror that responds to the jury questionnaire becomes a part of the jury roll for that district for that year. Every jury selected in the district for the entire year comes from that roll. Second, for each jury trial, the sheriff randomly selects names from the jury roll to create a jury array. Third, through the in-court jury selection, a twelve-person petit jury is selected from that jury array to hear the trial. The first two steps are governed by the provincial *Juries Act*. The third step is governed by the federal *Criminal Code*.

6. The provinces of Flavelle use different data sources to assemble their jury rolls. In Falconer, s. 6(2) of the *Juries Act* specifies that sheriffs are to use municipal property lists to randomly select jury notice recipients. Section 6(2) does not cover residents of Falconer who live on reserves. Accordingly, s. 6(8) specifies that sheriffs must obtain the names of on-reserve residents from any record available to compile the jury roll. Falconer is the only province in Flavelle to use a separate process for sending jury notices to reserve communities.

7. Almost all people living on reserves in Lenora are Indigenous, and almost all Indigenous people in Lenora live on a reserve. To speak of the representativeness of reserve communities, then, is to speak of representativeness of Indigenous peoples more generally.

Indigenous under-representation on Lenora's jury rolls

8. The jury rolls in Lenora, a judicial district of Falconer, have under-represented Indigenous persons for decades. In 2008, a widely-disseminated documentary on the under-representation of Indigenous persons on Falconer's juries sparked public scrutiny. In response, the Premier of

Falconer publicly committed to addressing the under-representation of Indigenous persons on juries, particularly in the District of Lenora.

9. At that time, the under-representation of Indigenous persons was caused by two factors. First, the jury notice delivery system inadequately delivered notices to reserve communities. Second, on-reserve residents were significantly less likely to respond to jury notices as compared to the off-reserve population. Falconer has since resolved the mailing and delivery issues. With respect to the second cause, Falconer commissioned a comprehensive report addressing the underlying causes of low jury questionnaire response rates from reserves (the "Yak Report").

10. The Yak Report found that the problem of low response rates was multi-causal and complex, but, at least in part, resolvable. Indigenous communities' conceptions of justice focus on reconciliation and healing, whereas Flavelle's criminal justice system is viewed as punitive. Many Indigenous persons canvassed by the Yak Report expressed a reluctance to participate in a system that was antithetical to their values. Moreover, many Indigenous persons reasonably perceive the Flavellian criminal justice system with distrust due to their history of alienation and discrimination. Relatedly, Falconer has done a poor job of communicating with reserve communities about criminal justice issues. This further alienates Indigenous persons and deprives them of knowledge on issues such as how to expunge old criminal records, which would make them eligible for jury service. It also deprives them of knowledge respecting the steps that Flavelle has taken to incorporate Indigenous concepts of justice into the Flavellian justice system. The Yak Report also found that there are real and perceived practical difficulties of serving on a jury as an on-reserve resident in Lenora, such as cost and language barriers.

11. The Yak Report made eleven recommendations. It recommended, *inter alia*, that Falconer: establish education initiatives on reserves; meaningfully communicate and engage with reserve

communities; continue to study the causes of low response rates; allow on-reserve residents to volunteer for jury service; amend jury questionnaires to better reflect Indigenous culture and values; and address cost issues.

12. The province created a Jury Committee to implement the Yak Report's recommendations. In 2010, however, the province dismantled the Jury Committee before successfully implementing a single recommendation. The province has taken no further steps to implement the Report, despite falling response rates. In 2018, 7.5% of residents receiving jury questionnaires on reserves in Lenora responded, compared to a 70.6% response rate from off-reserve residents.

The Appellant's case

13. Ms. Carol is an Indigenous woman living on a reserve in Lenora. In May 2018, Ms. Carol was charged with murder. Prior to her trial, Ms. Carol challenged the constitutionality of her jury on the basis that it was selected from a jury roll that was not representative. Of the 700 people on Lenora's 2018 jury roll, only 23 lived on reserves. The trial judge, Justice Thomson, found that the jury roll violated ss. 11(f), 11(d) and 15(1) of the *Charter*. He granted a temporary one-year stay of proceedings, giving Lenora time to improve its jury roll compilation.

14. On appeal to the Falconer Court of Appeal, Justices Church Carson and Marinacci overturned Thomson J's ruling, finding no breach of ss. 11(f), 11(d) or 15(1). Writing in dissent, Justice Sanderson upheld the trial judgement in its entirety. The Appellant appeals to this Court.

PART III - ISSUES

15. The Appellant raises three issues:

I. Did the 2018 Lenora jury roll, from which the Appellant's jury was selected, comply with her right to a representative jury pursuant to ss. 11(f) and 11(d) of the *Charter*?

No. Properly understood, the right to a representative jury imposes a continuous obligation on the state to take reasonable steps to include distinct perspectives on the jury roll. Given Indigenous peoples' history with the criminal justice system and the overwhelming evidence of their under-representation on jury rolls, Falconer was obliged to actively facilitate and encourage jury notice responses from Indigenous on-reserve residents. Its failure to do so violated the Appellant's right to a properly constituted jury and caused an appearance of institutional partiality.

II. **Did the composition of the 2018 Lenora jury roll comply with section 15(1) of the *Charter*, either (i) for Ms. Carol personally or (ii) for potential jurors living on reserves?** No. A jury roll that is properly representative of a judicial district is a benefit afforded by the *Juries Act*. Falconer's inaction denied Ms. Carol this benefit, which exacerbated her pre-existing disadvantage as an Indigenous defendant. Falconer's inaction also denied Indigenous persons in Lenora the benefit of serving on a jury, perpetuating their pre-existing disadvantage of alienation from Flavelle's justice system. Falconer's actions were not justified under s. 1.

III. **What is the appropriate remedy?** A temporary stay of proceedings, as ordered by the trial judge, was an appropriate and just remedy under section 24(1) of the *Charter*. This remedy ensures that the Appellant will be tried before a properly constituted jury and gives Falconer time to meets its representativeness obligations. With respect to the section 15(1) claim on behalf of potential jurors, a declaration is appropriate.

PART IV - ARGUMENT

A. ISSUE ONE: FALCONER BREACHED THE APPELLANT'S SS. 11(F) AND 11(D) RIGHTS

i. Overview of Appellant's position on representativeness

16. Falconer failed to discharge its constitutional obligation to provide a jury that would "represent, as far as is possible and appropriate in the circumstances, the larger community."[1]

17. A purposive approach to the right to a representative jury roll leads to a rejection of the Supreme Court of Canada's judgment in *R. v. Kokopenace*, relied on by the court below.[2] *Kokopenace* (SCC) fails to adequately protect the individual and societal purposes of the right to a representative jury roll. It should be rejected by this Court. While Canadian authority is persuasive in Flavelle, it is not binding.

18. The Appellant agrees that the right to a representative jury roll is best evaluated as a corollary state obligation.[3] The individual's representativeness right is analyzed by focusing on the state's fulfilment of its corresponding obligation. This is because the right to a representative jury roll is an internally qualified right, and factors outside of the state's control will inevitably impact the ultimate composition of the jury roll. A fully representative roll is the ideal outcome, but the accused's representativeness right will only be breached by inadequacy in the state's efforts.

19. However, two key elements of the majority reasoning in *Kokopenace* (SCC) must be rejected. First and foremost, the nature of the state's obligation to provide a representative jury roll

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[1] *R. v. Sherratt*, [1991] 1 S.C.R. 509 at 525(f) [*Sherratt*] (Appellant BOA, Tab 29).
[2] *R. v. Kokopenace*, 2015 SCC 28 [*Kokopenace* (SCC)] (Appellant BOA, Tab 25).
[3] *Ibid* at para. 46.

must be informed by Flavelle's unique relationship and history with Indigenous peoples.[4] Second, the state's obligation must be continuous and responsive to the outcome of previous efforts.[5]

20. The correct test for jury roll representativeness, largely mirroring Justice LaForme's test for the Court of Appeal for Ontario in *Kokopenace*, is as follows.[6] The right to a representative jury roll imposes a continuous obligation on the state to take reasonable steps, evaluated with regard to all the circumstances, to include distinct perspectives on the jury roll. The analysis must be specifically informed by: 1) Flavelle's unique relationship with Indigenous peoples and their history of alienation from and oppression by the criminal justice system, and, 2) the outcome of previous representativeness efforts.

21. The "distinct perspectives" element of the test will easily be met in cases such as the Appellant's where the allegedly under-represented perspective is that of Indigenous on-reserve residents. As Justice LaForme wrote with respect to on-reserve populations in *Kokopenace* (OCA), "their race, their shared heritage and their on-reserve life experiences bring important and distinctive perspectives to their jury service."[7] More broadly, the perspective of all Indigenous Flavellians – those living both on and off reserve – is "distinct." While the Indigenous population is itself extremely diverse, Indigenous Flavellians share a common thread in their history and experiences that gives rise to a distinct perspective not shared by the non-Indigenous population.[8]

22. It then falls to be determined what "reasonable efforts" requires against the factual matrix of this case. In many cases, the state may only need to deliver jury notices to a broad cross-section

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[4] Contra *Kokopenace* SCC, *supra* note 2 at paras. 1, 60, 64, 88, 97-102.
[5] Contra *Kokopenace* SCC, *ibid* at paras. 69-86.
[6] *R. v. Kokopenace*, 2013 ONCA 389 at paras. 25-51 [*Kokopenace* (OCA)] (Appellant BOA, Tab 26).
[7] *Ibid* at para. 40.
[8] *R. v. Ipeelee*, 2012 SCC 13 at para. 77 ("Indigenous population shares a 'distinct history,' unlike any other, born out of the legacy of colonialism") [*Ipeelee*] (Appellant BOA, Tab 22).

of the judicial district. However, in this case, reasonable steps required the state to engage directly and meaningfully with reserve communities to facilitate and encourage jury notice responses. There are three main reasons for this. First, the history of Indigenous alienation from the Flavellian criminal justice system places heightened importance on Indigenous representativeness. Second, the honour of the Crown is engaged by Falconer's attempt to include reserve residents on the roll. Third, Falconer's previous efforts had failed and Falconer was informed of potential solutions.

23. In what follows, the purposes of jury roll representativeness in ss. 11(f) and 11(d) are established. Then, the proposed test is supported and expanded upon. Finally, the test is applied to the facts of this case, establishing a breach of the Appellant's rights under ss. 11(f) and 11(d).

ii. The right to a representative jury roll is integral to the jury's purposes and protects institutional impartiality

24. The Supreme Court of Canada has consistently identified representativeness as an integral component of the s. 11(f) right to trial by jury and s. 11(d) right to an impartial trial.[9] Representativeness is a pre-condition to the jury's fulfilment of its purposes, protected by s. 11(f). Representativeness is also one piece of a larger guarantee of impartiality at the institutional level, protected by s. 11(d).

25. First, representativeness is a pre-condition to the jury's constitutionally protected purposes. In *R. v. Sherratt*, the Court held that the s. 11(f) right to trial by jury would be "meaningless" if it did not contain a guarantee that the jury would represent, as far as appropriate in the circumstances,

[9] *Sherratt, supra* note 1; *Kokopenace* SCC*, supra* note 2; *R. v. Biddle,* [1995] 1 S.C.R. 761 at paras. 52-53 [*Biddle*] (Appellant BOA, Tab 16); *R. v. Williams*, [1998] 1 S.C.R. 1128 at para. 47 [*Williams*] (Appellant BOA, Tab 33); *R. v. Davey*, 2012 SCC 75 at para. 30 [*Davey*] (Appellant BOA, Tab 18). See also *R. v. Church of Scientology of Toronto*, [1997] O.J. No. 1548, 116 C.C.C. (3d) at 60(b)-61(f) [*Scientology*] (Appellant BOA, Tab 17).

a broad cross-section of the community.[10] This is because the following underlying purposes of the right to trial by jury rely on the inclusion of distinct perspectives:

- The jury is an excellent fact finder due to its collective decision making;
- The jury acts as the conscience of the community due to its representative character;
- The jury acts as a final bulwark against oppressive laws and their enforcement;
- The jury increases public knowledge of the criminal justice system; and,
- The jury fosters trust in the criminal justice system by involving the public.[11]

26. The jury's fact finding capacities and its ability to guard against oppression are integral to an accused's fair trial rights and are connected to the right to an impartial jury, as discussed below.

27. Beyond those individual interests, *Sherratt* and its progeny make it clear that the jury system protects grander societal ends. In *R. v. Davey*, the Supreme Court of Canada stated that the jury system "must promote public confidence in the jury's verdict, and in the administration of criminal justice."[12] In *R. v. G.(M.),* Justice Cory emphasized that the jury system is "extremely important to our democratic society."[13] And in *Scientology*, Justice Rosenberg wrote, "The representative character of the jury also furthers important societal or community interests."[14] In view of this communal component of an accused's s. 11(f) right, Misha Boutilier aptly writes that section 11(f) "deputizes the accused to achieve the underlying societal purposes" of the jury.[15]

28. The representativeness component of the right to trial by jury must be interpreted accordingly. Doing so does not require representativeness in every trial at the petit jury stage. Rather, it requires that distinct perspectives be included in the jury system as an institution. When

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[10] *Sherratt*, *supra* note 1 at 525(f).
[11] *Ibid* at 523(g)-524(e).
[12] *Davey*, *supra* note 9 at para. 30.
[13] *R. v. G.(M.)*, [1996] 3 S.C.R. 362 at para. 13 [*G.(M.)*] (Appellant BOA, Tab 20).
[14] *Scientology*, *supra* note 9 at 61(a-f).
[15] Misha Boutilier, *Optional By-Products or Constitutionally- Protected Purposes? Societal Interests in Representativeness, the s. 11(f) Right to Trial by Jury, and the Kokopenace Decision*, (2018) 65 C.L.Q. 458 at 458 (Appellant BOA, Tab 36).

a distinct group is functionally excluded from jury participation, the jury is "unable to perform properly many of the functions that make its existence desirable in the first place."[16] Most importantly, it ceases to serve as the foundation for a legitimate criminal justice system. It also ceases to educate or involve the excluded group and cannot act as the conscience of the community.

29. It is well accepted that individually held rights may be interpreted so as to further societal purposes. Section 11(d), for example, protects against perceived partiality – not just real partiality – in order to maintain public confidence in the administration of justice.[17] Similarly, s. 8 is interpreted to ensure that the public at large can go about their daily lives feeling secure against unreasonable intrusions from the state.[18] The structure of s. 11(f) is no different. The right is held by the accused, but societal ends help inform its meaning. For those societal ends to be achieved, the jury roll must include distinct perspectives.

30. *R. v. Turpin* does not hold otherwise. Out of context, the language in *Turpin* might suggest that s. 11(f) only protects individual interests in the right to trial by jury, not societal ones.[19] Properly understood, however, *Turpin* narrowly holds that the state cannot advance its interests in trial by jury when those interests do not align with the accused's. The choice in *Turpin* was "between an interpretation of s. 11(f) which would allow a jury trial to be <u>forced upon an unwilling accused</u>" and one that would "permit the accused to waive" the right.[20] The Court held that the accused could waive the right to trial by jury. Whether the right can be waived is a different question than what the content of the right is when the accused avails herself of the right. When

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[16] *Sherratt*, *supra* note 1 at 525(f).
[17] *R. v. Valente*, [1985] 2 S.C.R. 673 at 689(c-h) [*Valente*] (Appellant BOA, Tab 31).
[18] *R. v. Dyment*, [1988] 2 S.C.R. 417 at 427(e)-428(a) (Appellant BOA, Tab 19).
[19] *R. v. Turpin*, [1989] 1 S.C.R. 1296 [*Turpin*] (Appellant BOA, Tab 30). See, for example, p. 1311.
[20] *Ibid* at 1314(g-j) (emphasis added).

the right is engaged, its content must be defined with respect to the jury's broad purposes. This is directly supported by *Sherratt* and *Scientology, supra*, and *Turpin* does not contradict it.

31. Second, representativeness protects institutional impartiality. By curbing subconscious biases and bringing diverse viewpoints to the fact finding process, the inclusion of distinct perspectives furthers jury impartiality.[21] However, the jury composition process is carefully calibrated to balance competing interests, some of which do not operate harmoniously with representativeness. Random selection is also vital to an impartial jury, and the Flavellian jury system faithfully protects juror privacy. [22] Further, counsel are given tools to challenge jurors, meaning the petit jury composition may be manipulated. Finally, full proportionate representation at any stage of the jury selection process would be an elusive and logistically impossible goal.

32. Therefore, while a representative petit jury is "to be sought after" as it provides "extra assurance of impartiality," an accused has no right to a representative petit jury.[23]

33. Representativeness operates, however, at the jury roll stage as a part of the institutional foundation from which the rest of the selection process proceeds: "the random selection process, *coupled with the sources from which this selection is made*, ensures the representativeness of Canadian criminal juries."[24] If the preliminary source – the roll – is not itself representative, then the petit juries selected from that roll are guaranteed *not* to include distinct perspectives before the in-court selection process even begins, and the process is impugned at the institutional level. Therefore, a representativeness jury roll is well established as a "safeguard" to impartiality.[25]

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[21] *Williams*, *supra* note 9 at paras. 28, 47; *Biddle*, *supra* note 9 at paras. 53, 57.
[22] *Davey*, *supra* note 9 at para. 30.
[23] *Biddle*, *supra* note 9 at paras. 53, 57.
[24] *Sherratt*, *supra* note 1 at 525(h) (emphasis added).
[25] *Williams*, *supra* note 9 at para. 47.

34. Accordingly, in *Scientology*, the Court of Appeal for Ontario determined that the state cannot intentionally exclude identifiable groups from the jury roll. To do so would "cast doubt on the integrity of the process and risk the creation of the appearance of bias."[26]

35. Choosing not to actively include a distinct group that is systemically, but not intentionally, excluded from the jury roll threatens the integrity of the process and risks the appearance of bias in the same way. Institutional partiality may arise from inaction.[27] This is particularly so when the justice system has alienated a group and their non-participation is caused by their alienation.

36. In summary, representativeness is a key component of ss. 11(f) and 11(d). The representativeness right is qualified due to the importance of randomness, juror privacy, challenge procedures and feasibility. The right is fulfilled if the state's efforts to include distinct perspectives are reasonable, considering all of the circumstances and the purposes of representativeness.

iii. The state's efforts must reflect the unique place of Indigenous peoples and their history of estrangement from and oppression by the criminal justice system

37. The state's obligation in cases of Indigenous under-representation is heavier than in cases of under-representation of other groups. This is because: (1) the purposes of representativeness take on increased importance in the context of Flavelle's relationship with Indigenous peoples; and, relatedly, (2) the state's efforts to include Indigenous peoples on the jury roll engage the honour of the Crown.

38. First, the protected purposes of representativeness command that the state be held to a high standard in its efforts to include Indigenous perspectives on the jury roll. The purposes of legitimization, education, involvement, and preventing oppression and bias respond to the heart of

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[26] *Scientology*, *supra* note 9 at 60(d).
[27] *R. v. Nahdee*, [1993] O.J. No. 2425, 1993 CarswellOnt 135 at para. 20 (Appellant BOA, 28).

the troubling relationship between the criminal justice system and Indigenous peoples. When those purposes are unfulfilled due to Indigenous under-representation, we worsen a grave problem. The representativeness right may not be "the appropriate vehicle" for *repairing* the current state of affairs,[28] but it must prevent the problem from *worsening* within the confines of the jury system.

39. Canadian jurisprudence provides a well-documented account of Indigenous estrangement from and oppression by the criminal justice system. In *Williams*, the Court took notice of widespread bias and racism against Indigenous peoples.[29] In *Gladue* and *Ipeelee*, the Court discussed the dramatic over incarceration of Indigenous peoples and their accompanying alienation from the justice system.[30] And as this case now shows, Indigenous peoples are overwhelmingly the subjects of, yet not participants in, criminal justice proceedings.[31] In *Ipeelee*, the Court expressly notes the unique cause of Indigenous alienation from the criminal justice system:

> The overwhelming message emanating from the various reports and commissions on Aboriginal peoples' involvement in the criminal justice system is that current levels of criminality are intimately tied to the legacy of colonialism… As Professor Carter puts it, 'poverty and other incidents of social marginalization may not be unique, but how people get there is. No one's history in this country compares to Aboriginal people's.'[32]

40. The current problem of Indigenous under-representation is cyclical. As the Yak Report shows, the history that gave rise to alienation from the justice system fuels the problem of under-representation.[33] Indigenous persons are reasonably reticent to involve themselves in a justice system that they view as antithetical to their values and that has oppressed people from their community.[34] In turn, under-representation also further fuels the problem of alienation.

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[28] *Kokopenace* SCC, *supra* note 2 at para. 65.
[29] *Williams*, *supra* note 9 at para. 54.
[30] *R. v. Gladue*, [1999] 1 S.C.R. 688 at paras. 52-65 (Appellant BOA, Tab 21); *Ipeelee*, *supra* note 8 at paras. 56-63.
[31] Citing to facts from prfoblem
[32] *Ipeelee*, *supra* note 8 at para. 77 (emphasis added).
[33] Official Problem, at para. 23.
[34] *Kokopenace* SCC, *supra* note 2 at para. 279 (Cromwell J. dissenting).

Estrangement from the justice system is both a cause and effect of under-representation. Many of the Yak Report's recommendations to increase response rates focus on legitimization, inclusion and education—purposes that the jury as an institution is constitutionally enshrined to fulfill.[35]

41. Without meaningful state intervention to confront the problem—a problem itself caused by state action—there is no reason to believe the cycle will break, and the jury's societal functions will continue to go unfulfilled. As Justice Cromwell stated, dissenting at the Supreme Court in *Kokopenace* (SCC): "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."[36]

42. Second, Falconer's obligations under s. 6(8) of the *Juries Act* are informed by the honour of the Crown. Section 6(8) is the mechanism through which Falconer includes on-reserve residents on the jury roll. Given Falconer's use of municipal lists as the primary source for compiling jury rolls under s. 6(2) of the *Act*, reserves would be entirely excluded from juries without s. 6(8). Section 6(8), then, is a constitutional necessity. It is, in effect, a "constitutional obligation" owed directly to reserves in Lenora. According to *Manitoba Metis*, when dealing uniquely with Indigenous populations to fulfil a constitutional obligation, the honour of the Crown applies.[37]

43. This is further supported by a purposive understanding of the honour of the Crown. While the honour of the Crown typically arises in the context of Aboriginal or treaty rights, "[t]he historical roots of the principle of the honour of the Crown suggest that it must be understood

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[35] Official Problem, at para. 30.
[36] *Kokopenace* SCC, *supra* note 2 at para. 281.
[37] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 623 at paras. 73-78 [*Manitoba Metis*] (Appellant BOA, Tab 11).

generously."[38] Indeed, it has been held that "the honour of the Crown is always at stake in its dealings with Aboriginal peoples."[39] This is because the honour of the Crown arises from Flavelle's colonial legacy: "Aboriginal peoples were here first, and they were never conquered; yet, they became subject to a legal system that they did not share… The honour of the Crown characterizes the 'special relationship' that arises out of this colonial practice."[40] Its purpose is "the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty."[41]

44. The Yak Report shows that the representativeness problem, at its core, is rooted in Flavelle's colonial legacy and imposition of a foreign legal system.[42] Falconer's colonial practices entailed Indigenous estrangement from and abuse by the criminal justice system. Now, that history interferes with Indigenous participation in the justice system and perpetuates the cycle of alienation. The source of this problem demands that the solution engage the honour of the Crown.

45. The honour of the Crown "is not a mere incantation, but rather a core precept that finds its application in concrete practices and gives rise to different duties in different circumstances."[43] In this case, like *Manitoba Metis*, the honour of the Crown requires the state to diligently fulfil the purpose of its obligation.[44] The Crown must act diligently to include Indigenous on-reserve residents on the jury roll. To do so, Falconer must work respectfully and meaningfully with reserve communities with an honest commitment to increasing jury notice response rates.

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[38] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 17 [*Haida*] (Appellant BOA, Tab 8).
[39] *Ibid*.
[40] *Manitoba Metis*, *supra* note 37 at para. 67.
[41] *Ibid* at para. 66. See also *Haida*, *supra* note 38 at paras. 16-19.
[42] Official Problem, at para. 23-24.
[43] *Manitoba Metis*, *supra* note 37 at para. 73; *Haida*, *supra* note 38 at paras. 16-18.
[44] *Manitioba Metis*, *ibid* at paras. 73-78.

iv. The outcome of the state's efforts must inform the adequacy of its process

46. The reasonableness of the state's efforts must be assessed in the context of the success or failure of its past efforts and all of the available information as to the cause of continued under-representativeness. A test that assesses the reasonableness of the state's efforts with no regard to the outcome fundamentally disconnects the representativeness right from its purposes by treating the process as an end in itself as opposed to a means to increase actual representativeness. If, as in this case, the state fixes purely procedural notice delivery issues but representativeness continues to fall, the state is obliged to respond accordingly. When the cause of continued non-representativeness is known or ascertainable, that cause must be addressed.

47. This is not a radical departure from the way the Flavellian jury selection process has always been understood. First, requiring the state to target on-reserve populations is fully consistent with the principles underlying the representativeness right. Indeed, to a certain extent, the *Juries Act* already requires the province to specifically target reserves. Second, the value of purely random jury roll selection is premised on the idea that randomness will result in representativeness.[45] When that assumption is proven false, a departure from pure randomness is required. Finally, the jury is not and has never been a static institution. The representativeness right should respond to developing circumstances and knowledge, always grounded in its purposes.

v. The state breached the Appellant's s 11(f) right to trial by jury

48. Applying a properly contextual test to evaluate the state's fulfillment of its continuous constitutional obligation to take reasonable steps to include distinct perspectives on the jury role, the state fell short. A section 11(f) breach follows automatically from this conclusion.

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[45] *Sherratt*, *supra* note 1 at 525(h).

49. After jury notices were properly delivered to on-reserve residents, under-representativeness persisted due to low response rates. The Yak Report identified several underlying causes of the low response rates and presented a thorough set of recommendations to tackle the problem. By dismantling the Jury Committee, Falconer decided not to facilitate or encourage responses or work with reserve communities in any capacity to address the problem.

50. Fixing delivery issues alone was insufficient. For one, the state's process had insufficient regard for the unique place of Indigenous people in Flavelle's criminal justice system. Falconer's decision not to engage with Indigenous communities and to discharge its s. 6(8) obligations through a junior bureaucrat was also inconsistent with the honour of the Crown. Moreover, Falconer's refusal to adapt and respond to failed attempts to increase the response rate neglected the continuing nature of their obligations.

51. At the minimum, Falconer had to take some steps to facilitate and encourage jury notice responses from on-reserve residents. This is a significant obligation, and one that cannot be fulfilled by a single junior bureaucrat. Beyond that, it is not for the Appellant to say exactly what steps the government should have taken. That said, reinstitution of the Jury Committee to begin implementing the Yak Report's recommendations would be a sufficient starting point. [46]

[46] See, for example, *R. v. Madahbee-Cywink*, 2015 ONSC 434 at paras. 42-59 (Appellant BOA, Tab 27). In that case, the province of Ontario began to implement measures similar to the Yak Report recommendations in neighbouring Canada, after Kokopenace (OCA) and prior to Kokopenace (SCC). The court would not "micro-manage" the implementation of the recommendations, but taking some action was necessary.

vi. The state breached the Appellant's 11(d) right to an impartial trial

52. The state's representativeness failure also caused the appearance of institutional partiality. The question asked in s. 11(d) analysis is: would an informed person, viewing the state's actions realistically and practically, and having thought the matter through, reasonably apprehend bias?[47]

53. A purposive understanding of representativeness—an institutional element essential to the balance and integrity of the selection process—is vital to this analysis. As Justice Gonthier stated in *R. v. Bain*: the "well-informed observer certainly knows that a jury should be impartial, representative and competent."[48] The well-informed observer must also understand the history of Indigenous peoples and the Flavellian criminal justice system.

54. Institutional impartiality does not require that the accused's petit jury itself appear biased. Perceived bias may arise solely from the compilation process without regard for the outcome. In *Bain*, the apprehension of bias arose from "the manner of [the jury's] selection" leaving members of the community "in doubt as to the merits of the process" by which the jury was selected.[49] Whether or not the resulting petit jury appeared biased was beside the point. Similarly, Justice Gonthier wrote in *Biddle* that it was improper to ask if "the jury, when viewed quite apart from the selection process" gives rise to perceived bias.[50] Instead, we must gauge the "anticipated effect of the conduct of the Crown… on the perception of a reasonable observer as to the quality of the jury."[51] Given that "representativeness furthers the perception of impartiality," an attempt to exclude representativeness "in itself undermines the impartiality of a jury."[52]

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[47] *Valente*, *supra* note 16 at 689(c); *Kokopenace* (SCC), *supra* note 2 at para 49.
[48] *R. v. Bain*, [1992] 1 S.C.R. 91 at 114(e-h) (Gonthier J. dissenting but not on this point) (Appellant BOA, Tab 15).
[49] *Ibid* at 103(e-j).
[50] *Biddle*, *supra* note 9 at para. 50 (Gonthier J. concurring in the result).
[51] *Ibid*.
[52] *Ibid* at para. 53.

55. In this case, Falconer knew that Indigenous peoples were consistently and severely under-represented on Lenora juries and over-represented as accused persons. Moreover, as the reasonably informed member of the community would know, this group has historically been alienated from and abused by the justice system, including wrongful convictions caused at least in part by systemic racism.[53] The Yak Report presented Falconer clear and comprehensive recommendations as a starting point for their representativeness efforts. Falconer viewed at least some of these recommendations as feasible, as they initiated a plan to implement them. Yet, Falconer decided to clean its hands of the problem, cease its engagement efforts, and allow juries to continue to under-represent the Indigenous population.

56. When the context of this case is fully appreciated and the proper role of representativeness is understood, the state's unresponsiveness would cause the reasonable person to apprehend partiality. The Appellant does not suggest that the state was motivated by actual bias. Nonetheless, the state's process leads to a reasonable perception that the state is less committed to guaranteeing the impartiality of Indigenous persons' trials compared to the rest of the population. The institutional "safeguard"[54] of representativeness was knowingly discarded for Indigenous accused.

B. ISSUE TWO: FALCONER VIOLATED S. 15(1) OF THE *CHARTER*

57. The Court of Appeal erred in overturning Justice Thomson's conclusion that Falconer breached s. 15(1) of the *Charter*. Falconer breached the s. 15(1) rights of Ms. Carol and potential jurors of Indigenous descent living on reserves by failing to take steps to improve Indigenous representation on juries. With proper implementation, the *Juries Act* provides benefits both for the

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[53] *Report of the Royal Commission on the Donald Marshall, Jr. Prosecution*, (Nova Scotia, 1989) at 1 (Appellant BOA, Tab 37).
[54] *Williams*, *supra* note 9 at para. 47.

accused and for society at large. The government must modify its implementation of the *Act* to ensure Indigenous accused and persons living on reserve can access these benefits.

58. The Appellant raises two s. 15(1) claims: one on behalf of herself, as an Indigenous defendant, and the second on behalf of all Indigenous potential jurors living on reserve in Lenora. The breach arises from Falconer's failure to address the under-representation of persons living on reserve, not from the distinction in s. 6(8) of *Juries Act*.

59. A s. 15(1) claimant must demonstrate that: (1) the impugned law or government action creates a distinction on the basis of an enumerated or analogous ground; and (2) the law imposes "burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating… disadvantage."[55] The Appellant's s. 15(1) claims in the case at bar should be interpreted in light of the considerable pre-existing historical disadvantage Indigenous persons in Flavelle face.

60. The government of Falconer's deliberate inaction denied Ms. Carol the benefit of a representative jury roll. A jury roll that is properly reflective of one's community is a benefit afforded by the *Juries Act*. Likewise, Falconer denied potential jurors living on reserves a meaningful chance to be on a jury. When characterizing the denial of a benefit of the law, the right to equality must be given independent content without consideration of "justificatory factors applicable under s. 1 of the Charter."[56]

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[55] *Québec (Attorney General) v. Alliance du personnel professional et technique de la santé et des services sociaux*, 2018 SCC 17 at para. 25 (Appellant BOA, Tab 13), quoting *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para. 19-20 [*Taypotat*] (Appellant BOA, Tab 9).
[56] *Turpin*, *supra* note 19 at 1325(g).

i. The government's inaction created a distinction on the basis of Indigeneity

61. Both of the Appellant's claims satisfy the first branch of the s. 15(1) test. This is a case of adverse effects discrimination arising from the application of a facially neutral law.[57] The government's application of s. 6(8) of the *Juries Act* had a disparate impact on Indigenous persons in Lenora, both with respect to Indigenous accused and Indigenous potential jurors living on reserves. This disparate impact is reflected in the stark differences in response rates between reserve communities and municipalities.[58]

62. The effects of systemic discrimination can be difficult to identify. Often, the social factors contributing to systemic discrimination will act as a barrier to prevent a particular group from accessing the benefit provided by a facially neutral law. In *Vriend*, the Supreme Court recognized the analytical challenge that adverse effects claims pose: "[the] distinction may be more difficult to see because there is, on the surface, a measure of formal equality".[59] The Court stressed the need to consider the distinction "in the context of the social reality of discrimination" that the claimant faces.[60] In *Withler*, the Supreme Court suggested that "historical or sociological disadvantage may assist in demonstrating that the law imposes a burden or denies a benefit to the claimant that is not imposed on or denied to others."[61]

63. Substantive equality requires that courts recognize both direct and indirect discrimination. From the beginning of its s. 15(1) jurisprudence, the Supreme Court of Canada has recognized that

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[57] *Eldridge v. British Columbia (Attorney General),* [1997] 3 SCR 624 at para. 77 [*Eldridge*] (Appellant BOA, Tab 6).
[58] Official Problem at paras. 34-37.
[59] *Vriend v. Alberta*, [1998] 1 SCR 493 at para. 82 [*Vriend*] (Appellant BOA, Tab 34).
[60] *Ibid* at para. 82.
[61] *Withler v. Canada (Attorney General)*, [2011] 1 SCR 396 at para. 64 [*Withler*] (Appellant BOA, Tab 35).

identical treatment may result in serious inequality. Quoting *Big M,* Justice McIntyre recognized in *Andrews* that, "the interests of true equality may well require differentiation in treatment."[62]

64. The use of an identical process for contacting potential jurors living on a reserve as for those living off-reserve results in a distinction in the form of unequal representation on jury rolls. Because of Lenora's demographic makeup, this distinction is drawn on the basis of Indigeneity.

ii. The government perpetuated Ms. Carol's pre-existing disadvantage

65. Falconer perpetuated Ms. Carol's pre-existing disadvantage by subjecting her to the coercive force of a criminal justice system that functionally excluded potential jurors with whom Ms. Carol shared a history relevant to her experience in that system. Ms. Carol knew her jury array would not be randomly selected from a roll that included people with a similar background as hers, unlike non-Indigenous criminal defendants. Falconer undermined Ms. Carol's sense of human dignity by denying her of the chance to see her community reflected in the jury roll. These myriad harms perpetuated the alienation and estrangement of Ms. Carol, as an Indigenous accused.[63]

66. Section 15(1) does not require that Indigenous accused are tried by petit juries that perfectly reflect community demographics. It does require, however, that those accused (1) are treated in a manner similar to other members of Falconer's society with respect to the representativeness of the jury roll; and, consequently, (2) have a reasonable chance to have a representative jury array.

67. The focus of the second stage of the s. 15(1) is disadvantage.[64] Justice Abella summarized the thrust of the second step in *Québec v A*, stating: "If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is

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[62] *Andrews v. Law Society of British*, [1989] 1 SCR 143 at 165(a) [*Andrews*] (Appellant BOA, Tab 1).
[63] Official Problem, at para. 22; *Gladue*, *supra* note 30 at paras. 61-65; *Ipeelee*, *supra* note 8, at paras. 60, 77.
[64] *Québec (Attorney General) v. A*, [2013] 1 SCR 61 at paras. 325-330 [*Québec v. A*] (Appellant BOA, Tab 12).

discriminatory."[65] Writing for the majority on s. 15(1) in *Andrews*, McIntyre J. defined "disadvantage" for the purposes of s. 15(1) as the imposition of "burdens, obligations, or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society."[66]

68. As an Indigenous defendant, Ms. Carol faces a unique and pre-existing disadvantage. The Court acknowledged the importance of pre-existing disadvantage in *Withler*, stating that "[p]erpetuation of disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of that group."[67] Indigenous persons are over-represented as criminal defendants in Flavelle's criminal justice system. Indigenous women in particular are at risk of incarceration: Indigenous women are over-represented in Flavelle's prisons by a factor of ten. This over-representation is coupled with the systemic alienation outlined in the Yak Report and recognized by the Supreme Court of Canada in *Gladue* and *Ipeelee*.[68]

69. The government of Falconer undermined Ms. Carol's human dignity in failing to make efforts to increase Indigenous on-reserve representation on the jury roll. Human dignity is no longer an element of the legal test for a breach of s. 15(1), but it remains "an essential value underlying the s. 15 equality guarantee."[69] When assessing whether a law or government action violates human dignity, the relevant question is found in *Law*: "Does the law treat [the claimant] unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?"[70] Ms. Carol is a defendant in a justice system which has imposed

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[65] Ibid, at para. 332.
[66] *Andrews*, *supra* note 62 at 174(h).
[67] *Withler*, *supra* note 61 at para. 35.
[68] Official Problem at paras. 25-26; *Gladue*, *supra* note 30 at paras. 61-65; *Ipeelee*, *supra* note 8 at paras. 60, 77.
[69] *R. v. Kapp*, [2008] 2 SCR 483 at para. 21 [*Kapp*] (Appellant BOA, Tab 24).
[70] *Law v. Canada (Minister of Employment and Immigration)*, [1991] 1 SCR 497 at para. 53 [*Law*] (Appellant BOA, Tab 10).

considerable suffering on her community. Falconer's decision to defund the Jury Committee and take no substantial action to improve under-representation undermined Ms. Carol's status as an equal member in Flavellian society.[71]

70. Not every cross-section of the population can assert a s. 15 breach where the jury roll is not representative of their personal characteristics. Courts should hold the government to account for perpetuating pre-existing systemic disadvantage where it had a hand in creating that disadvantage. Here, the government's historical actions are to blame for the current under-representation. This causal connection is the reason the failure to make efforts to improve representation is discriminatory, rather than amounting to a mere indirect distinction on the basis of an enumerated ground.

iii. The government perpetuated the pre-existing disadvantage of Indigenous persons living on reserve

71. The jury plays a pivotal role in the criminal justice system. Inclusion on a jury roll is fundamental to a group's full participation in Flavellian society. The government's inaction denied Indigenous persons living on reserve in Lenora a meaningful opportunity to participate in the jury system. In this way, the government perpetuated the pre-existing disadvantage faced by Indigenous persons living on-reserve. While other communities are able to engage with the justice system as jurors – and benefit from the participatory nature of the jury system – the legacy of colonialism imposes a burden on Indigenous persons which precludes them from meaningful engagement. This is particularly injurious given the over-incarceration of Indigenous persons.

72. Indigenous persons living on reserves in Lenora have a strong social interest in being treated as respected participants in Flavellian society. The disproportionate incarceration of

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[71] *Gosselin v. Québec (Attorney General)*, [2002] 4 SCR 429 at para. 20 (Appellant BOA, Tab 7).

Indigenous persons in Falconer adds further weight to the group's interest in a representative jury roll. The under-representative jury roll is a component of the system of discrimination in Falconer. Exclusion from the jury, given its importance in the greater criminal justice system, perpetuates the gulf between Indigenous communities and off-reserve communities.[72] The magnitude of the interest at stake is an important contextual factor in the analysis of disadvantage laid out in *Law*.[73]

73. In practice, recipients of jury questionnaires can choose whether or not to refuse those questionnaires.[74] Indeed, the Yak Report found that some Indigenous persons would refuse to serve on a jury because the Flavellian criminal justice system is antithetical to their values. This should not be read to suggest that Falconer's process does not violate s. 15(1). Rather, as Abella J noted in *Québec v. A*, "substantive equality looks not only at the choices available to individuals, but at 'the social and economic environments'" in which those choices play out.[75] The fact that recipients have a choice whether or not to return the questionnaire does not lead to the conclusion that there has been no violation of s. 15(1). Systemic discrimination is complex, and while choice is one factor in under-representation, choice does not vitiate the discriminatory impact of the government's process.

74. Historically, Indigenous persons have been excluded from participating in Flavelle's justice system. Their unique perspectives are often ignored or belittled. The government's actions perpetuated the stereotype that in Flavelle, Indigenous persons are passive subjects of the criminal

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[72] *Québec v. A*, *supra* note 64 at para. 332.
[73] *Law*, *supra* note 70 at paras. 74-75; The four factors referred to in Law can be read to affirm the approach to substantive equality set out in *Andrews*, (*Kapp*, *supra* note 69 at para. 23).
[74] Official Problem at para. 10.
[75] *Québec v. A*, *supra* note 64 at para. 342.

justice system, rather than respected participants in that system. This stereotype does not conform to the group's actual characteristics or capacities.[76]

75. The Yak Report detailed several ways in which Indigenous persons living on a reserve face specific barriers to participating on juries. For example, many persons living on a reserve have criminal records. Without awareness of the processes for expungement or pardon, old criminal records are a bar to participating on a jury.[77]

76. When determining whether the government's conduct violated s. 15(1), this Court should examine the government's actions cumulatively. It is not appropriate to look at the government's efforts solely within the context of compiling the jury roll for Lenora. The disadvantage of Indigenous persons living on reserve on Falconer is a product of centuries of colonialism. In the recent past, the governments of Flavelle and Falconer have actively discriminated against Indigenous persons.[78] This discrimination lead to the present alienation from and ambivalence toward the justice system, demonstrated by the low response rate to jury questionnaires.

77. Viewed from this perspective, the government's own actions are a cause of low response rates. Features of jury questionnaires that may seem neutral, such as a warning that a response is required by law or the form being written in only French and English, have a different meaning in the context of Flavelle's colonial history. The government's supposedly neutral process for compiling the jury roll has the effect of furthering the feeling of alienation pervasive in reserve communities.

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[76] *Withler*, *supra* note 61 at para. 36; *Québec v. A*, *supra* note 64 at para. 326.
[77] Official Problem at para. 29.
[78] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para. 66 (Appellant BOA, Tab 4).

78. Exclusion from jury rolls is part of a vicious cycle in the systemic alienation of Indigenous persons from the justice system. In this way, the pre-existing social disadvantage Indigenous persons suffer from is distinguishable from that of other potential claimant groups. The government's demonstrated apathy toward including Indigenous perspectives in the jury system perpetuated the social disadvantage the claimant group already suffered.

iv. Section 15 imposes positive obligations to address systemic discrimination

79. The government of Falconer has a positive obligation to address inequality in the compilation of jury rolls in Lenora. Absent special efforts, response rates from reserve communities will continue to fall below the response rates of Lenora's off-reserve population. As the Yak Report demonstrated, there are clear and achievable steps the government could take to improve response rates.[79] Following the precedents set in *Eldridge* and *Auton*, the claimant is not requesting the government provide a benefit beyond what the law already provides.[80]

80. Properly interpreted, s. 15(1) provides a guarantee of substantive equality in the form of positive obligations when a facially neutral process perpetuates the effects of systemic discrimination. The Supreme Court recognized this in *Eldridge*, stating: "The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field."[81] In *Turpin*, Justice Wilson framed the purpose of s. 15 as "*remedying* or preventing discrimination against groups suffering social, political and legal disadvantage in our society."[82]

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[79] Official Problem at para. 30.
[80] *Eldridge*, *supra* note 57 at para. 95; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 SCR 657 at para. 41.
[81] *Eldridge*, *supra* note 57 at para. 78.
[82] *Turpin*, *supra* note 19 at 1333(c), emphasis added.

81. Where the government's historical actions are a cause of present systemic disadvantage, and where a facially neutral law or government action perpetuates that disadvantage, a s. 15(1) breach should be found. To remedy the breach, the government should be required to accommodate the group's pre-existing disadvantage. Such an approach to s. 15(1) would maintain the dual purpose of s. 15 as a prohibition against discrimination and a guarantee of equal benefit of the law.

v. The province's actions are not justified under s. 1 of the *Charter*

82. The government's actions do not satisfy the *Oakes* test.[83] There is nothing on the record to suggest that Falconer attempted to balance competing social demands with respect to its decision to ignore the Yak Report's recommendations. The government has not asserted any pressing and substantial objective with respect to either their facially neutral process nor their decision to cancel the Committee's funding. The only pressing and substantial concern the government may provide is the need to redirect $25m to "other public services."[84] Moreover, the government's deliberate inaction is not minimally impairing. Apart from the efforts of a junior bureaucrat, Falconer took no steps to engage with Indigenous communities to address a dramatic disparity in response rates. Given the importance of equality rights in the criminal justice system, Falconer's inaction cannot be a proportionate course of conduct.

C. ISSUE THREE: A TEMPORARY STAY AND A DECLARATION IS THE APPROPRIATE REMEMDY

83. To respond to the ss. 11(f), 11(d), and personal s. 15(1) breaches, the trial judge correctly ordered a temporary one-year stay of proceedings so that Ms. Carol would be tried by a jury selected from Lenora's 2019 jury roll. In preparing that roll, Falconer must exercise reasonable

[83] See application of *R. v. Oakes*, [1986] 1 SCR 103, in *Eldridge*, *supra* note 57 at para. 84-94.
[84] Official Problem at para. 33.

efforts to achieve representativeness. To respond to the s. 15(1) claim on behalf of potential Indigenous jurors on reserves in Lenora, a declaration is the appropriate remedy.

The temporary stay of proceedings

84. Trial judges have a broad discretion to craft remedies that are appropriate and just in the circumstances.[85] Generally speaking, a section 24(1) remedy should respond purposively and effectively to the violation of the infringed right.[86] The remedy should also be fair to the claimant, and the public interest should be considered.

85. The standard of review of a s. 24(1) remedy is deferential. Appellate intervention "is warranted only where a trial judge misdirects him or herself in law, commits a reviewable error of fact, or renders a decision that is so clearly wrong as to amount to an injustice."[87]

86. In this case, a temporary stay of proceedings is the correct remedy. The Appellant will be given a trial from a constitutionally compliant roll so long as the state fulfills its constitutional obligations. At the same time, this remedy is not unduly burdensome on society's interest in prosecuting criminal matters, as the trial will proceed with a fair, impartial and representative jury. A temporary stay is effective, responsive, proportionate and fair.

87. The remedy in this case is also supported by precedent. In *R. v. Wabason*, a one-year stay of proceedings was ordered as the appropriate and just remedy to an unrepresentative jury roll.[88] That case was decided using the Ontario Court of Appeal's *Kokopenace* test, the same test advanced by the Appellant in this appeal. Dissenting at the Supreme Court in *Kokopenace*,

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[85] *Doucet-Boudreau v. Nova Soctia*, 2003 SCC 62 at paras. 52-53 (Appellant BOA, Tab 5).
[86] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at para. 145 (Appellant BOA, Tab 3).
[87] *R. v. Babos*, 2014 SCC 16 at para. 86 (Appellant BOA, Tab 14).
[88] *R. v. Wabason*, 2014 ONSC 2394 at paras. 32-34 (Appellant BOA, Tab 32).

Cromwell J. also stated that a temporary stay would be the appropriate remedy where the representativeness issue was raised before trial.[89]

88. A temporary stay of proceedings will not jeopardize the Appellant's right to a be tried in a reasonable time under s. 11(b) of the *Charter*. Given that this is a case of first impression in Falconer, unreasonable delay attributable to the temporary stay of proceedings would be justified under the "exceptional circumstances" branch of the test from *R. v. Jordan*.[90]

The declaration

89. The remedy for a s. 15(1) breach must flow from the claim. The evidence before the court from the Yak Report provides a systemic account of alienation. As such, systemic remedy of a declaration is required for the Appellant's public interest claim. As in *Eldridge*, the appropriate remedy here is a declaration of unconstitutionality.[91]

PART V - ORDER SOUGHT

90. The Appellant respectfully requests that this Court allow the appeal and order a temporary stay of proceedings and a declaration of unconstitutionality.

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

University of Toronto
Nicholas Martin and Holly Kallmeyer for the Appellant

[89] *Kokopenace* (SCC)*, supra* note 2 at para. 292.
[90] *R. v. Jordan*, 2016 SCC 27 (Appellant BOA, Tab 23).
[91] *Eldridge*, *supra* note 57 at para. 96.

SCHEDULE A - TABLE OF AUTHORITIES

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Secondary Sources	**Paragraphs**
Misha Boutilier, *Optional By-Products or Constitutionally- Protected Purposes? Societal Interests in Representativeness, the s. 11(f) Right to Trial by Jury, and the Kokopenace Decision*, (2018) 65 C.L.Q. 458	27
Report of the Royal Commission on the Donald Marshall, Jr. Prosecution, (Nova Scotia, 1989)	55

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.

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;

Charter of Rights and Freedoms, 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.