GRAND MOOT 2018

JURY REPRESENTATION AND THE *CHARTER*

R v Carol

Official Problem

Jury Representation and the *Charter*

Introduction

1. This appeal addresses the scope of an accused's right to a representative jury under section 11(d) and section 11(f) of the *Charter*, when policy recommendations become constitutional obligations, and if section 15 of the *Charter* provides a remedy for systemic discrimination.
2. Lenora is a district in the Province of Falconer, a common law Province in the country of Flavelle. Flavelle and Falconer have a Constitution, judicial system, *Criminal Code*, systems of governments, common law, and social and political history identical to those of Canada and Ontario, respectively.
3. Flavelle's highest court is the Supreme Court of Flavelle. All Canadian legislation is binding on the Supreme Court of Flavelle, but the Court is not bound by Canadian jurisprudence. However, decisions of Canadian courts, particularly the Supreme Court of Canada, are considered highly persuasive.
4. The Superior Court of Falconer and the Falconer Court of Appeal have jurisdiction over all issues raised in their respective jurisdictions below.

Background

5. Flavelle has a long and troubling colonial history, identical to that of Canada.
6. Although Indigenous people constitute less than 4% of Flavelle's population, Indigenous offenders make up 20% of federal penitentiary inmates. This overrepresentation is even more pronounced amongst Indigenous woman, who account for 41% of all women in custody.

7. Located in the Province of Falconer is the District of Lenora. The total population of the District of Lenora is 65,000. There are 46 First Nations located within its boundaries, making up approximately a third of Lenora's population. The overwhelming majority of Indigenous people in Lenora live on-reserve and virtually all those living on-reserves are Indigenous peoples. In the District, 54% of jury trials involve Indigenous peoples as complainants, accused, or both.

Statutory Scheme for Jury Selection

8. Jury selection in Falconer takes place in three stages. First, jury rolls are prepared by a local sheriff. This involves mailing physical jury service notices to residents in a particular district and having them fill out a questionnaire form. Second, at the request of a judge, names from the jury roll list are selected by the sheriff to constitute jury panels, sometimes referred to as the "jury array." Third, through the in-court jury selection stage, a *petit jury* is selected from amongst the members of the jury panel to hear a criminal trial.

9. Only the third step of this process is governed by the Federal *Criminal Code*. The other two stages are governed by Falconer's Provincial *Juries Act* (the "**Act**").

10. Of the two steps regulated by the Act, the assembly of the jury roll is generally the most complex and contentious. The Act provides that a jury roll will be prepared every year for each district in Falconer by the sheriff. First, the sheriff determines the number of prospective jurors required for the year. From there, jury service notices and questionnaires are sent out to randomly selected persons. Everyone who receives a jury service notice is required by law to complete the questionnaire and return it to the sheriff. It is an offence punishable by fine or imprisonment not to do so, although citizens of Falconer are rarely fined or imprisoned for failing to return questionnaires. Once the jury service

questionnaires have been returned, the sheriff prepares a jury roll made of those who returned the questionnaires and who are eligible for jury service and certifies that it is the proper roll.

11. Under Section 6(2) of the Act, the Director of Municipal Property identifies those who will receive notices by randomly selecting them from the names listed on the most recent municipal enumeration, provided that they are (1) residents of the country or district, (2) Flavellian citizens, and (3) at least 18 years of age. The Director is also required to ensure that each municipality's shares of those who receive notices approximately reflects that municipality's shares of those in the county or district eligible to receive notices.

12. The municipality enumeration process does not capture those who reside on-reserves. The Act provides a separate process for including those living on-reserves at this stage of the jury roll process, permitting the sheriff to use any available list of on-reserve residents from which to randomly select the names to receive jury service notices. Specifically, Section 6(8) provides:

    > 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.

13. Other Provinces in Flavelle use different statutory schemes for compiling jury rolls. Falconer is the only province that distinguishes between on-reserve and off-reserve residents.

Past Issues with Jury Rolls

14. For decades, Lenora's jury rolls have featured systemic underrepresentation of Indigenous peoples. In 1993, the return rate for completed jury service questionnaires sent to reserves

was 33% compared to 70% for off-reserve residents. In 2002, Indigenous on-reserve response rates fell to 15.8%. By 2008, the response rate declined to 10%, compared to 55.6% for off-reserve residents.

15. Although the Act under section 6(8) dictated that the sheriff was responsible for ensuring Indigenous on-reserve representation on jury roles and monitoring response rates from reserves, in practice this responsibility fell to a low-level bureaucrat, Stephanie Moon, who had very little training or experience with First Nations reserves.

The Yak Commission

16. In 2008, the Flavellian Broadcasting Corporation (the "FBC") produced a widely-disseminated documentary on the underrepresentation of Indigenous persons on juries. This documentary generated considerable public scrutiny and highlighted two problems in Lenora's approach to on-reserve jury selection.

17. First, the mailing and delivery lists used to send jury service questionnaires to reserves were out of date. They were compiled from a hodgepodge of various sources - such as old reserve lists from 2000 and band lists which included people not living on-reserve – and, as a result, over 50 percent of jury service questionnaires could not be delivered. In comparison, only 5 percent of jury service questionnaire sent out to the off-reserve population could not be delivered.

18. Second, the FBC argued that Flavelle's criminal justice system and colonial past had alienated Indigenous peoples from the jury system. The FBC reached this conclusion on the basis of qualitative interviews with various Indigenous residents on-reserve.

19. As a result of political pressure flowing from the documentary, the Premier of Falconer, Douglas Dodge, made a public commitment to address the underrepresentation of Indigenous peoples on juries throughout the province and particularly in Lenora.

20. Two initiatives were introduced. First, the Province dedicated substantial resources to ensuring that it had up to date and accurate lists of on-reserve residents. By 2010, these efforts resulted in mailing addresses and residency lists as accurate as those used off reserve. Thus, the issue with mailing lists was largely resolved.

21. Second, Falconer commissioned the prestigious University of Jackman's law school Dean, Edward Yak, to conduct a comprehensive report (the "**Yak Report"**) addressing the underlying causes of low response rates from First Nations reserves.

22. The Report identified five key practical barriers that exist with respect to the participation of First Nations peoples on juries.

a. A "Foreign System"

23. After interviewing Indigenous persons across Lenora, Ed Yak determined that one of the primary obstacles to Indigenous participation was cultural. Indigenous conceptions of justice centre around concepts of reconciliation and healing between perpetrator and victim, and specifically exclude ideas of punishment and judgement. Many Indigenous persons told Yak they would refuse to participate in a "foreign system" that contradicted their basic values.

24. The Report determined that the fact that jury questionnaires announced it was a punishable offence to fail to respond compounded the feeling among Indigenous persons that they were being compelled to participate in a colonial system contrary to their core beliefs. It was also found problematic that notices demanded the respondent declare

Flavellian citizenship – an act many Indigenous persons would only perform reluctantly, if at all.

b. A Racist Justice System

25. The Report determined that a deep distrust of the justice system (including both police forces and the courts) among Indigenous persons served as a further barrier to their participation in juries. They were reluctant to participate in a system that they perceived as hostile to them. Yak documented that most Indigenous people knew of instances of mistreatment of First Nations inmates in prison, general disrespect by police, and discriminatory public reaction to First Nations complaints.

26. Yak was particularly troubled by the practical experience of Indigenous persons in the justice system in remote communities in northern Lenora. Here, a lack of funds and infrastructure meant that participants in the justice system experienced it as treating them inhumanely, and in sharp distinction to their primarily non-Indigenous counterparts in urban centres. Yak highlighted the following quote as depicting a typical day in a northern Lenora court:

> Any client who wants to talk to their lawyer, it happens in the kitchen. The judge changes in the library. The lawyers don't have a room they can interview people in, if the kitchen is full and the bar is full, so there is no privacy, no confidentiality. There is a makeshift wall inside the courtroom, so you can have a meeting there, or you are meeting alongside of the walls. It's a whole shaming process, there is no privacy for anyone… Something has to change, it's no longer acceptable.

c. Cost Obstacles

27. The Report determined that there were also logistical barriers that First Nations peoples, particularly in northwestern Lenora, were forced to overcome to participate on juries. Transportation from reserve communities to urban centres was determined to be a significant challenge, because it often required multiple modes of transportation that could

take up to several days. The cost for airfare far exceeded what people could afford out-of-pocket. Hotel stipends were minimal and would only cover the cost of substandard accommodation, and meal allowances did not allow for healthy options.

d. Language Obstacles

28. It was further determined that the fact jury questionnaires were issued in Flavelle's two official languages – English and French – precluded persons who spoke Indigenous languages from participating. Even where such persons were able to respond to questionnaires, it was difficult for them to (1) travel to urban centres where Indigenous languages were scarcely spoken and (2) to participate in English or French judicial proceedings without access to government-financed translation services.

f. Criminal Records

29. Yak wrote:

> Finally, First Nations people identified that the existence of criminal records, and lack of awareness of pardon procedures, present a significant bar to jury service. They explained that some First Nations people have old criminal records, many for minor offences, that excuse them from being eligible for jury service. However, owing to the lack of information and costs associated with pardon procedures, most do not expunge their criminal record, choosing to live with it instead.

30. As a result of his findings, Yak made eleven recommendations to the Lenora government.

    a. **Recommendation 1:** the Attorney General should establish an Advisory Group to the Attorney General on matters affecting First Nations and the Justice System.

    b. **Recommendation 2:** the Ministry of the Attorney General should provide cultural training for all government officials working in the justice system who have contact with First Nations peoples, including police, court workers, Crown prosecutors, prison guards and other related agencies.

c. **Recommendation 3:** the Ministry of the Attorney General should carry out the following studies:

i. a study on legal representation that would involve Legal Aid Lenora, particularly in the north, that would cover a variety of topics, including the adequacy of existing legal representation, the location and schedule of court sittings, and related matters.

ii. a study on First Nations policing issues, including the recognition of First Nations police forces through enabling legislation, the establishment of a regulatory body to oversee the operation of First Nations law enforcement programs and the creation of an independent review board to adjudicate policing complaints;

d. **Recommendation 4:** the Ministry of the Attorney General should create an Assistant Deputy Attorney General position responsible for Aboriginal issues, including the implementation of the Report.

e. **Recommendation 5:** the Ministry of the Attorney General should provide broader and more comprehensive justice education programs for First Nations individuals, including:

i. developing brochures in First Nations languages with plain wording which provide comprehensive information on the justice system; and

ii. commissioning the creation of video or other educational instruments, particularly in First Nations languages, that would be used to educate First Nations individuals as to the role played by the jury in the justice system and the importance of participating on the jury.

f. **Recommendation 6:** the Ministry of the Attorney General should consider amending the questionnaire sent to prospective jurors to:

i. translate the questionnaire into First Nations languages as appropriate;

ii. remove the wording threatening a fine for non-compliance and replacing it with wording stating simply that Lenora law requires the recipient to complete and return the form because of the importance of the jury in ensuring fair trials under Lenora's justice system;

iii. on the premise that a First Nations member living on-reserve in Lenora satisfies the Flavellian citizenship requirement under s. 2(b) of the *Juries Act*, add an option for First Nations individual to identify themselves as First Nations members or citizens rather than Flavellian citizens; and

iv. provide, through an amendment to the Juries Act, for a more realistic period than the current five days for the return of jury questionnaires.

g. **Recommendation 7:** the Ministry of the Attorney General should consider implementing the practice from parts of the U.S., that when a jury summons or questionnaire is undeliverable or is not returned, another summons or questionnaire is sent out to a resident of the same postal code, thereby ensuring that nonresponsive prospective jurors do not undermine jury representativeness.

h. **Recommendation 8:** the Ministry of the Attorney General should consider a procedure whereby First Nations people on-reserve could volunteer for jury service as a means of supplementing other jury source lists.

i. **Recommendation 9:** the Ministry of the Attorney General should consider enabling First Nations people not fluent in English or French to serve on juries by

providing translation services and by amending the jury questionnaire accordingly to reflect this change.

j. **Recommendation 10:** the Ministry of the Attorney General should adopt measures to respond to the problem of First Nations individuals with criminal records for minor offences being automatically excluded from jury duty by:

i. amending the *Juries Act* provisions that exclude individuals who have been convicted of certain offences from inclusion on the jury roll, to make them consistent with the relevant *Criminal Code* provisions, which exclude a narrower group of individuals;

ii. encouraging and providing advice and support for First Nations individuals to apply for pardons to remove criminal records; and

iii. considering whether, after a certain period of time, an individual previously convicted of certain offences could become eligible again for jury service.

k. **Recommendation 11:** that the Ministry of the Attorney General should consider the issue of jury member compensation.

Falconer's Reaction to The Yak Commission

31. Following the publication of the Yak Report in 2008, Douglas Dodge publicly pledged to implement each of the recommendations. Accordingly, Premier Dodge funded a Jury Review Implementation Committee ("**The Jury Committee**") – consisting of Indigenous leaders, academics, criminal justice practitioners, and Falconer government officials – and provided them with a sizable $25 million a year budget. Their goal was to implement each of the Yak Commission's recommendations, with the goal of proportionate Indigenous representation on juries by the year 2012.

32. Falconer's efforts to improve jury representativeness achieved some success. Largely as a result of the efforts to improve mailing addresses and residency lists for Indigenous reserves, response rates for on-reserve jury service questionnaires increased from 2008 to 2009. Consequently, the 2009 and 2010 jury rolls were more representative of Indigenous peoples across the Province. In the District of Lenora specifically, the response rate for on-reserve jury service questionnaires increased from 10% in 2008 to 15% in 2010 and the number of Indigenous jurors on Lenora' jury roll increased from 5.7% in 2008 to 10% in 2010.

33. However, despite initial enthusiasm, media attention and public scrutiny of juries quickly dissipated. Accordingly, in 2010, Douglas Dodge decided to dismantle The Jury Committee and spend its $25 million a year budget on other public services. As a result, no steps were ultimately taken towards implementing the Yak Commission's recommendations. With the problem of compiling mailing lists and the delivery of questionnaires dealt with, Douglas Dodge considered his work "complete." When pressed by critics about the failure to implement the recommendations, Premier Dodge responded that he had clearly fulfilled Falconer's constitutional mandate.

On-reserve response rates continue to fall

34. Following the dismantling of the Jury Committee - and despite much improved mailing lists and delivery methods - the response rates to jury questionnaires for on-reserve residents in the District of Lenora continued to fall in the years after 2010. In 2010, the response rate to jury questionnaires was 15% for on-reserve residence, compared to 55.6% for off-reserve residents. Since that time, the on-reserve response rate fell by 0.75% every

year, such that, by 2018, only 7.5% of on-reserve residents were responding to questionnaires which would allow them to be placed on the jury roll.

35. Conversely, off-reserve resident response rate continued to climb by an average of 1.5% a year as a by-product of Douglas Dodge's effort to improve the mailing and delivery of jury forms for on-reserve residents. By 2018, 70.6% of off-reserve residents were responding to jury roll questionnaires.

36. This low response rate meant that Indigenous peoples continued to be significantly underrepresented on jury rolls. In any given year, the District of Lenora would have 700 potential jurors on its jury roll. In 2010, despite the improved delivery of jury service notices, only 39 on-reserve residents made it onto Lenora's jury roll. Following the dismantling of The Jury Committee, this number decreased by roughly two responses every year. By 2018, only 23 on-reserve residents were included on the year's jury roll.

37. During this time, Indigenous on-reserve residents represented 35% of Lenora's total population and 28% of Lenora's population over the age of 18.

Lenora's efforts to address the low response rates

38. Lenora continues to rely on Stephanie Moon, a low-ranking bureaucrat, to engage with First Nations communities and address the low response rates. Ms. Moon has received no specific training on her duties in relation to First Nations nor on the realities of First Nations relations in Falconer and Flavelle more broadly.

39. Nevertheless, Ms. Moon has persistently inquired into the reserve's low response rates. Specifically, she has sent two to three letters a year to First Nations Chiefs and community leaders inquiring into the low response rates. These letters have been met with either silence

or explicit requests for the Yak Report's Recommendations to be implemented. Ms. Moon has consistently responded that the Province has decided not to fund those programs.

40. In response to low response rates, Ms. Moon has consistently increased the number of jury service questionnaires sent to reserves in order to deal with the low response rate. If each on-reserve resident responded, approximately 484 questionnaires should be sent out to reserves to ensure that roughly a third of Lenora's jury roll is Indigenous. However, given the low response rate, Ms. Moon increased this amount to 600 in 2008 through to 2012, 800 from 2012 to 2016, and 1000 to 2016 to 2018. Despite these efforts, the response rates continued to decrease over time.

41. From 2008 to 2018, Falconer has monitored its jury engagement efforts. It maintains up to date statistics about the response rates for on-reserve and off-reserve residents every year. Other Provinces in Flavelle do not monitor on-reserve response rates because their statutory scheme does not distinguish between on-reserve and off-reserve residents.

Lenora's underrepresentation challenged in the courts

42. Gladys Carol is an Indigenous woman living on-reserve in the District of Lenora. On May 7, 2018, she was charged with second degree murder. Ms. Carol claims self-defence.

43. Carol's jury roll was compiled in accordance with the process specified above. Due to the low response rate, there were only 23 on-reserve residents on the 2018 jury roll out of 700 jurors, despite on-reserve residents representing 35% of Lenora's population.

44. Carol's jury panel, chosen from this jury roll, included no Indigenous people. Naturally, this resulted in her *petit jury* having no Indigenous representation.

45. Carol challenged Lenora's failure to deal with the systemically low jury response rate on the grounds that it violated her section 11(d), section 11(f), and section 15 *Charter* rights.

Lower Court Judgements

46. At the Court of first instance, the Crown contended that the section 11 issues should be decided within the framework of representativeness established by the Supreme Court of Canada in its 2015 decision *R v Kokopenace*. In this case, the Supreme Court determined on a nearly identical set of facts that the state's representativeness obligations were met in spite of the fact that Canadian mailing and delivery systems in 2015 were identical to those used in Falconer before 2008 – and thus were significantly inferior to those in place in present-day Falconer. In its factum, the Crown quoted an excerpt from the *Kokopenace* majority judgement penned by Justice Moldaver:

> To determine if the state has met its representativeness obligation, the question is whether the state provided a fair opportunity for a broad cross-section of society to participate in the jury process. A fair opportunity will have been provided when the state makes reasonable efforts to: (1) compile the jury roll using random selection from lists that draw from a broad cross-section of society, and (2) deliver jury notices to those who have been randomly selected. In other words, it is the act of casting a wide net that ensures representativeness. Representativeness is not about targeting particular groups for inclusion on the jury roll…
>
> In the meantime, what are we to do about jury trials? Are we to force Aboriginal people to participate under threat of imprisonment? Are we to carve out special rules allowing Aboriginal people to volunteer for jury duty, and thereby destroy the concept of randomness that is vital to our jury selection process in criminal trials? Are we to say that an Aboriginal on-reserve resident from the District of Kenora facing charges in Toronto or a similar district with no Aboriginal on-reserve population should be entitled to a change of venue? Are we to say that such an individual cannot get a fair trial in Toronto? Are we to say that other marginalized groups that have similarly strong grievances with our justice system can only get a fair trial if the jury roll proportionately reflects their numbers in a given community?

47. The Crown argued it was demonstrable that the Falconer government's process for assembling jury rolls was not only equal to the system considered by the Supreme Court of Canada in terms of its inclusion of Indigenous persons – the process was markedly better.

It provided a “fair opportunity for a broad cross-section of society to participate.” Thus, the Crown contended the state provided the accused the full range of representativeness she was guaranteed under the *Charter*.

48. Justice Thomson of the Falconer Superior Court rejected this argument. He felt that the government had a constitutional obligation to do more than merely develop an accurate mailing list. Accordingly, he refused to adopt the Canadian *R v Kokopenace* framework.

49. Based on the evidence presented in the Yak Report, Justice Thomson went on to determine that Ms. Carol’s section 11(d) and (f) rights had been violated. He wrote:

> Courts have consistently recognized that jury representativeness is necessary to ensure the impartiality of such tribunals guaranteed to Flavellians under s.11(d) and (f) of the *Charter*. In *Kokopenace*, the Supreme Court of Canada held that the state would have met its obligations under s.11(d) and (f) if it made reasonable efforts to: (1) compile the jury roll using random selection from lists that draw from a broad cross-section of society and (2) deliver jury notices to those who have been randomly selected. The process of compiling the jury roll – not the ultimately composition of the *petit jury* – was the decisive factor.
>
> But the Yak Report demonstrates that the *Kokopenace* framework renders representativeness an empty right. It is not enough for the state to go on providing the same process of delivering jury notices when extensive evidence demonstrates that this process does not, cannot, and will never fully include Indigenous Flavellians. Nor is it enough for the state to take minimal steps towards improvement and “call it a day.” A jury system that systematically excludes Indigenous persons is a jury system without representativeness – and such a system is unconstitutional.
>
> It is true that jury representativeness is a limited right. Indeed, as has been established by many courts, it would be impossible to compose a jury that perfectly represented every social group. But this does not mean that where the state is presented with extensive, government-commissioned study documenting how a large, historically marginalized group is systematically excluded from participating in juries, it can pretend that it meets its constitutional obligations.
>
> In its failure to implement the eleven recommendations outlined in the Yak Report, the government violated Ms. Carol’s *Charter* rights.

50. Justice Thomson went on to consider the section 15 claim. Ms. Carol raised two section 15(1) claims: one as an individual Indigenous defendant and another on behalf of potential jurors living on-reserve in the District of Lenora. Justice Thomson granted Ms. Carol public interest standing with respect to the second claim. Ms. Carol succeed on both claims. Specifically, Justice Thomson held:

> The Supreme Court's s.15 jurisprudence is troubling and, often times, unsatisfactory. This case brings to light one of s.15's obvious short comings: its failure to provide a remedy for systemic discrimination. At the present time, I concede that it seems the sole pathway to a s.15 claim is to ask: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? This leaves little room for claimants to argue for remedies to systemic discrimination. In my view, however, instead of simply looking for a distinction, courts should ask whether the applicant has been denied equality before or under the law, or the equal benefit or protection of the law. Framing the question this way is a necessity to achieving true equality. I cannot summarize my concerns better about the government's position in this case than Mary Eberts and Kim Stanton did in their critique of the *Kokopenace* decision:[1]
>
> > The majority's decision fails to connect the government's systemic failures with the lack of response by Indigenous people to the call for jury roll membership. This population has been profoundly alienated from the Canadian criminal justice system. The chronically low representation of Indigenous people on juries may be contrasted with the alarming increase in representation of Indigenous people in Canadian prisons in the last decade. Howard Sanders, the federal correctional investigator, has reported that First Nations, Métis and Inuit prisoners in federal prisons account for 23% of inmates, up from 17% a decade ago. Indigenous women comprised approximately 32% of all female federal prisoners in 2010-11--up more than 85 per cent in 10 years. Given that Indigenous people account for about 4% of the total population in Canada, these numbers are wildly disproportionate. The system is structurally discriminatory. The majority decision is a very disappointing missed opportunity to address one aspect of the problem.
>
> In my opinion, s.15 must provide a remedy for claimants experiencing systemic discrimination. This conclusion is supposed by the text and purpose of s.15. First, the text of s.15 reads as follows:

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[1] Mary Eberts and Kim Stanton, "The Disappearance of the Four Equality Rights and Systemic Discrimination from Canadian Equality Jurisprudence." (2018) 38 Nat'l J. Const. L 89.

> 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, color, religion, sex, age or mental or physical disability.

> Much of the previous jurisprudence has focused on the term "discrimination". This has resulted in courts looking for a case of individual discrimination before considering systemic discrimination as a contextual factor. This is a mistake. This approach ignores the presence in s.15 of equality rights under the law and of the equal protection and equal benefit of the law. Properly constructed, these phrases demonstrate structural dimensions of legal protection which provide a home for protection against systemic discrimination. Protection against systemic discrimination – in addition to protect from instance of individual discrimination – is necessary to truly promote equality. The structural and largely invisible nature of systemic discrimination means that individual instances of discrimination may be difficult to establish. This case is a prime example.

> This reading of s.15 is also supported by the purpose of this section. A powerful women's lobby group emerged in the 1980s to argue that s.15 should provide a guarantee of equality in the substance of the law, not just its administration. Their proposal to broaden the language of s.15 was accepted by the government. Holding that the government has fulfilled its constitutional obligations merely because it provides the same jury roll questionnaires to all citizens equally - while it turns a blind eye to the structurally racist and discriminatory criminal justice system which perpetuates Indigenous peoples' alienation from the jury system – is a quintessential case of prioritizing equal administration of laws over substantive equality.

> Finally, I would note that Supreme Court of Canada in cases like *Ipeelee*, *Williams* and *Gladue* acknowledge the existence of systemic discrimination and acknowledged these as a contextual factor in s.15 analysis. Thus, while I concede that the test that I am adopting is novel, I believe it is properly grounded in law and will inevitably be adopted in the next iteration of s.15 jurisprudence when the Supreme Court has the chance to opine on it.

51. Justice Thomson further concluded that these violations could not be justified under section 1 of the *Charter*.

52. To remedy the section 11(d) and section 11(f) *Charter* infringements, Justice Thomson ordered a stay of proceedings for one year until a new, more representative jury roll was constituted. Justice Thomson ordered this remedy under section 24(1) on the grounds that

the lack of Indigenous representation on jury rolls created an appearance of unfairness such that public confidence in the integrity of the justice system would be undermined if Ms. Carol was tried with her current jury. Justice Thomson further declared, also using section 24(1) of the *Charter*, that Falconer's failure to take proactive steps to rectify Indigenous underrepresentation on juries was a violation of section 15(1) of the *Charter*. Justice Thomson ordered Falconer to reinstitute the Jury Committee and implement the Yak Recommendations.

53. At the Falconer Court of Appeal, Justices Church-Carson and Marinacci wrote a majority judgement overturning Justice Thomson's ruling in its totality. They wrote:

> While Thomson J. has produced a novel and interesting judgement, it is, with respect, one that misses the mark.
>
> The protections provided by s.11(d) and (f) of the *Charter* no doubt guarantee Ms. Carol a representative jury. However, this right has always been held to be a circumscribed one. Because of the inevitable impossibility of assembling a perfectly representative *petit jury*, Flavellian courts should define representativeness with reference to the process used to compile a jury roll, and not to ultimate composition of the jury. Therefore, we would adopt the framework of representativeness established in *Kokopenace* framework.

54. The majority found that Ms. Carol's section 11(d) and (f) rights had not been violated, and ordered that her trial continue with the present jury roll. They also overturned Thomson J's finding on section 15, finding that there was no "distinction" created by a law.

55. Sanderson JA wrote a blistering dissent that would have upheld the trial judgement in its entirety. He wrote:

> The trial judge has provided eloquent, thoughtful reasons based in compelling evidence for departing from the established s.11 and s.15 tests. The majority undoubtedly fears the "slippery slope" opened by the trial judgement, as it departs significantly from established constitutional jurisprudence. But it is time to venture where "timorous souls" will not go. The protections guaranteed by the text, spirit, and objectives of sections 11 and 15 cannot be achieved by providing an abstract right to jury representativeness and juries that are never representative, nor a formal

but not substantive right to equality. The *Charter* demands more, and this Court must deliver.

Issues on Appeal to the Supreme Court of Flavelle

1. Have Ms. Carol's section 11(d) and section 11(f) *Charter* rights been violated by the lack of Indigenous representation on Lenora's juries?
2. The Supreme Court of Flavelle has granted public interest standing to Ms. Carol for her section 15 claim on behalf of potential jurors living on-reserve in the District of Lenora.
   a. Have Ms. Carol's section 15 rights been violated by the lack of Indigenous representation on her jury?
   b. Have potential jurors living on-reserve in the District of Lenora experienced a section 15 violation?
3. If yes to any of the above, can the infringements be justified under section 1 of the *Charter*?