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A Tale of Two Countries' Engagement with the Fair Cross Section Right: Aboriginal Underrepresentation on Ontario Juries and the Boston Marathon Bomber's Jury Wheel Challenge

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A TALE OF TWO COUNTRIES' ENGAGEMENT WITH THE FAIR
CROSS SECTION RIGHT: ABORIGINAL UNDERREPRESENTATION ON
ONTARIO JURIES AND THE BOSTON MARATHON BOMBER'S JURY
WHEEL CHALLENGE

MARIE COMISKEY*

INTRODUCTION

I. RIGHT TO A REPRESENTATIVE JURY

A. *Canada*

B. *United States*

II. ABORIGINAL UNDERREPRESENTATION ON JURIES—CANADA

A. *The Iacobucci Report*

B. *R. v. Kokopenace*

III. FAIR CROSS-SECTION ENGAGEMENT IN THE UNITED STATES: THE
CASE OF DZHOKHAR A. TSARNAEV

CONCLUSION

INTRODUCTION

Imagine two men each charged with serious crimes, one in Canada and the other in the United States. The first is an Aboriginal man facing a second-degree murder charge in Canada. The second is a young Chechnya man accused of planning and executing the Boston Marathon bombing in the United States. Both must face a jury of their peers and yet, when they arrive in their respective courtrooms, the jury venire differs in substantial respects from the jury-eligible population outside the court's doors.

In the first, Clifford Kokopenace sees virtually no Aboriginal persons, although Aboriginals make up a third of the population in his judicial district of Kenova, Ontario. In the second, Dzhokhar Tsarnaev sees a courtroom with almost no persons over seventy and fewer Afri-

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can-Americans than in the general population. The issue before the court in each country is whether the court has violated the defendant's constitutional right to a jury selected from a fair cross-section of the community. This article examines how courts interpret and apply the fair cross-section right in Canada and the United States through two cases that have received extensive media attention.

In Part I, the article begins with a discussion centered on how the Supreme Court of Canada and the United States Supreme Court have defined the fair cross-section of the community as a component of the constitutional right to a jury trial. Part II focuses on the crisis of Aboriginal underrepresentation on juries in Ontario. The issue will be first examined through the findings of the ground-breaking study by a former Supreme Court of Canada Justice on the causes of the crisis. Next, the article will look at how protests by the families of young deceased Aboriginals at coroners' inquiries brought media attention to the underrepresentation issue. It will then move to the case, *R. v. Kokopenace*,¹ where the Ontario Court of Appeal was divided on the sufficiency of the government measures to address the problem. In Part III, the article will look at how the fair cross-section arguments were marshalled by Tsarnaev in attacking the validity of the grand jury and petit jury's indictment against him and explore the debate over the appropriate methods for calculating disparity. The paper will conclude by asking whether the questions raised in these two cases have any lessons with general principles applicable to each country.

I. THE RIGHT TO A REPRESENTATIVE JURY

A. Canada

In Canada, the right to a jury trial is enshrined in section 11(f) of the Charter of Rights and Freedoms (Charter),² which guarantees that any person charged with an offense has the right to the benefit of a jury trial where the maximum punishment is five years of imprisonment or more. The Supreme Court of Canada held in *R. v. Sherratt*³ that the right would be meaningless unless it encompassed some guarantee that the jury act impartially and represent, to the extent possible, the community. The jury's representativeness allows it to act as the conscience of

1. *R. v. Kokopenace*, 2013 ONCA 389, [2013] O.J. No. 2752 (Can. Ont. C.A.).
2. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, s. 11 (U.K.).
3. *R. v. Sherratt*, [1991] 1 S.C.R. 509 (Can.).

the community.⁴ Justice L'Heureux-Dubé found that the right to representativeness is achieved by two facets of the jury system in Canada: 1) the sources relied upon to prepare the jury rolls used to summon jurors; and 2) the random selection process.⁵ In Canada, provincial statutes prescribe the juror summons process.⁶ For example, section 6(2) of the Ontario Juries Act requires that the Director of Assessment (an employee at the Municipal Property Assessment Corporation appointed as Director) randomly select persons who are at least eighteen, live in Canada, and are Canadian citizens, from the tax assessment lists, and mail jury service notices to them.⁷ The numbers selected from each municipality are also to reflect in proximate terms the proportion of that municipality's population to the overall population in the county.

In Canada, there is a strong belief that too extensive a voir dire process would pollute the jury and that random selection of jurors from the venire is to be preserved as much as possible.⁸ Once in the courtroom, Canadian lawyers generally have very limited information (name, address and occupation) about the prospective jurors before selecting the jury; questioning of jurors does not normally occur.⁹ The one exception is where the defendant rebuts the presumption that potential jurors are impartial through evidence demonstrating a realistic potential of widespread bias in the community, which some jurors may be unable to set aside.¹⁰ Generally, only one or two limited questions within a challenge for cause process is permitted to assess

4. *Id.* at 523.

5. *Id.* at 525. For a description of the voir dire process in Canada, see generally Marie Comiskey, *Does Voir Dire Serve as a Powerful Disinfectant or Pollutant? A Look at the Disparate Approaches to Jury Selection in the United States and Canada*, 59 DRAKE L. REV. 733 (2011).

6. These sources are set out in provincial legislation. In Ontario, the Juries Act, R.S.O. 1990, c. J.3, s. 5(1) (Can.), requires the sheriff for the county to annually determine how many jurors will be required and provide that number to a designated official at the Municipal Property Assessments Corporation so that municipals records can be used to select names to receive a jury service notice.

7. Juries Act, R.S.O. 1990, c. J.3, s. 6(2) (Can.).

8. Comiskey, *supra* note 5. See also Brent Kettles, *Impartiality, Representativeness and Jury Selection in Canada*, 59 CRIM. L. Q. 462 (2013). The limited number of questions is also prompted by a desire within the judiciary that the process not evolve into an "American style voir dire". Regina A. Schuller & Neil Vidmar, *The Canadian Criminal Jury*, 86 CHI.-KENT LAW REVIEW 497, 517 (2011).

9. Neil Vidmar, *The Canadian Criminal Jury: Searching for a Middle Ground*, 62 LAW & CONTEMP. PROBS. 141, 150 (1999) [hereinafter Vidmar, *The Canadian Criminal Jury*]. Neil Vidmar, *Pretrial Prejudice in Canada: A Comparative Perspective on the Criminal Jury*, 79 JUDICATURE 249, 253 (1996).

10. Schuller & Vidmar, *supra* note 8, at 515. In recent years, the Canadian courts have been willing to take judicial notice of the potential for bias in trials involving visible minority defendants. *Id.* at 517.

whether the prospective juror would be able to judge the defendant impartially.¹¹ It is not the judge who decides whether a potential juror is impartial or not, but the decision is placed in the hands of two “triers”, who are randomly selected from the jury venire.¹² The “triers” observe the defense attorney pose the “challenge” question to the potential juror and, on the basis of the answer given and any clues from demeanor or body language, must then inform the court whether they find the potential juror acceptable or not. If the potential juror is deemed acceptable, it is then up to the lawyers to determine whether they will exercise any of their peremptory challenges. If they do not, the individual is then sworn in as one of the jurors.¹³

The Ontario Court of Appeal has also determined that the right to a representative jury is also encompassed within the right to an impartial tribunal under section 11(d) of the Charter.¹⁴ A representative jury is not only to ensure an impartial tribunal, but also furthers the important societal goal of instilling confidence in the jury.¹⁵ However, the Ontario Court of Appeal has recognized that requiring the sheriff to assemble a fully representative roll or panel would contravene the random selection process, as it would require a more intrusive process focused on retrieving information about ethnicity, religion, education and other characteristics. The key then is to have a process that “provides a platform for the selection of a competent and impartial petit jury, ensures confidence in the jury’s verdict, and contributes to the community’s support for the criminal justice system.”¹⁶

B. The United States

In the United States, the right to a jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to an impartial jury.¹⁷ In *Berghuis v. Smith*, the U.S. Supreme Court was careful to clarify that the defendant has the right to

11. *Id.*

12. *R. v. Barrow*, [1987] 2 S.C.R. 694, 714 (Can.); *R. v. Parks* (1993), 15 O.R. 3d 324, [1993] O.J. No. 2157 (Can. Ont. C.A.). The judge plays a supervisory role and determines whether the challenge for cause process may proceed and vets the structure of the questions posed.

13. For a more detailed description of the process, see Vidmar, *The Canadian Criminal Jury*, *supra* note 9, at 159–161.

14. *R. v. Kokopenace*, 2013 ONCA 389, [2013] O.J. No. 2752, para. 26 (Can. Ont. C.A.); *R. v. Church of Scientology* (1997), 33 O.R. 3d 65, 118 (Can. Ont. C.A.), *leave to appeal denied*, [1998] 1 S.C.R. vii.

15. *Church of Scientology*, 33 O.R. 3d at 119.

16. *Id.* at 121.

17. *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

be tried by a jury drawn from sources reflecting a fair cross section of the community.¹⁸ A tri-partite test was set out in *Duren v. Missouri*¹⁹ for determining if a prima facie violation exists. The defendant must demonstrate that: (1) the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of the “distinctive” group in the venire is not fair or reasonable when compared to the number of the group in the community; and (3) that systematic exclusion in the jury process has led to the exclusion.²⁰ The burden then shifts to the government to demonstrate that the impugned aspects of the jury selection process advance a significant state interest.²¹

At issue in *Berghuis* was the problem of underrepresentation of African Americans on juries. One of the concerns voiced by the defendant was that the method of jury selection in Michigan’s Kent County Circuit Court had siphoned off African American jurors to the venires in district courts.²² By assigning prospective jurors to the circuit court last, the venires in the circuit court contained substantially fewer African Americans, and the jury that tried Diapolis Smith for murder contained no African Americans.²³ While the trial court was persuaded that African-Americans were underrepresented in Circuit Court venires, the evidence adduced had not demonstrated that the juror-assignment order or any other feature of the juror management process had systematically excluded African Americans.²⁴ As a result, the fair-cross-section claim had not met the third prong of the *Duren* test and was rejected.²⁵

The *Berghuis* case wound its way through the appellate courts and produced an array of conflicting decisions with varying interpretations of the evidence and disagreement over the method of calculating disparity.²⁶ The Michigan Court of Appeals disagreed with the trial court’s assessment and found that the prioritization of filling district court venires had resulted in the underrepresentation of African Americans

18. *Berghuis v. Smith*, 559 U.S. 314, 319 (2010); *Duren v. Missouri*, 439 U.S. 357, 360 (1979).

19. *Duren*, 439 U.S. at 364.

20. *Id.*

21. *Id.* at 367–68.

22. *Berghuis*, 559 U.S. at 320.

23. *Id.* at 320–321.

24. *Id.* at 323.

25. *Id.* at 324.

26. For a more detailed summary of the court decisions, see Thomas R. Neumeier, *A Burden Too Heavy: Berghuis v. Smith and the Fading Right to a Jury from a Fair Cross-Section of the Community*, 31 B.C. THIRD WORLD L.J. 69 (2011).

and ordered a new trial.²⁷ The Michigan Supreme Court reversed the intermediate appellate court's decision and was skeptical about whether the evidence established underrepresentation but ultimately held that even if benefit of the doubt was given on prong two of the test, there was no systemic exclusion.²⁸ Smith then brought a habeas corpus petition in the United States District Court, which was dismissed.²⁹ The Court of Appeals for the Sixth Circuit reversed and found that the comparative disparity statistics demonstrated that the representation of African Americans on venires in Kent County was unfair and imbalanced and that a prima facie cross-section violation had been established.³⁰

The United States Supreme Court granted certiorari, reversed the judgment of the Court of Appeal for the Sixth Circuit and remanded the case for further proceedings consistent with the opinion.³¹ Writing for the United States Supreme Court, Justice Ginsberg refused to endorse any one of three methods of calculating disparity and described each of the methods (absolute disparity, comparative disparity and standard deviation) as "imperfect".³² In the Court's view, each of the methods has its own intrinsic weaknesses and shortcomings.³³ While Smith was able to demonstrate that a change in the policy of the order of filling venires had reduced the comparative disparity of African Americans from 18.0% to 15.1%, this was not considered a substantial change.³⁴ This fact was conceded by counsel for Smith in oral argument.³⁵ Ginsberg also pointed out that the Court was constrained by the statute governing the habeas application, § 2254 of the Antiterrorism and Effective Death Penalty Act of 1996, which restricted relief for the prisoners to those situations where decision was contrary to or involved an unreasonable application of federal law.³⁶ In the Court's view, the decision of the Michigan Supreme Court in rejecting the fair-cross-

27. *Berghuis*, 559 U.S. at 324.

28. *Id.*; *People v. Smith*, 615 N.W.2d 1, 3 (Mich. 2000).

29. *Smith v. Berghuis*, 543 F.3d 326, 329 (6th Cir. 2008).

30. *Id.* at 344.

31. *Id.* at 333.

32. *Id.* at 329.

33. *Id.* The state had sought a ruling that a ten percent absolute disparity was required before a court could conclude that a prima facie fair cross-section violation had occurred.

34. *Id.* at 331.

35. *Id.*

36. *Id.* at 325-26.

section claim was consistent with *Duren* and involved no unreasonable application of federal law.³⁷

II. ABORIGINAL UNDERREPRESENTATION ON JURIES IN ONTARIO

A. The Iacobucci Report

In August 2011, former Supreme Court of Canada Justice, Frank Iacobucci, was appointed to conduct an independent systemic review on the processes for including First Nations persons living on reserve³⁸ on the jury roll from which potential jurors are chosen for jury trials and coroners inquests.³⁹ He was tasked with the responsibility of making recommendations to ensure and enhance representation of those First Nations persons and to strengthen the relationship between the state (the Ministry of the Attorney General of Ontario) and First Nations people on the issue of representation on juries.⁴⁰ The precipitating events that lead to the review were a worsening of the problem of Aboriginal representation on juries in Ontario in the preceding ten years. The spotlight shone on the problem in a series of cases, several of which had wound their way to the highest appellate court in the province, the Court of Appeal for Ontario.⁴¹

The first set of cases involved juries in coroner's inquests into the deaths of two Aboriginal men living in First Nations communities.⁴² The families of Jacy Pierre and Reggie Bushie expressed their concerns about the underrepresentation of Aboriginals on the jury roll in the Thunder Bay district and requested that a court official be summoned in order to obtain evidence about how the jury roll was prepared. They relied on the data that emerged in the Kaschewan Inquest in the Kenora district, which revealed that only fourteen of the forty-nine First Nations represented by Nishnawbe Aski Nation (NAN) were on the jury rolls.⁴³ While their request was initially refused and upheld upon

37. *Id.* at 333.

38. A reserve is a tract of land in Canada, which has been set aside for the exclusive use of an Indian band. They are held in trust by the Crown for the bands. *See* Indian Act, R.S.C. 1985, c. I-5, s. 2(1) (Can.); *Ross River Dena Council Band v. Canada*, 2002 SCC 54, [2002] 2 S.C.R. 816, para. 5 (Can).

39. FRANK IACOBUCCI, *FIRST NATIONS REPRESENTATION ON ONTARIO JURIES: REPORT OF THE INDEPENDENT REVIEW CONDUCTED BY THE HONOURABLE FRANK IACOBUCCI* 95–96 (2013).

40. *Id.*

41. *Id.* at 34.

42. *Nishnawbe Aski Nation v. Eden* (2009), 259 O.A.C. 1 (Can. Ont. Sup. Ct.), *rev'd*, 2011 ONCA 187, 104 O.R. 3d 321 (Can. Ont. C.A.).

43. IACOBUCCI, *supra* note 39, at 13; *see also Nishnawbe Aski*, 2011 ONCA at para. 68.

judicial review, the Ontario Court of Appeal reversed the lower court's decision and ordered the Director of Court Operations to testify at the inquest to provide evidence about the jury roll.⁴⁴ Justice John Laskin found that the decision of the Indian and Native Affairs Canada (INAC) to cease providing band lists resulted in an almost blanket exclusion of First Nations people living on reserves from the jury roll and that the Kenora jury roll was manifestly unrepresentative.⁴⁵

Justice Iacobucci embarked on a broad consultation process before rendering his report. In November 2011, he sent a letter to all First Nations governments and treaty organizations in Ontario.⁴⁶ In his letter, he introduced the terms of the independent review, offered to conduct in person meetings, receive written submissions or both.⁴⁷ After an initial engagement process with First Nations people, he prepared a progress report and discussion papers that were posted on the website of the Independent Review of First Nations Representation on Ontario Juries.⁴⁸ The report and discussion papers contained detailed questions on various proposals to address the jury representation issues and invited feedback. The Inquiry received submissions from NAN, the Union of Ontario Indians (an advocate for 39 Anishinabek First Nations in Ontario), and an independent paper by Elder Ernie Sandy and Elder Mike Esqueba, Chiefs of Ontario; Aboriginal Legal Services of Toronto; the Provincial Advocate for Children and Youth; and Legal Aid Ontario.⁴⁹

In his report entitled *First Nations Representation on Ontario Juries* (Iacobucci Report), which was released in February 2013, Justice Iacobucci begins with the warning that the topic of his report is only a symptom of the critical juncture that the justice system finds itself in relation to First Nations people, especially in Northern Ontario.⁵⁰ He contrasts the overrepresentation of Aboriginals in the prison system with their underrepresentation on juries and in all facets of the administration of justice from trial judges and prosecutors, to defense attor-

44. *Nishnawbe Aski*, 2011 ONCA at para. 80.

45. *Id.* at para. 68.

46. IACOBUCCI, *supra* note 39, at 15.

47. *Id.* at 149; *see also id.* at 131–52 (listing the First Nations and government officials with whom Justice Iacobucci and his team met).

48. *Id.* at 15. *See also* FIRST NATIONS AND JURIES REVIEW, www.firstnationsandjuriesreview.ca (last visited May 18, 2015).

49. *Id.* at 6, 73–74; *see also id.* at 64–83 (summarizing the positions taken in the written submissions).

50. *Id.* at 2.

neys and court officials.⁵¹ While the report was careful to state that the problems are complex and multi-faceted, several causes were identified for the underrepresentation of First Nations peoples on juries. The first problem identified is the philosophical conflict between First Nations' values and those in the Canadian justice system.⁵² The Aboriginal notion of justice is focused on restoration of peace and equilibrium and far less on controlling behavior through specific and general deterrence.⁵³ The systemic discrimination experienced by First Nations peoples within the criminal justice system has created an inter-generational mistrust so deep that it is viewed as an "affront" for them to participate in the delivery of the justice system.⁵⁴ The First Nations people see the justice system as a foreign system imposed on them without their consent and a system that does not reflect their core value.⁵⁵ Inadequate police services and lack of enforcement of First Nations by-laws were identified as a key contributor to negative opinions about the criminal justice system.⁵⁶

A second problem identified was a lack of knowledge and awareness of the jury system and the broader justice system, which leads to reticence about participation within it.⁵⁷ Substantial concerns were also raised during the consultation process about protecting the privacy rights of First Nations people when preparing the jury rolls.⁵⁸ One of the practical challenges identified was that the Department of Aboriginal Affairs and Northern Development had refused to provide band lists to provincial governments since 2001 on privacy grounds, but securing this data from the bands themselves was not always practicable since they did not necessarily keep records of their residents' names, dates of birth and addresses.⁵⁹ Finally, problems were identified with the initial jury questionnaire used to assess eligibility.⁶⁰ Several aspects of the jury questionnaire discouraged responses from the First Nations peoples including the threats of a fine or imprisonment

51. *Id.*

52. *Id.* at 4. A painful aspect of the history of jury trials in Ontario is that they were used as a tool by the British to punish what was perceived to be disloyal behavior by First Nations peoples and to discourage First Nations peoples to follow their own customary practices. *Id.* at 7.

53. *Id.* at 4.

54. *Id.*

55. *Id.*

56. *Id.* at 58.

57. *Id.* at 4.

58. *Id.* at 5.

59. *Id.*

60. *Id.*

for failure to respond within five days, the requirement that Canadian citizenship be declared, and requiring proficiency in English or French.⁶¹

In order to address the complex problem of jury representation, the Iacobucci Report made seventeen recommendations.⁶² The first recommendation was for the Ministry of the Attorney General to create an Implementation Committee tasked with overseeing the implementation of the recommendations.⁶³ Another key recommendation was the creation of comprehensive justice education programs for First Nations individuals, including informational brochures in First Nations languages about the role played by criminal, civil and coroner's juries; commissioning video materials in First Nations languages about the role of the jury; and the importance of participation.⁶⁴ To address the problems identified with the jury eligibility questionnaire, Justice Iacobucci recommended extensive changes to its content and format. He recommended that the government remove threats concerning non-compliance and replace them with a statement stating Ontario law requires that the form be completed and returned because of the importance of fair trials.⁶⁵ He suggested that the return period of five days be extended to a more realistic period and that the language in the questionnaire be simplified and translated into First Nations languages.⁶⁶ Given the angst experienced by some First Nations individuals at having to declare themselves Canadian citizens, he suggested that the questionnaire allow self-identification as First Nations member or citizen and that the Juries Act be amended to broaden eligibility beyond Canadian citizenship to include this category.⁶⁷ To address the problem of inclusion of First Nations people on jury rolls, Justice

61. *Id.*

62. *Id.* at 8-11 (for a full list of all Recommendations).

63. The Implementation Committee was created, and the members of the committee are publically identified. Many of the committee members are themselves lawyers of First Nations' or Métis background. Alvin Fiddler, a long-time First Nation community leader, is co-chair of the Juries Review Implementation Committee. See *First Nations Representation on Ontario Juries*, ONT. MINISTRY OF THE ATT'Y GEN.,

http://www.attorneygeneral.jus.gov.on.ca/english/juries_implementation_committee.asp (last modified Oct. 7, 2014).

64. IACOBUCCI, *supra* note 39, at 9 (Recommendation 6). As part of this recommendation, Justice Iacobucci also suggested that a program using law students to provide intensive summer education for First Nations representatives be considered after consultation with Chiefs and Court Services officials.

65. *Id.* at 90 (Recommendation 10).

66. *Id.*

67. *Id.*

Iacobucci recommended that the viability of using other sources for on-reserve residents, such as provincial health cards and driver's license databases, be studied.⁶⁸ He also recommended that any Implementation Committee⁶⁹ created as a result of the recommendations in the report study what possibilities exist for a renewed memorandum of understanding between Ontario and the federal government for access to federal records of band residents.⁷⁰

One of the recommendations suggested adopting the same practice used in some parts of the United States to deal with a "undeliverable" or "returned" summons or questionnaire—that another summons or questionnaire be sent out to a resident with the same postal code.⁷¹ Justice Iacobucci also proposed that the Ministry of the Attorney General and the Implementation Committee consider whether a procedure could be established to allow First Nations individuals living on a reserve to volunteer for jury service in order to supplement jury source lists.⁷² Since many First Nations people are not eligible for jury service because of their criminal records, Justice Iacobucci recommended a loosening of the eligibility criteria on criminal records.⁷³ He suggested amending the law so that a record for a minor offense would not cancel eligibility, and creating a period after which a criminal conviction would not impact eligibility for jury service.⁷⁴

B. R. v. Kokopenace

The issue of representation of Aboriginals on juries in Ontario came to the forefront in *R. v. Kokopenace*.⁷⁵ The central issue in the case was whether the deficiencies in Aboriginal representation on jury rolls in Ontario were so substantial that the constitutional right to a fair jury trial had been violated. The two appellants (Clifford Kokopenace and Clare Spiers), whose appeals were joined together because they raised the same issue, sought new trials.⁷⁶ In the section that follows, this article will examine the ground-breaking aspects of the majority's de-

68. *Id.*

69. See *supra* note 63.

70. IACOBUCCI, *supra* note 39, at 90.

71. *Id.*

72. *Id.* (Recommendation 12).

73. *Id.* at 91 (Recommendation 14).

74. *Id.* As an example, he cited the bar of only two to four years (depending on the offense) which exists in New South Wales.

75. *R. v. Kokopenace*, 2013 ONCA 389, [2013] O.J. No. 2752 (Can. Ont. C.A.).

76. *Id.*

cision to extend the doctrine of the honour of the Crown to the criminal justice system resulting in heightened obligations to include Aboriginals living on reserves on the jury rolls in a district. It will ask whether the majority opinions of Justices Harry LaForme and Stephen Goudge go too far in creating a heavy burden on the provincial state government to obtain access to names within the federal government's control, and whether it is unrealistic to expect substantial improvements to response rates when the causes of the low rates are complex and not easily resolved. The section will also consider the pragmatic approach of dissenting Justice Paul Rouleau, who agreed philosophically with the majority's interpretation of the law on jury representation and the increased standard of care required in the context of Aboriginals living on reserve, but considered the government's response to be measured and adequate.

The *Kokopenace* decision concerned two defendants who were separately convicted by criminal juries: Clifford Kokopenace and Clare Spiers.⁷⁷ Kokopenace had been convicted in Kenora of manslaughter in June 2008, and Spiers was convicted in Barrie of first-degree murder and two counts of kidnapping in December 2007.⁷⁸ The cases were heard together⁷⁹ as both Kokopenace and Spiers sought new trials on the same ground—infringement of their right to an impartial jury trial caused by a failure of the jury rolls in each of the districts in which they were tried (Kenora and Thunder Bay) to fairly represent Aboriginal persons.⁸⁰ However, the court elected only to decide the issue on the facts of *Kokopenace*.⁸¹ The Court of Appeal stated that since the court had already held in an earlier decision that the improper jury vetting entitled Spiers to a new trial, it was unnecessary to decide the jury representation issue.⁸²

The jury roll from which Kokopenace's jury was derived contained 699 potential jurors' names; twenty-nine of those names were on-reserve residents.⁸³ Municipal tax records could not be used to obtain names of those who lived on reserves as reserves are considered fed-

77. *Id.*

78. *Id.* at para. 1.

79. All of the other grounds of appeal raised by Kokopenace were raised and dismissed in a decision released two years earlier. *Id.*

80. *Id.* at para. 2.

81. *Id.* at para. 3.

82. *Id.*; see *R. v. Spiers*, 2012 ONCA 798, 113 O.R. 3d 1, para. 91 (Can. Ont. C.A.).

83. *Kokopenace*, 2013 ONCA at para. 10.

eral land held in trust for Aboriginals.⁸⁴ Historically, the Provincial Jury Centre⁸⁵ had relied on band lists provided by INAC but this practice ended in 2001 as a result of privacy concerns.⁸⁶ Since the district of Kenora had not been very successful in obtaining updated lists directly from the bands, it continued to use many of the outdated lists to prepare its jury roll in 2008.⁸⁷ Among its efforts to obtain updated residence information, court officials had faxed a letter of request for names to the chiefs of forty-two of the forty-five First Nations communities in the district of Kenora and received only four responses.⁸⁸ In person meetings with fifteen communities resulted in obtaining lists of eight more bands.⁸⁹

The INAC lists would have been deficient and erroneous in several senses—they would not have included those who had achieved the age of majority since 2001 and would have included those who had died or moved off reserve. The use of incomplete lists was then compounded by an increasing failure-to-return rate within the on-reserve Aboriginal population.⁹⁰ The rate of return from First Nations persons living on reserve had dropped precipitously over a decade. In 1993, the rate of return by on-reserve residents was 33%, a rate that was seen as troubling when compared to the 77% return rate of off-reserve returns.⁹¹ In 2006, the return rate had dropped to 10.72% and a year later, it dropped almost another three percent to 7.83%.⁹² The rate of return from those living in municipalities was 66% in 2006 and 56% in 2007.⁹³ The responsibility of addressing this problem was placed on the shoulders of a low-level official in the government.⁹⁴ There was no

84. *Id.* at para. 41.

85. The Provincial Jury Centre is a centralized office located in London, Ontario that assists all of the court regions within Ontario with jury selection. Each of the fifty Superior Court of Ontario courts sends their estimate of number of jurors required for the year and the Provincial Jury Centre mails out and receives the initial jury eligibility questionnaires and then creates the annual jury roll. The Ministry of the Attorney General publishes a summary of the annual jury roll process. *The Annual Jury Selection Process*, ONT. MINISTRY OF THE ATTY GEN., http://www.attorneygeneral.jus.gov.on.ca/english/courts/jury/jury_selection_process.asp (last modified July 30, 2014).

86. *Kokopenace*, 2013 ONCA at para. 64.

87. *Id.* at para. 104.

88. *Id.* at para. 107.

89. *Id.* at para. 113.

90. *Id.* at para. 161.

91. *Id.* at para. 248; *R. v. Fiddler*, 1994 CanLII 7396, 30 C.R. 4th 333, para. 53 (Can. Ont. Gen. Div.).

92. *Kokopenace*, 2013 ONCA at para. 73.

93. *Id.*

94. *Id.* at para. 201.

engagement with Aboriginal leaders to explore the root causes of the failure to respond to jury summons or questionnaires.

The majority's decision in *Kokopenace* was that the state had failed in its constitutional obligations to ensure representative inclusion of Aboriginal on-reserve residents on the jury rolls in Kenora and that *Kokopenace's* petit jury had been improperly constituted and a new trial was warranted. Each of the three judges sitting on the panel wrote his own set of reasons, and each of the three opinions will be considered in turn below. Justice LaForme⁹⁵ authored the main decision of the court. Justice Goudge wrote a concurring opinion which pointed out where his analysis differed, and Justice Rouleau dissented from the majority and found that the efforts of the state to respond to the challenges of accessing band lists and drops in the return rates from on-reserve Aboriginals had been reasonable in the circumstances.⁹⁶

The key question according to Justice LaForme was whether Ontario had taken sufficient steps under section 6(8) of the Jury Act to ensure that Aboriginal on-reserve residents were included on the jury roll, thereby meeting its constitutional obligation to ensure representativeness.⁹⁷ As stated by Justice LaForme, "the focus must be on the steps taken by the state to seek to prepare a jury roll that provides a platform for the selection of a competent and impartial petit jury."⁹⁸ The court was critical of the prosecution's attempt to create a narrow obligation for the state limited only to the preparation of the lists from which jury service notices are prepared.⁹⁹ The state also has an obligation in facilitating delivery and receipt of and reply to the jury notices, to ensure a fair opportunity for the distinct perspectives of Aboriginals to be brought into the jury process.¹⁰⁰

95. Justice LaForme is the first appellate judge in Canada who is Aboriginal. *Justice Harry S. LaForme*, LAW COMM. OF ONT., <http://www.lco-cdo.org/en/justice-harry-laforme> (last visited May 6, 2015).

96. *Kokopenace*, 2013 ONCA 389.

97. *Id.*

98. *Id.* at para. 45.

99. *Id.* at para. 48.

100. *Id.* at paras. 47, 49. One of the unusual features of the case is that the issue of representation was not argued at the trial level but was introduced for the first time on appeal because of the release of the Ontario Court of Appeal's decision in *Pierre v. McRae, sub nom. Nishnawbe Aski Nation v. Eden*, 2011 ONCA 187, 104 O.R. 3d 321 (Can. Ont. C.A.). The prosecutor agreed that it was not in the interests of justice to oppose the representation argument being raised first on appeal. *Id.* at para. 13.

It was critical to the majority's analysis that the state had decided to address the procedure for including on-reserve residents directly within the Juries Act.¹⁰¹ Section 6(8) permitted the sheriff to use any record available to obtain the names of reserve inhabitants and required that the procedure of selecting eligible persons inhabiting the reserve be conducted in the same manner as if the reserve were a municipality.¹⁰² Justice LaForme held that the decision of the state to treat Aboriginals differently in how it implemented an accused's right to a representative jury in section 6(8) of the Ontario Juries Act meant that the doctrine of honour of the Crown applied.¹⁰³ This decision marked the first time that this legal principle had been applied in a criminal law context. Previously, the principle had been invoked where Aboriginal treaty rights were at issue.¹⁰⁴ The honour of the Crown is a constitutional principle, the purpose of which is "the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty."¹⁰⁵ In the field of criminal law, an important part of the contextual background is that although the Aboriginal population only makes up four percent of the general population, Aboriginal persons make up twenty percent of federal penitentiary inmates.¹⁰⁶ Justice LaForme acknowledged in his reasons the unfortunate attitude of discrimination against Aboriginals throughout the criminal justice system in Canada.¹⁰⁷ The implication of the principle of the honour of the Crown on this fact was that the state has an obligation to consult with and work collaboratively with Aboriginal leaders to obtain updated band lists, to determine the reasons for the low response rates, and to work on implementing solutions.¹⁰⁸

Justice LaForme found that the efforts of Ontario in taking steps to ensure the inclusion of on-reserve Aboriginals in the district of Kenora was deficient in such a significant way that the state had failed to meet its constitutional obligation of representativeness.¹⁰⁹ The specif-

101. Juries Act, R.S.O. 1990, c. J.3 (Can).

102. *Id.*

103. *Kokopenace*, 2013 ONCA at paras. 127–28.

104. *Manitoba Metis Federation Inc. v. Canada (Att'y Gen.)*, 2013 SCC 14, para. 66 (Can.); *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, para. 42 (Can.); *Haida Nation v. B.C. (Minister of Forests)*, 2004 SCC 73 (Can.).

105. *Manitoba Metis Federation Inc.*, 2013 SCC at para. 66.

106. *Kokopenace*, 2013 ONCA at para. 136. The figures are more stark for female Aboriginals—they account for forty-one percent of all women in sentenced custody.

107. *Id.* at para. 136.

108. *Id.* at para. 206–10.

109. *Id.* at para. 211–12.

ic obligation that the government had was to ensure that Aboriginal on-reserve residents had a fair opportunity to have their distinct perspective included on the jury roll.¹¹⁰ Justice LaForme was very critical of the paucity of efforts to obtain updated band lists and with the decision to foist responsibility for this critical task on a relatively low-ranking employee who was provided little to no assistance or resources in carrying out her responsibilities.¹¹¹ While Justice LaForme acknowledged that this employee, Ms. Louhuizen, was dedicated to the principle of representativeness and made her best efforts to fulfill her responsibilities, he found that the efforts to obtain accurate and complete lists of on-reserve residents, when measured against the obligations of the state, were manifestly unreasonable.¹¹²

Justice LaForme concluded that the government was aware of the problem of decreasing rates of return by on-reserve Aboriginals by the early to mid-1990s. In his view, the decision of Justice Erwin Stach in *R. v. Fiddler*.¹¹³ ought to have put the state on notice that the jury roll might be unrepresentative, thereby resulting in a contravention of the section 11 Charter right to a jury trial.¹¹⁴ Despite the existence of a government policy directive in 1996, that expressed concern over the number of returned questionnaires and a statement that it was essential for the numbers to be evaluated, the issue was not acted upon for almost ten years.¹¹⁵ In the court's view, the Provincial Jury Centre "blinded" itself to what was happening with questionnaires and summons sent to on-reserve Aboriginal residents.¹¹⁶ The result was that the return rate declined to 15.8% in 2002 and was almost cut in half when it fell to 7.83% in 2007.¹¹⁷ Despite the backdrop of these alarming drops in response rates, Justice Laforme found the government made no real efforts to investigate the cause of the declining rates or reach out to the First Nations communities to build understanding in

110. *Id.* at para. 276 (Goudge, J., concurring).

111. *Id.* at para. 186-94.

112. *Id.* at para. 194.

113. *R. v. Fiddler*, 1994 CanLII 7396, 30 C.R. 4th 333 (Can. Ont. Gen. Div.). Justice Stach found that the return rate for Aboriginals living on-reserve was approximately 33% whereas it was 60 to 70% for non-Aboriginals.

114. *Kokopenace*, 2013 ONCA at para. 87.

115. *Id.* at para. 88 (Policy Directive #563, Ministry of the Attorney General).

116. *Id.* at para. 89.

117. *Id.*

order to structure a solution.¹¹⁸ Instead, the bulwark of the efforts was focused on obtaining band lists.¹¹⁹

The standard of care that Justice LaForme concluded that the state had to meet was a high one—the state “must demonstrate that it exercised diligence, resourcefulness, ingenuity and persuasion.”¹²⁰ One of the errors that he was most critical of was the failure to properly identify the boundaries of reserves within the district, which resulted in three reserves being excluded and one reserve being erroneously included.¹²¹ This error weakened the representativeness of the jury roll as each reserve is a distinct community.¹²² A second error was the continued use of band lists when the state knew that these lists also contained the names of off-reserve members.¹²³ These errors created deficiencies and distortions in the representativeness of the jury rolls.¹²⁴ The government had also failed to act in a manner that was sensitive to the estrangement that Aboriginals experience with the criminal justice system.¹²⁵ While the full effect of the errors could not be known, the evidentiary records were sufficient in Justice LaForme’s view to establish a violation of sections 11(d) and (f) of the Charter.¹²⁶ Given the fulsome consideration of the representativeness issue under sections 11(d) and (f), Justice LaForme only considered the section 15 equality argument in a cursory fashion.¹²⁷ He found that the record did not establish a violation of the defendant’s equality rights.¹²⁸ While there was also an assertion that the defendant’s equality rights had been violated before the court, the Court of Appeal held that it was not necessary to consider whether the records also established a section 15 violation.¹²⁹ The impact of the violation found was to reduce public confidence in the criminal justice system—a result that necessitated a retrial order.¹³⁰

118. *Id.* at para. 94.

119. *Id.*

120. *Id.* at para. 160 (citing *R. v. Nahdee*, [1993] O.J. No. 2425, para. 20 (Can. Ont. H.C.J. Gen. Div.) (QL)).

121. *Id.* at para. 173.

122. *Id.*

123. *Id.* at para. 116.

124. *Id.* at para. 185.

125. *Id.* at para. 210.

126. *Id.* at para. 187.

127. *Id.* at para. 215–23.

128. *Id.* at para. 223.

129. *Id.* at para. 223.

130. *Id.* at para. 227.

Justice Goudge, who wrote a concurring opinion, agreed with how Justice LaForme defined the representativeness right encompassed by the right to a fair and impartial jury and agreed that the doctrine of the honour of the Crown imposed a heightened burden in these circumstances.¹³¹ Justice Goudge was not as concerned as Justice LaForme with the use of out of date band lists. While the government's response to the challenge of no longer having access to the federal government's source of band lists was left largely in the hand of one individual, Ms. Loohuizen, Justice Goudge viewed her efforts in a more positive light. In his view, she made a number of different efforts to acquire more comprehensive band lists, and if this were the only challenge to the 2008 jury roll, he would have found her efforts sufficient.¹³² He also differed in his assessment of the impact of the stale dated nature of the lists—they only had a marginal impact on the representativeness on the jury roll.¹³³ While he recognized that the use of seven-year-old data¹³⁴ excluded those who had achieved the age of majority, died, and moved within or off reserve in the intervening years, he did not explain why the impact was minimal. One of the reasons might be because although the pool was more limited than it should have been, the Provincial Jury Centre was still summoning a number that was proportionally related to the overall population. Justice Goudge was more concerned about the failure of the state to facilitate delivery of questionnaires to on-reserve residents and encourage responses.¹³⁵ There was no evidence that government officials had ever tried to meet with Aboriginal leaders to comprehend why response rates were so low despite the stark contrast in return rates—the return rates for off-reserve individuals were four to five times higher than individuals living on reserve.¹³⁶ It was the government's failure to address and improve the dramatic declines in response rates of on-reserve Aboriginals that violated Kokopenace's constitutional jury representation rights. The accused's right to a jury required that there be reasonable efforts to give Aboriginal on-reserve residents a fair opportunity to

131. *Id.* at para. 234.

132. *Id.* at para. 256–58.

133. *Id.* at para. 255.

134. Thirty-two of the band lists used were seven years old as they were the old lists provided by INAC in 2000, and the government had been unsuccessful in its attempts to procure newer, updated lists for these bands. *Id.* at para. 254.

135. *Id.* at para. 265.

136. *Id.* at para. 263.

have their distinct perspectives included in the jury.¹³⁷ The failed response to the high non-delivery rate and the low return rate resulted in a failure to meet the constitutional obligations required in the preparation of the 2008 jury roll necessitating a new trial.

One way to interpret the *Kokopenace* decision is to view it as indictment of negligent jury management. Paula Hannaford-Agor, Director of the Center for Jury Studies of the National Center for State Courts, has argued that negligent jury management can constitute systematic exclusion.¹³⁸ Hannaford-Agor's stance is that the time has come for courts to be held accountable when the failure "to operate the jury system in a reasonably effective manner results in substantial underrepresentation of distinct groups in the jury pool."¹³⁹ In *Kokopenace*, the duty of care relationship found between the government and Aboriginals was rooted in the painful past, which included domination by the conqueror, broken promises, distrust, and an enduring legacy of discrimination.

Dissenting from the majority in *Kokopenace*, Justice Rouleau found that the government's efforts in responding to the inadequate lists problem and the declining response rate to jury questionnaires by on-reserve residents in the Kenora region was reasonable.¹⁴⁰ While Justice Rouleau was in agreement with Justice LaForme's analysis on the law of representativeness flowing from the constitutional right to a jury trial and with his conclusion that the government has a special relationship with Aboriginals, he disagreed with the majority's finding that the government response did not meet constitutional scrutiny.¹⁴¹ While Justice Rouleau conceded that "[i]t is not clear, however, where constitutional requirement ends and where good policy begins,"¹⁴² his view was that the majority was essentially legislating policy in a realm where the government response could have taken many forms. In Justice Rouleau's view, what is constitutionally required is that "the government make reasonable efforts to give on-reserve residents a fair opportunity to bring their distinctive perspective to the jury pro-

137. *Id.* at para. 204.

138. Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 *DRAKE L. REV.* 761, 788 (2011).

139. *Id.*

140. *Kokopenace*, 2013 ONCA at para. 304.

141. *Id.* at para. 316.

142. *Id.* at para. 285.

cess.”¹⁴³ He was unwilling to delve into and assess the solutions suggested by the Iacobucci Report to address the deep sense of alienation that exists between the Aboriginal people and the criminal justice system and to improve Aboriginal representation on juries, stating that this was beyond the purview of the court.¹⁴⁴

The decision of the Court of Appeal for Ontario will not be the last word on Aboriginal representation on juries in Canada. The Attorney General of Ontario was successful in applying for leave to appeal to the Supreme Court of Canada and the oral hearing occurred in October 2014.¹⁴⁵ The decision of the Supreme Court of Canada in the *Kokopenace* case will be of critical importance to the future of jury law in Canada.¹⁴⁶ The majority opinion of the Ontario Court of Appeal represents a strong indictment against what the majority considered a lackluster response to endemic and worsening problems of Aboriginal under-representation on Ontario juries.

III. FAIR CROSS-SECTION ENGAGEMENT IN THE UNITED STATES: THE CASE OF DZHOKHAR A. TSARNAEV

In the United States, the jury representation issue was engaged recently in the Boston Marathon prosecution of Dzhokhar A. Tsarnaev. Tsarnaev was charged with multiples crimes in relation to twin pressure-cooker bombs, which detonated near the Boston Marathon finish line on April 15, 2013, killing three people and injuring over two hundred.¹⁴⁷

Tsarnaev brought a motion to dismiss the indictment and stay the proceedings under 28 U.S.C. § 1867(a) on the grounds of a substantial

143. *Id.*

144. *Id.*

145. *Docket: R. v. Kokopenace*, SUPREME COURT CAN., <http://www.scc-csc.gc.ca/case-dossier/info/dock-regi-eng.aspx?cas=35475> (last visited May 6, 2015). The leave to appeal process is very similar to the certiorari system in the United States Supreme Court. Three justices vote on whether to grant leave, and the court only agrees to hear a small number of cases each year.

146. There are currently at least twenty cases held in abeyance waiting the release of the Supreme Court of Canada's decision. Judy Porter, *20 Cases Delayed by Ontario's Jury Roll Problem: Lack of Aboriginal Representation in Jury Pools Delays Trials, Inquests*, CBC NEWS (Jan. 2, 2015), <http://www.cbc.ca/news/canada/thunder-bay/20-cases-delayed-by-ontario-s-jury-roll-problem-1.2865727>. Rosemary Cairns Way argues in *An Opportunity for Equality: Kokopenace and Nur at the Supreme Court of Canada*, 61 CRIM. L. Q. 465 (2014), that this case represents an opportunity for the Supreme Court to affirm its commitment to substantive equality in the criminal justice context.

147. *In re Tsarnaev*, 780 F.3d 14 (1st Cir. 2015). On February 27, 2015, the First Circuit denied Tsarnaev's petition for mandamus and refused to compel the district court to grant a change of venue.

failure to comply with the requirements of the Sixth Amendment,¹⁴⁸ the Jury Selection and Service Act of 1967¹⁴⁹ and the Jury Selection Plan for the District of Massachusetts.¹⁵⁰ Specifically, he alleged that the jury wheel used to populate the grand jury failed to comply with the fair cross-section requirement of the United States Constitution in three significant ways: (1) failure to comply with requirements of the Jury Selection Plan to send replacements summons for each summons returned as undeliverable; (2) the clause permitting persons over seventy years of age to automatically opt out created a disparity in the jury wheel; and (3) there was a substantial under-representation of African Americans in the jury wheel.¹⁵¹ After losing this motion,¹⁵² Tsarnaev raised the same argument concerning his petit jury. The trial judge, Judge George O'Toole, dismissed the second motion with curt reasons referencing his earlier reasons on the first motion.¹⁵³ Since the bulk of the analysis occurs within the judgment disagreeing that there were fair representation violations within the grand jury process, this section of the article will focus primarily on the reasoning in that decision.

In order to comply with its obligation under the Jury Selection and Service Act of 1968,¹⁵⁴ to ensure random selection of grand and petit juries, the Massachusetts District Court prepared a jury plan of its pro-

148. U.S. CONST. amend. VI.

149. 28 U.S.C. § 1867(a) (2013) (providing that in criminal cases, a “defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.”).

150. *United States v. Tsarnaev*, 53 F. Supp. 3d 443 (D. Mass. 2014); Motion to Dismiss Indictment and Stay Proceedings Pending Reconstituting Jury Wheel to Conform with Statutory and Constitutional Requirements at 3–4, *United States v. Tsarnaev*, No. 13-10200-GAO (D. Mass. Aug. 22, 2014) [hereinafter Motion to Dismiss Indictment]. The following website has a comprehensive repository of all court filings and decisions in the Tsarnaev case: <http://thebostonmarathonbombings.weebly.com/latest-court-documents.html>.

151. *Id.* While this paper was in the editing phase, Tsarnaev was convicted on April 8, 2015, by his petit jury of the thirty charges in relation to the Boston Marathon bombing. Martha Neil, *Tsarnaev Found Guilty in Boston Marathon Bombing Trial; Could get Death Penalty*, A.B.A. J. (2015), available [at http://www.abajournal.com/news/article/accused_boston_marathon_bomber_is_guilty_on_first_15_charges_could_get_deat/](http://www.abajournal.com/news/article/accused_boston_marathon_bomber_is_guilty_on_first_15_charges_could_get_deat/).

152. *Tsarnaev*, 53 F. Supp. 3d 450.

153. *United States v. Tsarnaev*, No. 13-10200-GAO, 2015 WL 1138273 (D. Mass. Mar. 13, 2015).

154. 28 U.S.C. § 1863. While the U.S. Supreme Court held that the Sixth Amendment requires the petit jury to be drawn from a fair cross-section of the community (*Duren v. Missouri*, 439 U.S. 357, 363 (1979)), it is the Act which extended this right to the federal grand jury selection process.

cedures.¹⁵⁵ The plan provided for the Massachusetts Office of Jury Commissioner to create a “master jury wheel” for the three divisions in the state (Eastern Division, Central Division and Western Division) using a method that ensures that the counties in the division are proportionally represented.¹⁵⁶ The master jury wheel consists of the names and addresses of the residents randomly selected from the municipal resident lists.¹⁵⁷ The Clerk then draws the names of as many persons as may be required based on anticipated juror demands¹⁵⁸ and then those persons are sent a one-step juror summons/qualification form.¹⁵⁹ After the questionnaires are assessed to confirm eligibility, names are entered in a “qualified jury wheel” based on their assigned number. ¹⁶⁰ In order to address the problem of an “undeliverable” summons being returned from localities in which there are higher proportions of African-Americans, Judge Nancy Gertner ordered that the plan be amended to require that a new summons/qualification form be mailed to a resident from the same zip code.¹⁶¹ While the First Circuit held that Judge Gertner had exceeded her jurisdiction in ordering this additional step and found that the jury plan, in its original form, complied with the fair cross section requirements, they also remarked that Massachusetts was free to amend its jury plan.¹⁶² The First Circuit conceded that reason for concern existed about the lower proportional representation of African Americans among the qualified potential jurors.¹⁶³

155. U.S. DIST. COURT FOR THE DIST. OF MASS., PLAN FOR THE RANDOM SELECTION OF JURORS (Mar. 3, 2009) [hereinafter PLAN].

156. *Id.* § 6(a)(i). The plan specifies that the Massachusetts Jury Commissioner is to use the Marsaglia Random Number Generator and follow the procedures outlined for its use in the regulation entitled: “Specification of Random Selection Methods and Procedures.”

157. *Id.* § 6(a)(iii).

158. *Id.* § 7(a). The number includes both the number of jurors anticipated to be required and the number of prospective jurors that will be unavailable or ineligible.

159. *Id.* § 7(c).

160. *Id.* § 9(b) (Police officers, firefighters, active members of the armed forces and public officers of the federal, state or district governments who actively engaged in performing official duties are exempt from jury service in Massachusetts).

161. *United States v. Green*, 389 F. Supp. 2d 29 (D. Mass. 2005), *rev'd*, *In re United States*, 426 F.3d 1 (1st Cir. 2005). For a consideration of the problem of underrepresentation of Hispanics on grand juries in California, see Hiroshi Fukurai, *Where Did Hispanic Jurors Go? Racial and Ethnic Disenfranchisement in the Grand Jury and the Search for Justice*, 2 W. CRIM. REV. 1 (2000).

162. *In re United States*, 426 F.3d 1.

163. *Id.* at 7–9. The plan was amended in 2007 to include this supplemental step. *United States v. Tsarnaev*, 53 F. Supp. 3d 443, 445 n.3 (D. Mass. 2014); PLAN, *supra* note 155, § 8. Judge Gertner (who is now Professor Gertner) has questioned why there was a trial when the defendant would have pled guilty had the U.S. Attorney General not sought the death penalty. She likened the first phase of the trial to an extended penalty phase hearing as the defense admitted Tsarnaev’s liability. See Nancy Gertner, *Was Dzhokhar Tsarnaev Trial Necessary?*, BOS. GLOBE (Apr. 8,

1. The Failure to Follow the Supplemental Draw Procedure

Tsarnaev adduced evidence in an affidavit from a jury consultant, Jeffrey Martin, that there were nineteen summonses returned as undeliverable among the 400 sent, and that the replacement summonses required by the Jury Plan were never sent out.¹⁶⁴ District Judge O'Toole seemed critical of the absence of additional statistical information—he remarked on the fact that there was no evidence about which zip codes the “undeliverables” came from and therefore no ability to ascertain if certain zip codes were underrepresented or not in the grand jury pool.¹⁶⁵ It is unclear whether this information was provided to Tsarnaev as part of the jury background information that was furnished pursuant to a court order. If the data was not provided to Tsarnaev, it hardly seems fair to criticize its absence particularly when that information was squarely in the court's bailiwick. Judge O'Toole concluded that the minor deficiency in following the procedures in the jury plan was insufficient to meet the standard of a substantial failure to comply.¹⁶⁶ Instead, the court requires that the deficiencies not stand alone, but be linked to a denial or frustration of either the random selection of jurors or the fair cross section requirement of the Jury Selection and Service Act.¹⁶⁷ Thus, if the ability of the court and attorneys to assess juror disqualification, exclusions, exemptions, and excuses on the basis of objective criteria is impeded, a violation may exist.¹⁶⁸ Because of the failure to establish a nexus between the “undeliverable summonses” and the violation of either of these two principles, Judge O'Toole concluded that there was no prima facie case established.¹⁶⁹

The evidentiary bar in representative cross-section cases throughout the United States is frequently difficult to reach.¹⁷⁰ In the rare cases where prong two of the *Duren* test is met, the court will find that the underrepresentation has not been caused through systemic

2015), <https://www.bostonglobe.com/opinion/2015/04/08/was-dzhokhar-tsarnaev-trial-necessary/bUrzm2HaSL9kEtKbr3SAFK/story.html>.

164. *Tsarnaev*, 53 F. Supp. 3d at 446.

165. *Id.*

166. *See* *United States v. Royal*, 174 F.3d 1, 11 (1st Cir. 1999); *see also* *United States v. Savides*, 787 F.2d 751, 754 (1st Cir. 1986).

167. *United States v. Calabrese*, 942 F.2d 218, 227–30 (3d Cir. 1991); *Savides*, 787 F.2d at 754; *United States v. Schmidt*, 711 F.2d 595, 600 (5th Cir. 1983).

168. *Tsarnaev*, 53 F. Supp. 3d at 446.

169. *Id.* at 450.

170. For criticisms of the decision, see David M. Coriell, Note, *An (Un)Fair Cross Section: How the Application of Duren Undermines the Jury*, 100 CORNELL L. REV. 463, 466 (2015) and Neumeier, *supra* note 26, at 82.

means. In *United States v. Erickson*, the decision to summon additional people from a 25-mile radius from the courthouse rather than from the entire district was deemed not to be a substantial violation.¹⁷¹ In *United States v. LaChance*, the court criticized the decision of the expert to combine 1977 and 1981 jury data to create a larger sample—this resulted in the court being unable to determine the degree of underrepresentation of African Americans in the 1981 sources and was fatal to the appeal.¹⁷²

2. Did the Jury Plan Fail to Ensure Proportional Representation of African Americans and Citizens Aged Seventy and Older?

The second aspect of Tsarnaev's jury representation argument was that the jury plan failed to ensure proportional representation of two groups: (1) citizens aged seventy and older and (2) African Americans.¹⁷³ The court records established that from 2011 to 2013 almost ninety-seven percent of those aged seventy and older chose to opt out of jury service (as they were permitted to do under the Jury Plan) and the Clerk of the court granted automatic excusals.¹⁷⁴ This mirrored the statistics in the Tsarnaev case—approximately ninety-six percent of those in this age group opted out.¹⁷⁵ The impact on the jury wheel was to create an absolute disparity of 12.23% since the proportion of people age seventy and over made up 14.60% of the population but only made up 2.3% of the qualified Jury Wheel.¹⁷⁶ In order to illustrate the impact of disparity on jury composition, the expert statistician on jury pool procedures, Jeffrey Martin, explained that the absolute disparity statistic has a harsher impact on smaller populations. If the acceptable threshold of absolute disparity were set at ten percent, it would then be acceptable to have a Qualified Jury Wheel for the Eastern Division in Massachusetts without any African Americans in it.¹⁷⁷ However, Judge

171. *United States v. Erickson*, 75 F.3d 470, 477 (9th Cir. 1986).

172. *United States v. LaChance*, 788 F.2d 856, 868 (2d Cir. 1986). For an examination of the problem of underrepresentation of African Americans on juries in the United States, see Hiroshi Fukurai et al., *Where did Black Jurors Go? A Theoretical Synthesis of Racial Disenfranchisement in the Jury System and Jury Selection*, 22 J. BLACK STUD. 196 (1991).

173. *Tsarnaev*, 53 F. Supp. 3d at 446.

174. Motion to Dismiss Indictment, *supra* note 150, at Exhibit A, ¶ 17 (Declaration of Jeffrey Martin, August 22, 2014). For more information and a copy of this declaration, see http://thebostonmarathonbombings.weebly.com/uploads/2/4/2/6/24264849/exhibit_dismiss.pdf.

175. *Id.* ¶ 8.

176. *Id.*

177. *Id.* ¶ 26. Martin conceded that there is no scientific basis for any particular set level of absolute disparity that should be deemed unacceptable.

O'Toole refused to recognize persons seventy and older as a distinctive group—finding instead that this group lacked the essential characteristics that would give it distinct status under the Sixth Amendment or the Act.¹⁷⁸ The judge assessed this group using the three factors identified by the First Circuit in *Barber v. Ponte*¹⁷⁹: (1) is there a clearly identifiable factor such as gender or race; (2) does the group share a common thread in attitudes or experiences; and (3) is there a “community of interest” such that that these interests cannot be represented if excluded.¹⁸⁰ The court found that septuagenarians as a group lack a shared thread of experience and are an arbitrarily defined group consisting of men and women of diverse heritages.¹⁸¹ Judge O'Toole criticized the defendant's reliance on a marketing article¹⁸² proffered as proof of the group's distinctiveness, finding that it was “breezy intuitive advice” and had no persuasive value.¹⁸³ The court did not address the argument that septuagenarians have a breadth of life experience given the length of time lived and that their almost universal acceptance of the optional opt-out deprives defendants such of Tsarnaev of that wisdom.

In assessing the underrepresentation of African Americans, Judge O'Toole readily agreed that the first prong of the *Duren* test requiring a distinctive group was met.¹⁸⁴ However, he held that applying the absolute disparity methodology method,¹⁸⁵ the 2.06% difference in the proportion of African Americans in the jury eligible population and

178. *Tsarnaev*, 53 F. Supp. 3d at 448–49. The Seventh Circuit has also refused to consider this age group as distinct. *Silagy v. Peters*, 905 F.2d 986, 101–11 (7th Cir. 1990); see also *Brewer v. Nix*, 963 F.2d 1111, 1112–13 (8th Cir. 1992) (refusing to grant distinct status to ages 65 and older); *Wysinger v. David*, 886 F.2d 295, 296 (11th Cir. 1989) (per curiam) (refusing to grant distinct status to ages 18 to 25); *Ford v. Seabold*, 841 F.2d 677, 682 (6th Cir. 1988) (refusing to grant distinct status to ages 18 to 29).

179. 772 F.2d 982, 997 (1st Cir. 1985).

180. *Tsarnaev*, 53 F. Supp. 3d at 448–49.

181. *Id.* at 450. The North Carolina Supreme Court declined to find that young people between the ages of 18 and 29 were a distinctive group for fair cross-section claims. *State v. Price*, 272 S.E.2d 103, 110 (N.C. 1980).

182. Kaylene C. Williams & Robert A. Page, *Marketing to the Generations*, 3 J. BEHAV. STUD. BUS. (Apr. 2011), available at www.aabri.com/manuscripts/10575.pdf.

183. *Tsarnaev*, 53 F. Supp. 3d at 450.

184. *Peters v. Kiff*, 407 U.S. 493, 498–99 (1972). The U.S. Supreme Court has accorded “distinct” status to women and Mexican Americans. *Castaneda v. Partida*, 430 U.S. 482, 494–95 (1977) (Mexican Americans); *Taylor v. Louisiana*, 419 U.S. 522, 532–33 (1975) (women).

185. For an excellent explanation of the various tests used to assess whether there has been a violation of the fair cross section right (such as the absolute disparity test, ratio or comparative disparity method, absolute impact standard and standard deviation method), see Sara Sun Beale, *Integrating Statistical Evidence and Legal Theory to Challenge the Selection of Grand and Petit Jurors*, 46 LAW & CONTEMP. PROBS. 269 (1983).

their representation in the qualified jury wheel, could not be described as an unfair and unreasonable reflection of that distinct group.¹⁸⁶ The court refused to apply the comparative disparity methodology, which focuses on how much the disparity reduces the likelihood that a member from the distinctive group will be called for jury service.¹⁸⁷ This approach takes the absolute disparity percentage and divides it by the percentage of the group in the population.¹⁸⁸ If, for example, African Americans make up ten percent of the population and only five percent of the jury, then the comparative disparity is calculated as fifty percent and the result is described as African Americans being half as likely to be on venires. Under the comparative disparity method (which the court rejected), the disparity on the evidentiary record in the *Tsarnaev* case was 34.29% meaning that just over one-third of those within the group of African-Americans that could be expected to be represented on the jury list were missing.¹⁸⁹

Judge O'Toole did not acknowledge the legitimate debate that exists about the propriety of the absolute disparity method. In April 2014, the Ninth Circuit released an en banc opinion criticizing its previous exclusive reliance on the absolute disparity methodology¹⁹⁰ and reversing its previous position.¹⁹¹ The court held that districts courts are to analyze fair cross-section and equal protection cases with the particular method that is best suited to the facts and circumstances of the case before it.¹⁹² In an opinion authored by Judge Sidney Thomas, the court agreed with the criticisms made by the appellant in *United States v. Hernandez-Estrada* that the method unfairly favors large groups but refused to rule on which other methods were superior or

186. *Tsarnaev*, 53 F. Supp. 3d at 447 n.5 (African Americans made up 6.00% of the jury eligible population in the Eastern Division population and 3.94% of the qualified jury wheel in 2011, 2012 and 2013).

187. *United States v. Shinault*, 147 F.3d 1266, 1272 (10th Cir. 1998).

188. *United States v. Royal*, 174 F.3d 1, 7 (1st Cir. 1999). See also Peter A. Detre, Note, *A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel*, 103 YALE L.J. 1913 (1994).

189. Motion to Dismiss Indictment, *supra* note 150, at Exhibit A, ¶ 28 (Declaration of Jeffrey Martin, August 22, 2014). For more information and a copy of this declaration, see http://thebostonmarathonbombings.weebly.com/uploads/2/4/2/6/24264849/exhibit_dismiss.pdf.

190. The method was endorsed in *United States v. Potter*, 552 F.2d 901, 906 (9th Cir. 1977), and identified as the sole accepted method in *United States v. Sanchez-Lopez*, 879 F.2d 541, 547 (9th Cir. 1989). However, the Ninth Circuit criticized the test and recognized some of its limitations in *Serena v. Mock*, 547 F.3d 1051, 1054 n.2 (9th Cir. 2008).

191. *United States v. Hernandez-Estrada*, 749 F.3d 1154, 1164 (9th Cir. 2014), *cert denied*, 135 S. Ct. 709 (2014).

192. *Id.* at 1164–65.

comment on the circumstances, which would favor one method over another.¹⁹³ One of the examples that was most persuasive in dismantling the absolute disparity method from its favored perch was that the guideline requiring a minimum absolute disparity of 7.7% or more to establish a prima facie case meant that minority groups making up less than this as a proportion of the population could never be unrepresented in the jury pool.¹⁹⁴ In the Ninth Circuit district where Hernandez-Estrada's trial was held, African-Americans only constituted 5.2% of the population—the application of the court's previous policy in interpreting the absolute disparity quantum meant that there could never be a successful jury challenge for African Americans.¹⁹⁵ The Second Circuit has also criticized the preference for the absolute disparity approach as it minimizes disparities when the distinct group is a small proportion of the population.¹⁹⁶

The current debate in the United States seems mired in disagreement over how to calculate disparity and what method is the most appropriate to use. Despite the urgent need for clarification on this issue, the United States Supreme Court sidestepped this issue in *Berghuis* when Justice Ginsberg clearly stated that the court would not enter the arena to debate the pros and cons of the various tests.¹⁹⁷ As recently as December 2014, the United States Supreme Court signaled its unwillingness to weigh in on the debate by its refusal to grant certiorari in the *Hernandez-Estrada* case. This has created a situation where it is difficult for defendants to assess the bona fides of any fair representation argument as the strength of their position varies wildly depending on the disparity test favored by the court. It is time for the appellate courts to delve into the issue of statistics and the appropriateness of the various tests. The appellate courts have abandoned their critical role in guiding and shaping the law when they abdicate their responsibilities and simply state that the decision of which test is most appropriate will depend on the unique circumstances of the case. The result is that the future of fair representation claims looks bleak in the United States and most claims will wither on the vine mired in debates

193. *Id.*

194. *Id.* at 1161–62.

195. Another example provided by the Ninth Circuit was the District of Montana where no minority group reaches the threshold of 7.7% of the general population. Applying the guideline would mean that there could never be a viable fair cross-section challenge. *Hernandez-Estrada*, 749 F.3d at 1161–62.

196. *United States v. Jackman*, 46 F.3d 1240, 1247 (2d Cir. 1995).

197. *Berghuis v. Smith*, 559 U.S. 314, 319 (2010).

about the relative virtues of the absolute disparity, comparative disparity and standard deviation calculation methods. It is time for the courts to enter into a serious dialogue and analysis of how these tests should be used to inform our understanding of what the right to a jury selected from a fair representation of the community actually means under the United States Constitution.

CONCLUSION

This article has shown that the fair representation component of the right to a jury trial in Canada and the United States has taken two very different journeys. In Canada, the release of the novel and dramatic *Kokopenace* decision by the Court of Appeal for Ontario has sparked renewed debate about the relationship of First Nations peoples with the Canadian justice system and their rightful presence on juries. It is difficult to assess whether the case will have any broader application in jury representation claims or whether the issues it raises are unique to the Aboriginal community. The release of the Iacobucci Report has emphasized the deep wounds that exist in the Aboriginal community in relation to their experience in the Canadian justice system.

Only time will tell what the enduring implications are of the *Kokopenace* case and the Iacobucci Report. This could represent a watershed moment in the justice system that points the way to healing and reconciliation and greater participation of First Nations people as jurors. One of the positive signs is that the Implementation Committee has already signaled that it is looking for approval to invite First Nations peoples to volunteer on inquests—one of the recommendations within the Iacobucci Report. It will be critical to see whether the Supreme Court of Canada is willing to endorse and uphold the groundbreaking decision of Justice LaForme in extending the doctrine of the honour of the Crown to the state's responsibilities in ensuring the fair cross-section rights of a defendant in jury trials.

In the United States, the jurisprudence is at a critical juncture—there must be extensive consideration and analysis of the competing methodologies for measuring disparity in order to provide guidance to trial courts. Since the two most popular tests, absolute disparity and comparative disparity, paint vastly different pictures of the seriousness of any underrepresentation in jury venires, it is almost impossible for practical advice to be given to litigants about the wisdom of launching a fair cross-section claim as part of their case. It is simply not ade-

quate for the United States courts of appeals to sidestep the issue and recommend that decisions be made on a case-by-case basis. While it may not be realistic to expect the courts to construct bright line rules that will apply seamlessly in every case, appellate courts need to provide more concrete guidance to trial courts on measuring the impact and severity of underrepresentation in jury trials.

