

# Revisiting Representativeness in the Manitoban Criminal Jury

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## I. FRAMING REPRESENTATIVENESS

It has been over twenty years (1991) since the Aboriginal Justice Inquiry of Manitoba (AJI) issued its final report on issues facing Indigenous communities and their involvement with the justice system in Canada. One of the most troubling of its findings was that the jury selection process in Manitoba routinely had problems of inadequate Indigenous representation in the case of Indigenous accused persons. The Canadian jury selection process attempts to select a representative jury. A representative jury is defined as a jury that corresponds to a cross-section of society and the larger or wider community (*R v Kokopenace*, [2013] ONCA 389). Though the issue of jury representativeness was the basis of a relatively recent appeal in Ontario (*R v Kokopenace* [2013]), thus far, there is no binding national case law to suggest that an accused can insist that he or she be tried by

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a person with whom they share personal characteristics (e.g., ethnicity, disability, etc.). Certainly, there is Supreme Court authority which allows for challenging juror membership when a juror is suspected to possess racial bias, and for asserting that representativeness relates to the rights to be tried by a jury (s. 11(f)) and to a fair and impartial hearing apprised of the presumption of innocence (s. 11(d)) under the Canadian *Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 1 (see *R. v. Williams*, [1998] 1 SCR 1128; *R. v. Sherratt*, [1991] 1 S.C.R. 509).

While there are recent Ontario policy directives (such as the recent Iacobucci Report for Ontario, 2013) to ensure that Indigenous jury representation moves beyond a minimal standard (and to instill faith in the administration of justice), the degree to which jury representation is related to legal decision making is a matter that is largely unexplored in the extant Canadian literature (Ontario 2013). Even when the Manitoba Aboriginal Justice Implementation Commission (AJIC) tabled its final report on 29 June 2001, it failed to acknowledge the issues of Indigenous jury under-representation despite the Justice Inquiry's precipitating findings in 1991; it left the issue for the federal government to attempt to address, due to the administrative issues involved in ameliorating the representation issue (AJIC 2001; AJI 1991). Broader issues of Indigenous-justice system interactions were the primary focus of the report (AJIC 2001).

In this paper, we investigate how Canadian courts, and in particular, Manitoba courts have responded to jury representation problems raised in the 1991 report. We also review Ontario cases such as the Iacobucci Report (Ontario 2013) which indicated that the issue of Indigenous representativeness on juries is a significant challenge in Ontario. Given that case law supports the conception of the jury as the conscience of the community, we also endeavour to identify perceptions of representativeness of a population of students who participated in our survey.

We examine how Manitoba law and policy (and related) communities reacted to the problematic findings regarding juries in 1991. We then study a Manitoban student sample's conceptions of jury representativeness using an empirical approach. We examine how participants perceived the make-up of a representative jury, and whether demographic variables affect perceptions of representativeness. Some individual-level variables (e.g., education level and age) have been shown to impact juror comprehension of jury instructions, and extant American research has shown it is possible

that these variables also affect interpretations of more abstract conceptions relating to findings of guilt and innocence (Sommers 2007).

Broader issues of Indigenous representation such as incarceration and charging rates have largely occupied the policy landscape of Manitoba law and society scholars (Monture 2014). Yet, there has been less acknowledgment in the extant literature that Indigenous persons are routinely excluded from participating as triers of fact in the Canadian criminal justice system (AJI 1991). The absence of a fully developed literature on jury work may be due to concerns that participation in the Canadian justice system represents a form of colonial coercion, or it may simply be that studies have generally focused on Indigenous persons as accused persons rather than Indigenous persons as determiners of justice (AJI 1991). In either case, the time to examine the systemic problems in juror representation is long overdue.

This paper is not a revisiting of the issue of Indigenous inclusion in jury work in general since the history of Confederation. Rather, we are aiming to revisit what has happened in Manitoba (and to some extent Ontario) since the findings of the AJI. A complete history of jury composition and indigeneity is beyond the scope of our work. Certainly, there has been progress in Indigenous inclusion in jury composition over a long period of time. From 1886-1952 Indigenous people were barred from jury work stemming from an inability to vote, and for many years until 1971, reserve officials were less than forthcoming in sharing names from jury rolls (AJI 1991). These changes occurred in the charged political climate of Manitoba and so jury policy in Manitoba has been evolving for some time. Nonetheless, few studies have revisited the issue since 1991 and this revisiting is our main goal in this paper. While Manitoban politicians have struggled to implement justice reform in a variety of circumstances to account for Indigenous requirements, since 1991 there have been no official policy changes in the context of jury making, other than referring the bulk of the issues to the federal government for amelioration (see endnote 1).

Further, the AJI called for a comprehensive overhaul of the justice system to meet the requirements, needs and rights of Indigenous persons (this work has been theorized aptly by Coulthard 2008). Of course, in such a context, the mere tweaking of jury composition would not meet every requirement of the AJI. Certainly, the calls for Indigenous sovereignty and concomitant newly established justice systems could arguably alleviate the need for legal reform in the

mainstream justice system. The calls for Indigenous justice systems are profound and important. For example, Turpel notes that the preamble of the *Constitution Act, 1982* is insensitive to Indigenous people because it references “God” and the “rule of law” both of which are colonial constructions (1989:6); further, the Constitution fails to recognize that Indigenous people “have never fully consented to their collective dispossession through the wholesale taking of their traditional lands and resources” (Orkin 2003:445). In particular, some scholars take issue with Canadian assumptions about Indigenous people “have fundamental moral unit of a theory of justice” (Turner 2006:13). Turner notes that “Indigenous rights are a *sui generis* form of group rights and not merely a class of minority rights” — the quality and kind of rights that inure are fundamentally distinct and arise from a connection to the lands in Canada - this connection is uniquely distinct from equality rights that may vest in other vulnerable populations (2006:31). This distinction means that incremental law reform within the mainstream system cannot, alone, meet the needs of Indigeneity — thus proposing law reform within the mainstream system should not be seen as a settling of justice issues, but as a remedial step at best, in achieving justice for Indigenous communities (Turner 2006). Some scholars then call for a resurgence of Indigenous law in Canada (Borrows 2002), as something articulable, material and purposive, noting that while legal, political, and economic powers have improved for Indigenous Canadians, the changes have been “too slow and peripheral” (Moodie 2004:270). Scholars like Borrows call for the legitimacy of Aboriginal law as something that coexists with mainstream law and that would indeed bind Canadians (Borrows 2002). This fundamental and ambitious project does not though, preclude simultaneous amelioration of injustices in the mainstream system.

When presenting arguments in favour of Indigenous inclusion in the justice system one must remain sensitive to the fact that the rule of law itself is contested by many in Indigenous communities and that in particular the criminal justice system is fraught in its dealings with Indigeneity, being one of the major tools of Indigenous oppression, as evidenced by the overrepresentation of Indigenous persons in carceral environments in Canada, and in particular Manitoba. Yet the failure of Canadian justice to answer the rights and entitlements of Indigenous persons and Indigenous sovereignty should not be an excuse to fail to study and incorporate legal reform in the mainstream criminal justice system. Inclusive change should be encouraged on multiple fronts and incremental, intra-systemic law reform is one means of moving

towards a more inclusive, and representative system, even if a separate and sovereign Indigenous system may be an ultimate goal. Changes to the Canadian justice system (which in many cases could be seen as illegitimate, foreign and discriminatory to Indigenous persons) can move in lock step with more fundamental changes to the meting of justice in Canada, even when new justice systems are articulated. Turpel writes that:

[R]eforms to the mainstream system, and working out the fit or interaction between Aboriginal justice circles and projects and the mainstream system will take lengthy discussions and a commitment to a new relationship. This new relationship cannot be defined in the abstract or with preconceived ideas of what Aboriginal Peoples have to agree to before moving ahead on reform. It has to be defined together by thinking concretely and sympathetically about Criminal Justice reform (1994:219).

Adhering to the path of abstraction would mean stalling needed reform in the mainstream system while waiting for a new alternative system to be formed. This would create unacceptable gaps in justice for Indigenous populations. Incremental law reform to the mainstream system and sovereign alternative systems can develop simultaneously. This paper thus speaks to an issue of incremental law reform and should not be seen as an attempt to presuppose and circumvent the development of Indigenous justice systems. Equality and participation are values that the mainstream justice system should strive to attain, and we suggest that improved representation in jury work is an area where much improvement is needed in the mainstream system.

Israel notes the ways that Indigenous communities “have challenged the way that juries are selected” (2000:109). Israel argues that the lack of representation is ultimately a problem of legitimacy. We agree with Israel (2000) when he writes:

Do we want a legal system that enjoys very little legitimacy among specific parts of our society? Juries need not be a part of a solution to this problem if Indigenous people are able to operate their own justice systems...on the other hand, if juries are to act as a symbol of integrity and fairness and represent diverse communities, then changes have to be made in the ways that juries are selected (109).

More recently, Kettles has written of the legal failings of the Canadian jury system. Kettles writes that current jury selection methods are inappropriate given that vetting practices reduce representativeness of the jury and public confidence in the jury system (2013:464). Beyond the issues of jury vetting, other practices may indeed lead to representativeness issues on the jury. It is these other

practices that inform the case review we undertake in the later pages of this paper.

## **II. THE MANITOBA AND ONTARIO REPORTS**

In Manitoba, the Aboriginal Justice Inquiry was conducted in response to the tragic deaths of two Indigenous victims in 1987 and 1988, Helen Betty Osborne, and J.H. Harper, respectively. The report of the inquiry was an indictment of the way the Manitoban Justice system interacted with Indigenous Canadians (AJI 1991). The report was best known for its suggestions regarding the overrepresentation of Indigenous Canadians as victims and inmates within the criminal justice system, suggesting that Manitoba's approach to the unique problems facing Indigenous Manitobans were falling far short of the goals of substantive equality. One relatively less interrogated and explored chapter in the Report was Chapter 9 on Juries (AJI 1991).

The Report found that the jury system in Manitoba was a stark example of systemic discrimination against Indigenous Manitobans and noted that Indigenous communities were underrepresented on Manitoba juries (AJI 1991). This underrepresentation contributed to the feeling in Indigenous communities that the justice system was foreign and imposed. The Report found that though the jury system lies at the heart of the Anglo-Canadian justice system, to an Indigenous Canadian, the system might seem culturally inconsequential, as conceptions of guilt and innocence are largely antithetical to most Indigenous traditions (AJI 1991).

The Report cited two case studies as emblematic of the problems of juror representation in Manitoba. Of 120 people appearing on a jury panel in Winnipeg, only one was Aboriginal. In a second case study in Thompson, Indigenous representation on two juries was found to be 50% of their representation in the local community (AJI 1991).

Manitoba began to use computer records of the Manitoba Health Services Commission to form the lists of potential jurors in 1983 and this, at the time, was thought to be representative. The Report found that using health records as a basis for juror lists was effectively representative of the local community in most cases. The Sheriff of each region formed a jury panel by sending out registered mail summonses, and acting with the Chief Justice, determined the number of summonses. Those who attended the courthouse were assessed by a judge for qualifications to serve. The Crown and defence, at the time of the Report, then had an opportunity to exclude jurors for cause

(reasons related to impartiality), peremptory challenges (automatic exclusions) and in the case of the Crown, stand asides (i.e., allowing the Crown to later call the person for challenge) (AJI 1991).

The Report found that the summons process excluded Indigenous peoples from participation on the jury because the remote location of many Indigenous peoples, as well as more frequent itinerant habitation patterns, made dealing with mail or even a simple phone call, more difficult (AJI 1991). People who call in first are more likely to attend the courthouse and the slower response times that many Indigenous communities required meant further underrepresentation (AJI 1991). These conditions were exacerbated by the social and economic conditions of many of the people who were on the original list. The costs associated with being a juror, and in particular, the delayed reimbursement of those costs after the travel, further disincentivized Indigenous persons from participation (AJI 1991). Moreover, the Sheriff also possessed the discretion to exclude prospective jurors by virtue of lack of comprehension. Indigenous persons who only spoke Indigenous languages were routinely excluded from serving. The Report suggested this was another opportunity to underrepresent Indigenous persons on the jury.

The Report made sweeping recommendations including: when a Sheriff exempts an Indigenous person from service they should be replaced by a member from the same community; stand aside and peremptory challenges should be eliminated; rulings for challenges for cause should be made by the presiding judge; jurors in rural communities should be drawn from within 40 km of the trial location where practicable or from locations that are more functionally representative; and that translation services be provided for prospective jurors who speak only Indigenous languages and that the provincial legislation be amended to allow service of these individuals (AJI 1991).

Manitoba was the only province before 2013 to have conducted a major review of the underrepresentation of Indigenous jurors, though Alberta, British Columbia and North West Territories have noted similar deficiencies in other contexts (Ontario 2013:38). The only major reform of jury law that occurred was a response to the Supreme Court Decision of *R. v. Bain* [1992] 1 S.C.R. 91 (in which elements of the juror challenge scheme were held to give the apprehension of a pro state bias in the formation of the jury), when Parliament, in 1992, amended s. 634 of the *Criminal Code of Canada*, RSC 1985, c C-46 s. 745 to eliminate stand asides by the Crown and created equal peremptory challenges by both Crown and defence counsel (Ontario 2013:40). This

alteration was in response to a perceived imbalance of power between Crown and defence and was not aimed at ameliorating representation problems on juries.

Ontario's recent report on *First Nations Representation on Ontario Juries*, conducted independently by the Honourable Frank Iacobucci, echoed many of the same systemic problems found by the Manitoba Report (Ontario 2013). Though many of its recommendations are specific to Ontario, the report was limited in its mandate to "ensure and enhance the representation" of "on reserve" Indigenous persons and to strengthen "understanding, cooperation and the relationship" between the Attorney General and First Nations on the representativeness issue (Ontario 2013:3). The report received submissions from a variety of stakeholders, such as Indigenous communities and legal aid. The most alarming finding of the report is its contention that "it is clear that the jury system in Ontario...and its counterparts across a variety of Canadian ...jurisdictions, has often ignored and discriminated against Aboriginal persons" (Ontario 2013:53).

Amongst the reports and studies it commissioned was a submission by Karen R. Restoule, who interviewed 15 Indigenous persons and found "that there is a profound mistrust of, and alienation from, a criminal justice system that is perceived to be contrary to" Indigenous "original jurisdiction over justice matters and devoid of: Indigenous legal principles or cultural values" (Ontario 2013:53; Restoule 2012). The Ontario Report leaves little doubt that Indigenous underrepresentation on juries is an issue that plagues jury trials across all jurisdictions in Canada.

In the face of two high-profile public reports conducted over the last 25 years, one would assume that the case law of jury representativeness would demonstrate major challenges to the current representativeness procedures in place across Canada. Yet a review of the extant and reported case law demonstrates that the issue remains one that evades or confounds Canada's courts at most turns. We reviewed every reported Canadian case that looked at the issues of representativeness and juror challenges in Canada, and found that when the issue challenged was purely representativeness based, Courts were far less likely to allow a remedy for an accused. This is to be contrasted with situations in which jurors were challenged on the basis of bias - a method which seems to be far more well-received by both trial and appellate courts.

A discussion of all of the cases would be too expansive for a single paper; however, we do provide a summary of several cases below. For

the purposes of coherence, and because we have explored reports commissioned in Manitoba and Ontario, we will review sample cases in the jurisdictions of Manitoba and Ontario. We will also review Supreme Court of Canada cases that touch on representativeness issues as they provide binding precedent across Canada. We will also briefly review some sample cases that explore issues of juror bias in Canada in order to determine how representativeness interacts with bias as a legal value.

## A. Manitoba

In *R. v. Lamirande*, [2002] MBCA 41, the appellant, an Indigenous person, was charged with manslaughter for shooting an individual in the process of robbing a grocery store in Winnipeg. The appellant raised the lack of Aboriginal persons on the jury as a problem of representativeness (para. 150). The appellant argued that prior to jury selection there were few (if any) Aboriginal people on the jury panel, so as a result the applicant's counsel demanded that Aboriginal jurors be recruited. The trial judge had found that inquiring about what appeared to be a lacking Aboriginal membership among the jurors would be "offensive". The appellant argued that the jury panel itself must contain Aboriginal persons in proportion to the number of those residing in the community. The appellant argued that by refusing to question jurors on the panel about their background that there was a denial to the Charter guarantee of a fair trial under s. 11.

The Manitoba Court of Appeal agreed with the trial judge's ruling on representativeness and noted that all juries begin with the presumption that its members are impartial. For a jury pool to be representative, it does not need to have a particular racial, ethnic or gendered composition: so long as the jury is randomly selected from the community (abiding by *The Jury Act*, CCSM 2010, c. J30) Charter compliance was assured. Polling jurors based on race was not required. To demand a jury poll based on race, the Court ruled, would be its own form of racism, running counter to Canada's multicultural right that every person can stand as a juror, and is to be presumed impartial. The appeal was dismissed.

In *R. v. Teerhuis-Moar*, [2007] MBQB 165 the accused was charged with second-degree murder, and was of Aboriginal descent and a resident of Winnipeg at the time of the offence. The accused sought to challenge the validity of certain sections of *The Jury Act* and the jury formation process that purportedly violated a number of his Charter rights. The jury was randomly selected from the Manitoba Health

Services Commission List by the jury manager, whose tasks were delegated by the Chief Sheriff. The jury manager selected 1600 names of persons from Winnipeg from the roll that had been prepared the year before. The notices were sent out, with the regular request for exemption or reason for request of disqualification. With respect to this case, there were 176 potential jurors available from the 1600 who were summoned. The jury manager was unable to identify how many individuals were Aboriginal (para. 9).

The applicant in this case challenged the Chief Sheriff's discretion in getting to choose the geographic area from which jurors were summoned (from the area where the case was tried). He submitted that jurors should instead be summoned from the area where the offence took place and brought in to the court (*R. v. Teerhuis-Moar*, [2007] MBQB 165, para 45). These submissions were based on demographic claims made by the applicant, including that the Aboriginal population in Winnipeg was only 7% compared to 11.7% of the population of Manitoba, meaning that random selection from Winnipeg alone would result in an unrepresentative jury (para. 47). In addition to this issue, Aboriginal populations had much lower rates of home ownerships than non-Aboriginal populations (only 26.3% as compared to 77.6% of non-Aboriginals own homes). Additionally, other sources of underrepresentation were that Aboriginal populations move far more than do non-Aboriginal populations (25% had moved in the past year compared to 15% of other Manitobans). Given the higher incarceration rates for Indigenous persons the applicant also argued that the exclusion of convicted criminals from prospective juror lists also lowered the chances of achieving representativeness on the jury (para. 46).

The Court dismissed the application, noting that the Charter only guarantees a fair and impartial tribunal, and that a representative jury does not require representation from every population sector (*R. v. Teerhuis-Moar*, [2007] MBQB 165, para. 56). Indeed, adding more jurors with traits shared by the accused might instead derogate from the impartiality of the tribunal. The Court distinguished between impartiality and representativeness - impartiality arises when there exists a real potential for the jurors to be of biased opinion, while representativeness focuses on whether the jurors are drawn randomly from a fair cross-section of the community (so long as competent, community-representative jurors were selected, there was no reason to believe that the impartialness requirement was adversely affected; para. 62). The claims the applicant was making were considered by the Court

to “mean the imposition of inequality” (para. 64). Further, the use of the Health Services Insurance Act, CCSM 2008, c. H35 as a source of potential jurors was one of the most representative lists possible, including individuals of “Aboriginal heritage” (para. 78). The Court noted that the applicant’s claim that mail summonses excluded Indigenous people due to higher rates of mobility was “troubling” but does not prove that “representativeness of the community at large” was not achieved (para. 82-3). The Court also noted that only 13 out of 1217 prospective jurors were disqualified for possessing criminal records and that if even all of those were Aboriginal it would not have affected impartiality and representativeness in this case.

## B. Ontario

A search of written decision in Ontario reveals a number of representative challenges since the advent of the Charter. In the interests of space, we have selected some important examples as emblematic of the general legal trends emerging in Ontario. The cases continue to demonstrate the difficulty in challenging jury trials on representativeness grounds and echo the same difficulties faced by accused persons in Manitoba. The cases demonstrate the judicial opinion that the (Ontario) *Juries Act*, RSO. 1990, c.J.3 is not discriminatory against any particular group of people, and that impartiality and representativeness should not be confused. In particular, Ontario has denied the accused the ability to argue that the citizens are denied their equality rights under s. 15 of the Charter by being denied jury service on the basis of their race and/or heritage (see *R. v. Laws*, [1994] 7392 (ON SC) and *R. v. Church of Scientology of Toronto*, [1997] 16226 (ON CA) for examples).

In *R. v. Fiddler*, [1994] 7396 (ON SC), the accused, a member of the Nishnawbe-Aski Nation, was charged with two counts of sexual assault (s. 271 CCC), two counts of aggravated sexual assault (s. 273 CCC), and one count of anal intercourse (s. 159 CCC) against a young complainant in the Sandy Lake First Nations Territory, a first nations reserve in the judicial district of Kenora (NW Ontario). The accused was committed to stand trial in the town of Kenora, about 400 km away from Sandy Lake with a jury composed of members of the Judicial District of Kenora. The accused submitted that it was his constitutional right to have his trial at the Sandy Lake Reserve, and to be tried by individuals selected from the Sandy Lake area. The accused argued that he was unfamiliar with Kenora, which was 400km distance for him and witnesses to travel, and that the cultural and language barriers were

immense between himself and non-Aboriginal jurors. He asserted that culture, language, and geographic impact could negatively affect his ability to have a fair trial. In this case, the Crown decided to provide free travel and accommodation for Aboriginal witnesses when in Kenora for trial purposes (and, in the event of an acquittal, to return the accused back to his community). The travel time of two weeks was found to not be a major imposition for witnesses (para. 34).

The accused had argued that mailing notices to prospective jurors would effectively remove Indigenous representativeness from the jury due to higher mobility rates in the Aboriginal population. In 1993, the return rate was 60-70% for non-Aboriginals, but 33% for Aboriginals. In this case, the deputy sheriff wrote letters in the Aboriginal language of the band to rectify the situation. Additionally, the sheriff paid the expenses for travel/accommodations for reserve jury members.

The Court found that there was no requirement that jurors be fluent in the primary or only language of an accused for representativeness to be satisfied. As it was a Charter right to have an interpreter present at trial, any disadvantage from language barriers were mitigated. Although this was not an ideal solution - as interpretations will inevitably be altered to a degree - not being fully understood was not a Charter violation (*R. v. Fiddler*, [1994] 7396 (ON SC), para. 61). Further, the Court found that, in regards to allegations of sexual abuse, no distinct cultural differences were detectable between Aboriginal and non-Aboriginal approaches to the nature of the crime - there was no level of understanding the circumstances of the case required by a certain cultural group to make a competent decision on the matter (para. 61). The Court noted that the accused's interpretation of representativeness of community would be unworkable and problematic:

If the law is to reflect the moral sense of the community, the whole community—and not just a special part—must help to shape it. If the jury's verdict is to reflect the community's judgment—the whole community's judgment—jurors must be fairly selected from a cross-section of the whole community, not merely a segment of it... In this case, the accused is an elder of the community, a position that has a lot of influence and demands respect from community residents, and bands from the surrounding area (para. 81)... It is a conflict of interest to have jurors who know the accused in some way, which is a very likely scenario if the trial was to be held on the small reserve. Informing the jury of the cultural differences is a responsibility of the Crown, which in this case proves to be sufficient. Aboriginal populations are not

entitled to any higher degree of representativeness than the population at large (para. 85).

The Court also noted that the jury experience itself helped to inoculate against discrimination by the jury (*R. v. Fiddler*, [1994] 7396 (ON SC), para. 92). The Court found that the trial judge's warnings to the jury that they must not resort to preconceptions or biases, including racial biases, in arriving at their verdict also inoculated against discriminatory effects at trial. Therefore, the selection of members other than the Sandy Lake community was not racist, but was a means of ensuring community representativeness of diverse groups. In this case, cultural differences were but one component in a complicated matrix (para. 95). The Court summarized its view of Canadian law on the matter of juror representativeness and bias (para. 98):

Canadian courts have consistently held that juries need not be selected from any specific community, any specific race, nationality or other identifiable minority and that the right to trial by jury includes the right to be tried by a jury selected at random from persons representing a cross-section of the community. While participation from minority groups must continue to be encouraged and facilitated, no accused is entitled to trial by a jury selected on the basis of racial considerations which would result in the elimination of the general population from the jury panel.

The Court thus dismissed the claims of the accused and his motion to have an Aboriginal jury and hold the case on the reserve community.

A similar approach and finding was made in *R. v. Nahdee*, [1994] 7395 (ON SC). In this case, the Sheriff's officers had obtained supplementary lists of names (in addition to Municipal tax rolls) from the federal government, and had requested the local band councils provide contact information for the names to ensure representativeness. Citing privacy concerns, of 424 requests the bands delivered only 117 responses. Using similar reasoning to *Fiddler*, the Court denied claims of fair trial violations (and other related Charter rights) in the case of an Indigenous person charged with murder and aggravated assault and robbery. The Court noted that the Sheriff had undertaken "all reasonable efforts" to ensure representativeness (para. 14). This approach was followed more recently in *R. v. Wareham*, [2012] ONSC 908.

In *R. v. Kokopenace* [2013] ONCA 389, now the leading representativeness case in Ontario, the accused was appealing his conviction of manslaughter. He argued on appeal that the petit jury

found him guilty out of racial biases (in this case, a lack of inclusion of Aboriginal on-reserve residents). He argued numerous violations of Charter rights and of violations of the *Juries Act* R.S.O. 1990, c.J.3. The Court of Appeal noted that jury representation serves two major functions: 1) ensuring the jury is an impartial decision-maker (acting as a community conscience) and 2) serving to build public knowledge/trust in the criminal justice system (para. 28). The Court of Appeal found that the right to a representative jury is not an absolute right, but a qualified right that requires the state to use a jury roll process that provides for a generally representative panel of jurors. Hence, the only obligation of the state is to ensure that the list from which jurors are drawn is representative of the community (para. 31).

The majority of Court of Appeal did not support the notion that the appellant have a jury representative of his particular case/characteristics, but noted that it was open to a reviewing court to inquire whether the steps taken by the state to seek and prepare a jury roll was a reasoned platform for an impartial jury (*R. v. Kokopenace*, [2013] ONCA 389, para. 44). The state cannot control whether or not individuals respond to their notices received (para. 50). However, reasonable steps must be taken to ensure that there is a representative list of potential jurors to send notices out to, as well as taking efforts to encourage responses. The Court of Appeal noted in this case that very few summons were returned from Aboriginal communities and took notice of the reasons stated for such results in the Iacobucci Report. Little effort was made to rectify the low Aboriginal response rate and this failure violated the accused's rights to a fair jury trial under s. 11(d) and (f) of the Charter. This undermined the public confidence in the integrity of the justice system and the administration of justice (para. 226). The case was the first major Court analysis to draw on the Iacobucci report and may represent a new momentum for reviewing Courts in representativeness assessments.

In other contexts, challenges regarding jury representativeness have met with some limited success. For example, in *R. v. Huard*, [2009] 15442 (ON SC) the jurors being called upon from the community (Windsor and County of Essex) were from an area that was in a severe economic recession (the unemployment rate was one of the highest in the country). Many jurors responded in their letters that they feared the economic implications of sitting at a lengthy trial. In this particular case, increasing jury monetary supplementation was required in order to ensure jury representativeness. The Court stated that its ruling should not hold for all cases in the future and should be

determined on a case by case basis. In less necessitous circumstances, Ontario courts have ruled oppositely (See *R. v. Louis*, [2009] 21764 (ON SC)).

Most recently in *R. v. Wabason*, [2014] ONSC 2394 an accused charged with second-degree murder and breaking and entering challenged the lack of representation on a jury using s. 11 of the Charter. The Court applied the *Kokopenace* precedent; the Court found that the province had failed to make reasonable efforts to meet its representation obligations under the Charter, illustrating the wide-ranging potential effects of the *Kokopenace* case.

### III. SUPREME COURT OF CANADA AND INTERPRETATION

The leading case on representativeness is the Supreme Court case of *R. v. Sherratt*, [1991] 1 S.C.R. 509. The appellant was convicted of killing a pimp in Winnipeg. The accused had informed the police that he was involved in the pimp's death and that he dumped the body in a garbage bin; however, by the time the police had gotten to the bin, it had been dumped, necessitating a landfill search. There was wide media publicity especially since the victim had a lengthy criminal history. All reports occurred approximately 9-10 months before the trial. The accused wanted to challenge for cause each potential juror because he suspected partiality from pre-trial publicity. He had prepared 11 questions to be asked to each member of the jury panel. At issue was whether the accused was properly denied the ability to challenge each prospective juror. The appeal was dismissed largely because the Court found that an accused does not have the right to a favourable jury and the selection procedure cannot be used to thwart the representativeness that is essential to the proper functioning of a jury. The case also clarifies the scope of questioning that can occur in the juror selection process.

The case is important to our discussion because it outlines the nature of the scope of juror representativeness in Canada. The Court's majority noted that the importance of the jury and the Charter right to fair jury trial is:

meaningless without some guarantee that it will perform its duties impartially and represent, as far as is possible ... the larger community. Indeed, without the two characteristics of impartiality and representativeness, a jury would be unable to perform properly many of the functions that make its existence desirable in the first place. Provincial legislation guarantees representativeness, at least in the initial array. The random selection process, coupled with the sources from which this selection

is made, ensures the representativeness of Canadian criminal juries...However, the "in-court" selection procedure, set out in the Criminal Code, can impact on the representativeness of the jury in some situations. The impartiality of the jury is controlled in the main through the Criminal Code procedure. Section 11(d) of the Charter further buttresses the requirement of impartiality (*R. v. Sherratt*, [1991] 1 S.C.R. 509, 525).

This passage indicates the link in Canadian law between formation of the jury at the name gathering stage as well as questioning of individual jurors as critical for the establishment of representativeness analysis. No bright line can be drawn between the formation of the juror lists and the challenges towards individual jurors in ensuring the right to a representative jury as both issues may affect representativeness - a matter that stems from the right to a fair trial through the innocence presumption under s. 11(d) and the right to a jury trial under s. 11(f) of the Charter (*R. v. Kokopenace*, [2013] ONCA 389, para. 26).

The Charter right to a representative jury roll serves several purposes. Courts interpreting *Sherratt* note that a representative jury insures impartiality, provides an adjudicating body which acts "as the conscience of the community" and builds "public knowledge of and trust" in the criminal justice system (*R. v. Sherratt*, [1991] 1 S.C.R. 509, 53; *R. v. Kokopenace*, [2013] ONCA 389, para. 28). The *Sherratt* case, combined with the recent Iacobucci Report has given cause for courts to consider a cautiously expanded reading of the right to a representative jury as an "inherently qualified" right that places some tangible demands on the state (*R. v. Kokopenace*, [2013] ONCA 389, para. 31).

The legal focus in analyzing representativeness

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...jury that will ensure confidence in the jury's verdict and contribute to the community's support for the criminal justice system (*R. v. Kokopenace*, [2013] ONCA 389, para. 45).

The legal test is whether, in the process of compiling the jury roll, the province made reasonable efforts to provide a fair opportunity for the distinctive perspectives of "Aboriginal on-reserve residents to be included, having regard to all the circumstances and keeping in mind the objective served by the representativeness requirement" (para. 51). The standard of reasonableness is a "continuing one". If, over time, "further steps that are reasonably available are needed to provide the fair opportunity to be included, they must be taken" (para. 52).

The result is that representativeness is a continuing value that inures from the formation of the rolls throughout the trial process. The Iacobucci Ontario report, together with recent interpretations of the *Sherratt* decision, seem to imply that provinces are under a continuing duty for ensuring the jury formation process is apprised of Indigenous values on a reasonableness standard. That standard is meant to instill public confidence in the justice system, a matter given articulation through the conception of the administration of justice since the jury acts as the community's conscience. In this context it is remarkable that little has been said in the case law of determining what the content of the community's conscience is, or whether the disputed procedure meets public understandings of representativeness in the Canadian context.

#### IV. CHALLENGES FOR BIAS

Courts have been more liberal in allowing alteration of juries to deal with racial bias. In *R. v. Williams*, [1998] 1 SCR 1128, an Aboriginal man was charged with robbery of a pizza parlour in Victoria. He argued that he possessed the right to question potential jurors to determine the presence of bias against Aboriginal people. The Court of Appeal, agreeing with the reasoning in *R. v. Parks*, found that disallowing such challenges for cause could negatively bias the jury towards the Crown (para. 29) and that such questioning might be the only way to identify some biases (para. 36). The Court of Appeal noted that while such challenges might invade the privacy of prospective jurors, "the accused's rights to a fair trial must be held to the same standard as those protecting the privacy interests of prospective jurors" (para. 51).

The Court of Appeal noted that judicial notice can be taken of the social reality that biases against Aboriginal populations exist. This notice should serve to prevent systemic discrimination of Indigenous populations. Thus, the trial judge should have allowed the challenge for cause (*R. v. Williams*, [1998] 1 SCR 1128, para. 51).

Making the argument for racial bias-related questioning is not guaranteed, especially in cases where the trial judge allowed some limited questioning on possible racial bias. For example, in *R. v. Gayle*, [2001] 4447 (ON CA), an accused (black male) was charged with first degree murder of a white police officer and attempted murder of another officer. The accused argued that the trial judge erred in limiting the questioning of prospective jurors as to possible racial bias.

The Court dismissed the appeal on the basis the trial judge's limitations were reasonable. The trial judge permitted the challenge for cause, but limited the questioning to "Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the person charged is a black Jamaican immigrant and the victims are white police officers?" (para. 13). Additionally, the trial judge allowed questioning as to whether or not any of the potential jurors had family members/friends that were police officers and to whether they had been exposed to the publicity. This was in part due to the Crown bringing forth a psychologist as an expert witness who testified that it is nearly impossible to truly determine whether or not an individual is impartial via questioning, given that jurors do not want to appear racist in their answers (especially when questions are so obviously prying for bias). The expert submitted that the questions were adequate in testing the opinions and abilities to move past such biases; however, such questions could not guarantee impartiality. This style of question was found by the Appeal Court to align with the Parks/Williams rules and the notion that jurors are to be presumed impartial and indifferent (*R. v. Parks*, [1993], 84 C.C.C. (3d) 353, para. 332; *R. v. Williams*, [1998] 1 SCR 1128, paras. 501-503).

In *R. v. Find*, [2001] SCC 32, [2001] 1 SCR 863, an accused was charged with 21 counts of sexual assaults against different youths (aged 6-12). Prior to jury selection, he applied to challenge potential jurors for cause, believing that, given the stigmatization attached with sexual offences against children, that some jurors may not be able to try the case in an impartial manner. These challenges were denied and the Supreme Court of Canada upheld these denials. The Court explains why the arguments for juror bias in these cases is problematic:

In terms of widespread stereotypes affecting juror impartiality, there are many stereotypes that have plagued sexual offence trials, often which work in the "benefit" of the accused. Such include rape myths of women of unchaste character being more likely to have consented to the act and are hence less worthy of belief, the clothing and behavior of the woman suggested sex, and the testimony of children is likely fabricated and unreliable to name a few. None of these have ever been held to justify challenges for cause, as the courts trust that the jurors can act in an impartial manner in such "he said she said" cases. There is no reason to believe that stereotypical attitudes about accused persons are more intense than those placed on complainants (para. 101).

The Court's findings here upheld the reasoning in its earlier case of *R. v. Biddle*, [1995] 1 SCR 761, in which the accused appealed two counts of assault causing bodily harm and two counts of choking with intent to commit an indictable offence. The appellant was convicted by an all-female jury, a jury that the appellant argued was unrepresentative. The majority found that the issue was moot due to its decision in *Bain*, but the reasoning of Justices McLachlin and L'Heureux-Dubé in dissent seems to have been taken up by the Court in *Find*.

To say that a jury must be representative is to set a standard impossible of achievement. The community can be divided into a hundred different groups on the basis of variants such as gender, race, class and education. Must every group be represented on every jury? If not, which groups are to be chosen and on what grounds? If so, how much representation is enough? Do we demand parity based on regional population figures? Or will something less suffice? I see no need to start down this problematic path of the representative jury, provided the impartiality and competence of the jury are assured. Representativeness may be a means to achieving this end. But it should not be elevated to the status of an absolute requirement (para. 56).

## V. A BRIEF REVIEW OF JURY STUDIES ON RACE AND REPRESENTATION

Certainly in the United States, studies of juries and their representativeness are well worn, an observation which reflects the frequency of jury trials in America. Studies on the representativeness of jury rolls can be found in major jurisdictions (Kairys et al. 1977). The Canadian context is less prolific in the area of jury representation. The Manitoba and Ontario reports are amongst the best sources regarding issues of representation. Other major Canadian studies have not attempted to investigate the Canadian populace's views on representation, a matter all the more important given that the courts seem to want representativeness to meet the strictures of how the reasonable Canadian would react to the administration of justice in a given case.

Within the last 25 years there have been academic calls for jury reform. Petersen (1993) asserted that white jurors are more likely to be influenced by racial stereotypes and contended that juror challenges that removed prospective jurors from the jury exacerbated the bias and representative issues of a given jury. Petersen contended that Canada

should revisit its laws on peremptory challenges and the author was prescient in her advocacy for suggesting that questions for racist and prejudicial attitudes should be permitted (see Williams, Parks and Gayle above).

Roach (1995) studied the cases of *R. v. Parks* and *R. v. Williams* and outlined legal tools that could be used to prevent the risk that jury deliberations would be sullied by racial prejudice and stereotypes. Roach argued that the decisions should make clear that racial prejudices may apply to accuseds and complainants and calls for closer interrogation of whether the law should scrutinize for bias in the context of age or gender-based distinctions. Roach argues that Canada should strive to avoid the American model of jury vetting in which defence and prosecution struggle to obtain a favourable jury to ensure easy wins. Nonetheless, Roach noted that understanding of personal and institutional racism were critical investigations for future legal cases, though Roach remained wary of the claim that singular questions could cleanse a jury of bias (1995:426).

Israel (2003) examined the specific issues of Indigenous underrepresentation in the jury panel and described the roots of the issue through historic discrimination. Israel explored the problems that exacerbate the representation issues including the use and administration of non-representative lists, the broad Sheriff discretion in finding eligible members for a jury, the problems of using mail, issues related to qualification (including criminal records) and the rolling nature of jury service (which favours non-Indigenous response) (Israel 2003). Israel notes that Ontario and Manitoba studies such as the Manitoba Aboriginal Justice Inquiry, Law Reform Commission of Saskatchewan, Donald Marshall Jr. Inquiry and Commission on Systemic Racism in the Ontario Criminal Justice System irrefutably establish underrepresentation as a problem and that legal reform was a necessity (2003:43).

Morton (2003) studied the *R. v. Gayle* decision and noted that while the Court paid lip service to the notion of representativeness, it provided a formalistic legal decision that created a very high burden on an accused to demonstrate that the jury was either biased or unrepresentative. The process of assembling the list of potential jurors (i.e. the array of names) and its randomness together with the lack of misconduct on the part of the Sheriff seemed to satisfy formalistic interpretations that a jury was representative (Morton 2003). Morton asserted that the Canadian courts have in generally been ascribed to

conceptions of formal, not substantive, equality in ensuring jury representativeness and lack of bias.

Psychological studies have considered the race and decision-making of juries, albeit in the United States context (Sommers 2007; Hastie et al. 1983). Sommers notes that most studies focus on the race of the accused, rather than the jury. In general, jury studies have found that juries that are authoritarian hand out harsher punishments (McGowen and King 1982), that jurors who can be evaluated as highly ethnocentric are more likely to judge people who are of different race more harshly (Kemmelmeyer 2005) and that white jurors are more likely to convict dark-skinned than light-skinned accused persons (Foley and Chamblin 1982). In cases with ambiguous evidence, jurors of both races were harsher towards other-race defendants, showing a strong “in-group, out-group” effect (Ugwuegbu 1979). Other studies have found that race works in complex ways, but that different contexts will produce a race-based effect in mock trial scenarios (Sommers and Ellsworth 2000; Mazzella and Feingold 1994). Race-based effects have been found in a number of other studies, as well (Bowers et al. 2001; Bernard 1979; Hans and Vidmar 1982; Jones and Kaplan 2001; Marder 2002; Mitchell et al. 2005; Perez et al. 1993). In short, the litany of American psychological studies shows that race does, across a variety of contexts, predict juror decision-making.

The Canadian literature on juries is somewhat scant in terms of empirical studies, but, as we have discussed above, major jurisdictions are reporting representation and jury bias issues, and issues pertaining to bias on the jury. The two most recent major reports establish as social fact that jury representation is a major obstacle facing Indigenous accusers in Canada.

Iacobucci notes that the jury is a fact finder that protects against oppressive laws and that it acts as an “educator” because it helps to legitimize the criminal justice system by acting as the conscience of the community in criminal proceedings (Ontario 2013:20). These functions were adopted by the Supreme Court of Canada in *R. v. Sherratt*. The importance of representativeness in Canada was constitutionalized in 1982 but seemed to be apprised of the values of “fairness” and “random selection” (Ontario 2013:30). *R. v. Sherratt* served to link the Charter right to be tried by a jury under s. 11 (f) and the presumptions of innocence under a fair and public hearing in s. 11 (d) to the principles of representativeness. Iacobucci contends that the *Sherratt* decision serves notice that the jury’s role is essentially one that mirrors the

community's commitment to justice, including its conceptions of representation (Ontario 2013:31).

It is surprising, given the public reports, the Supreme Court's findings in *Sherratt*, and the psychological literature on race, representativeness, and bias, that there are no Canadian studies analyzing the opinions of Canadians regarding juror representation. If a jury stands as a proxy for the Canadian conscience, surely the content of that conscience, in respect to issues of representation, must be examined. Given this context, we developed a questionnaire in order to gather information on Canadian conceptions of representativeness. The implementation of the survey was accomplished through the use of a student sample.

It has been well established in the Canadian jurisprudence that the jury is to act as something of a moral arbiter in criminal cases, one that balances the administration of justice including the needs of an accused for due process and the state's interest in maintaining a secure society. It is worth noting that the conception of representativeness is derived from the Charter as opposed to explicitly within its enumerated terms. No Canadian study has attempted to understand if the conception of representativeness is a value that prospective jurors hold. Our literature search did not uncover any instance in which a Canadian sample was canvassed regarding attitudes and relative value of the conception of representativeness. Given the dearth of research on the topic, our questionnaire attempted to provide some content and context to the relative importance that representativeness has to populations. Questions were developed to study four basic themes associated with representativeness: 1) how participants understood and defined the concept of 'larger community' in the context of representativeness, 2) how participants understood and defined the composition of a representative jury, 3) how participants understood and defined representativeness with respect to the accused in a case, and 4) how participants understood and defined a representative jury with respect to the victim in a case. It is notable that while courts have been reluctant to give too much weight to the representativeness claims of accused persons, the two major public inquiries find major deficiencies in the implementation of representation rights. If the public perception were that representativeness was an acceptable value, the case for law reform would be strengthened considerably.

## VI. METHOD

### A. Participants

One hundred and thirty-six undergraduates from the University of Winnipeg participated online in exchange for bonus credit in their Introduction to Criminal Justice course. This research was approved by the University of Winnipeg Human Research Ethics Board. Six participants were excluded from analyses because they could not be classified according to their stated ethnic ancestry. Four of these participants reported mixed ethnicity and two indicated 'Canadian' for their ethnic ancestry. Eight other participants were excluded from analyses because they indicated their ethnicity was 'Other' but did not specify. These exclusions resulted in a final sample of 122 participants.

Females comprised 58.2% of the final sample. Ages ranged from 18 – 46 years ( $M = 20.62$ ,  $SD = 3.71$ ). Participants reported their ethnic ancestries as European (64.8%), Aboriginal (6.6%), and non-Aboriginal visible minority (28.7% ; referred to as 'other visible minority' [OVM] and comprised of participants that have Asian, African and South Asian ancestry).

### B. Materials

We used the currently accepted legal definition of a representative jury – one that corresponds to a cross-section of society and the larger community (*R. v. Kokopenace*, [2013] ONCA 389) – as the basis to examine how participants perceived the make-up of a representative jury. There were two types of questions used throughout the study. 1) Participants were presented with a statement (e.g., "A defendant should have an absolute right to a representative jury") and asked to indicate their level of agreement with the statement on a scale of 0% (do not agree at all) to 100% (agree completely) using a computerized sliding scale. 2) Participants were presented with a 'fill-in-the-blank' type of statement (e.g., "If the accused is of a racial minority, \_\_\_ juror(s) should be of the same racial minority") and asked to select from a drop-down menu the number of jurors they thought was appropriate for that scenario. Participants had the option to select a number from 0 to 12, or, alternatively, they could have selected the option "I do not think this is important to the issue of jury representativeness."

One final question asked participants to rank five options (Canadian population, Provincial population, local population, the accused, and the victim), from most to least important, in terms of jury representativeness (i.e., a rank of 'one' would indicate the participant

felt this item was most important regarding jury representativeness, a rank of 'two' would indicate this item was next most important to jury representativeness, etc.).

### **C. Procedure**

The study was completed online. Participants were provided with the study URL and completed the study on their own time. After accessing the URL, participants were told that the study would take approximately 90 - 120 minutes and were requested to complete it when they were in a quiet place free from distractions. Upon continuing, participants read a letter of information, provided electronic consent, and filled out demographic information before answering the study questions. For each question, participants were provided with the following instructions on the same page as the question:

According to Canadian case law, "a representative jury is one that corresponds to a cross-section of the larger community as far as is possible and appropriate in the circumstances."

The following instruction was also provided for the scale questions:

For the following statement, please rate your level of agreement from 0% (do not agree at all) to 100% (agree completely).

The following instruction was also provided for the number of juror questions:

For the following statement, please select the number of jurors, from zero (0) to twelve (12), that you believe is the appropriate number of jurors for that particular scenario.

Questions were delivered in thematic blocks such that participants answered questions on the same topic in a single grouping. The order of these blocks was randomized, and the order of questions within blocks was also randomized. The exception to the randomization was that the last question presented was always the ranking question. Following this question, participants were debriefed and thanked for their participation.

## **VII. ANALYTIC STRATEGY**

### ***Scale Questions***

We analyzed questions using mixed-model or one-way ANOVAs with ethnic ancestry as the predictor between-participants variable. We used mixed-model ANOVAs when looking at questions that paralleled

each other, with the paralleled questions as the repeated measure and ethnicity as the between-subjects factor. For example, in several instances identical wording was used for two separate questions with the exception of referencing the victim versus the accused in the question. We conducted one-way ANOVAs when questions were not paralleled with other questions, with ethnicity as the between-subjects factor.

### *“Fill-in-the-Blank” Questions*

For cases in which participants selected a number, we ran one-way ANOVAs with ethnicity as the predictor and number of jurors as the dependent variable. If participants selected the ‘not important’ option, 2 (ethnicity: European vs. OVM) x 2 (selected ‘not important’ vs. selected a number) chi-squares were undertaken. Analyses originally included Aboriginal participants, however, due to the low number of Aboriginal participants (8), in all cases this resulted in expected cell values < 5 so they were excluded from these analyses.

## VIII. RESULTS AND DISCUSSION<sup>1</sup>

Given that courts have been reluctant to allow accused-persons challenges on the basis of representativeness and given that courts have routinely relied on the notion that juries represent the conscience of the community, we were interested in examining the degree to which Manitoba-based samples might find representativeness to be an important legal value. In terms of the scale questions, the only statistically significant differences we observed were between participants who identified as being of European Ancestry versus OVM.

The lack of any significant findings with regard to Aboriginal participants was impacted by the small number of Aboriginal participants, which resulted in low power (i.e. little probability of finding significant differences if they actually existed). We provide the caveat that we know many further Aboriginal respondents are required to make any strong statements about the way Aboriginal Canadians perceive jury representativeness, but would feel remiss in not providing some comment on these participants. If we make the assumption that similar results would be found even with a larger sample of Aboriginal

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<sup>1</sup> Please note that all results are presented in Tables 1, 2, 3, and 4 available at Manitoba Law Journal Online <<http://robsonhall.ca/mlj/>>.

respondents, there are a few interesting points to note. First, the mean levels of agreement of participants who identified as Aboriginal tended to be between those of European and OVM participants. Second, in some cases the levels of agreement were at a near mid-point between the other two groups, and in other cases Indigenous responses were closer to the agreement expressed by participants of European ancestry than OVM. This is interesting because it indicates that in some cases, Indigenous participants may have more moderate opinions than European and OVM participants, and in others, their opinions align more closely with European than OVM participants. Again, these interpretations are based on the assumption that similar results would be found even with a larger sample of Indigenous participants (an assumption which may be faulty), so clearly, further research using larger Indigenous samples would be required to make definitive findings. Nonetheless given the importance of the Indigenous persons' stake in issues of representativeness, we report those findings in the tables.

We did find significant differences in the way OVM and European participants answered a number of the scale questions. OVM participants were more likely to agree than European respondents that juries should share characteristics with the accused (53.83% versus 36.16%) and victim (56.91% versus 34.32%) in a given case. This demonstrated, at best, modest endorsement, though not overwhelming, by OVM respondents for shared characteristics between the jury and the accused and victim. European disagreement with the conception of shared characteristics could be characterized as general disagreement with the statements.

This is supported by evaluating agreement with the statement that if a crime occurred on reserve, that the larger community (which the jury is said to represent) should be limited to reserve populations – agreement was 51.86% amongst OVM and only 37.37% amongst European. While neither population strongly agreed with the statement, OVM participants displayed modest receptiveness relative to Europeans regarding the conception of representativeness engulfing the geographic and cultural area of the reserve. In comparison, the findings for the statement that if a crime occurs on-reserve, that a jury representative of the “larger community” need not include members from the reserve - agreement was 45.47% amongst OVM, and 30.54% amongst Europeans indicating that both groups, and Europeans more so, show some level of discomfort with the exclusion of Indigenous, particularly on-reserve, people from juries for such crimes.

The highest levels of mean agreement occurred with statements that a jury should be made up of individuals who vary in cultural identity (73.78%), that conceptions of “larger community” should include the reserve for reserve-based crimes (65.24%), and that the “larger community” should, in part, share personal and cultural characteristics/identities of people within Canada (64.81%). The lowest values of agreement also suggested our sample valued representativeness – the greatest levels of disagreement were for statements that representativeness does not impact verdicts (32.84%), that legally defining what is meant by “larger community” was unimportant (38.92%), and that if the crime occurs on reserve, the “larger community” can exclude the reserve (34.87%). In tandem, these statements indicate that participants felt jury representativeness matters and legal conceptions of representativeness matter. In addition, communities in which crime occurs, in particular Indigenous ones, should, according to our respondents, include some conception of “larger community” that is comprised of people who live in the community where the crime occurred.

We also had participants answer questions about specific numbers of jurors required to achieve representativeness in various circumstances and found that OVMs wanted more juror representation in certain cases. If the accused was charged with sexual assault, OVMs wanted more sexual assault victims on the jury than Europeans (4.00 versus 1.90). OVMs wanted more jurors with a criminal record if the accused possessed one, than Europeans (3.79 versus 1.15).

In looking at the questions participants did not find important to the issue of representativeness, a greater proportion of Europeans than OVMs felt that it was unimportant that a certain number of jurors should have a career or occupation similar to the accused (35.4% versus 17.1%). Similarly, a greater proportion of Europeans than OVMs indicated it was not important to the issue of representativeness that a certain number of jurors should have a criminal record if the accused has a criminal record (32.9% versus 14.7%). OVMs viewed socioeconomic status as more important to the issue of juror representativeness. As the smallest proportions of participants indicating race and gender were unimportant to the issue of representativeness, this means that conversely, race and gender were found to be the issues of most importance to representativeness and that items least likely to be important to issues of representativeness were political affiliation and similarity in age to accused or victim. It

appears that participants viewed race and gender as two issues particularly relevant to their conceptions of jury representativeness.

Finally we asked participants to rank, from most (1) to least important (5), factors that ought be represented on a jury and provided the options of: Canadian population, provincial population, local population, the accused, and the victim. Mean rankings varied from 2.77 to 3.20 and there were no differences between means (all  $ps > 0.293$ ). The full range of rank (1 to 5) was selected for all items. We concluded there was large variability in terms of which of these items was most important to participants' sense of representativeness. Further, no race or item effects were found, indicating that - whether the respondent was OVM or European - the lack of consensus persisted.

Our findings allow us to tentatively conclude that representativeness of the jury is a concept that participants valued. Participants were most responsive to issues pertaining to race and gender. When it came to on-reserve crimes, participants wanted some on-reserve representation, but the degree of that representation varied, with OVM participants wanting greater representation. Participants wanted legal clarity on the definition of "larger community" that informs jury representation and believed that the concept of representativeness was important to the determination of a trial. In general, OVM participants wanted greater individual trait representativeness with accused and victims, than European participants wanted. Neither population showed a preference for representativeness being a value of more importance to either the accused or victim.

The results seem to indicate the possibility that participants' conceptions may align with the kinds of conclusions being made by investigatory committees, such as those in Ontario, and about how representativeness is problematic in the context of Indigenous offenders. The concept of Indigenous representation on a jury seems to be valued by participants to some degree. Our findings do suggest a potential affinity between the goals of recent public inquiries in jurisdictions like Ontario (and the findings of the Manitoba AJI of 1991) and inclinations towards representativeness, though future studies in other populations are necessary in order to make this claim definitively.

We see less preference for representation for attributes aside from race and gender, perhaps indicating that race and gender items mark the boundary between appropriate representativeness and stacking of

the jury by placing biased members on the jury (e.g., similar political affiliation of the accused). Certainly, the case law we reviewed demonstrates that courts, too, struggle with the need to establish representativeness on the one hand and the avoidance of bias on the other. Mainly, and with the notable exception of the Ontario Court of Appeal case of *R. v. Kokopenace*, courts have been reluctant to allow issues of representativeness to alter the trial process or to second-guess the jury formation process at the appellate level of review. The Iacobucci Report and, perhaps, as more data comes in, public sentiment, may align in the idea that a social problem exists when it comes to Indigenous representation and the Canadian jury system. On the other hand, our data also are consistent with representativeness concerns beyond just issues for Indigenous peoples.

## **IX. FUTURE DIRECTIONS AND LIMITATIONS**

In future studies we hope to receive enough Indigenous participation to statistically evaluate Indigenous responses to the posited questions. As our sample size increases, we imagine that statistical power will also increase, potentially allowing us to examine differences related to more discrete ethnic traits and affiliations. Future directions also involve expanding our age range for participants, as the current sample size was drawn from student participant pools at a post-secondary institution; this change will allow us to examine age-based distinctions.

We acknowledge that the findings from our student population may not generalize to the Canadian population given participants' limited range on demographic variables, and even more so when one considers that Indigenous peoples are underrepresented in the University setting. However, as an opening salvo into public perceptions of the issues of jury representativeness, the perceptions we uncovered allow us to tentatively assert that law reform in the area of jury representativeness is unlikely to be publicly perceived as unwelcome change in the mainstream justice system, even when the seeds of an alternative and co-sovereign Indigenous justice system may strengthen and grow in the future.

## **X. CONCLUSION**

It has been well over 20 years since the AJI found rampant underrepresentation of Indigenous persons in Manitoba's jury system.

Case law in Manitoba and Ontario demonstrates that the normal course is for courts to reject improper representation claims by an accused because conceptions of representative jury trials, though guaranteed by the Charter under s. 11 and in Supreme Court cases such as *R. v. Sherratt* continue to be too ethereal and legally amorphous to be actionable in the vast majority of cases. The Appeal Court's decision in *R. v. Kokopenace* together with the Iacobucci Report provide some faint hope that law reform may be on the way to ameliorate the representativeness issues. Certainly, (our study suggests that some public opinions about representativeness) align with the nascent legal changes, though further research would be needed to know whether widespread public opinion aligns with that of our sample. Given that the jury is said to be the conscience of the community and an arbiter of the administration of justice, community perceptions of representativeness are of obvious relevance to law reform in the area. Though we have seen some incremental steps forward towards greater representation in the last years, Manitoba's efforts to enhance representation have not yielded any fruit in the reported legal cases. Our participants' perceptions, together with actions undertaken in Ontario, suggest that it is time for Manitoba Justice to revisit the issue of Indigenous representation on its juries. Aboriginal overrepresentation in the justice system resulted in a wave of law reform changes in terms of the carceral experience and outcome, impacting sentencing and ideas of rehabilitation and integration. Despite these changes, we have not seen reductions in Indigenous offender involvement in the criminal justice system. Perhaps it is time to consider that Indigenous participation in the justice system could be constructive as justice-makers – as members of a jury who can give more concretized and contextual insight into the criminal trial at hand. Enhancing representation of the criminal jury, though difficult and controversial, is one missing piece of the justice system puzzle – a system that is meant to represent the wider community, in its never-ending efforts to protect it.

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