The Jury Representativeness Guarantee in Canada: The Curious Case of Disability and Justice Making

Michelle I. Bertrand PhD
Richard Jochelson PhD
Lauren Menzie
Criminal Justice Department,
University of Winnipeg,
Manitoba, Canada

Abstract

In Canada, juries are selected in order to act as the conscience of the community. To this end, the jury ultimately selected aims to be representative and should correspond to a cross section “the larger community” (Iacobucci, 2013). When questions of representation are considered in the literature or by the courts, the focus is often limited to race and ethnicity. However, Canadian literature often overlooks the effects of jury representativeness on other marginalized communities. This paper addresses this void by examining the issue of disability and jury representativeness, something rarely considered within a Canadian context or by the Canadian courts. We first discuss some recent examples of case law in the representativeness jurisprudence, including the recent Supreme Court ruling in R. v. Kokopenace and how representativeness relates to sections 11(d) and 11(f) of the Charter. We then provide data from a study we conducted using a student sample to provide some insight into public perception of representation guarantees as they are afforded to disability communities. This study examined respondents’ level of agreement with statements relating to representativeness guarantees and the rights of persons with mental or physical disabilities to be involved in the justice-making process. While there was considerable variation in individual responses, the results of this study ultimately demonstrated discrimination against jurors with both physical and mental disabilities which, when considered alongside recent jurisprudence, may be indicative of future adversity for disabled communities and for their advocates.
decision (*R. v. Kokopenace*, 2015) in which the majority of the Court confirmed that there is little in the way of recourse for an accused to insist that she be tried by a person with whom she shares personal characteristics (such as ethnicity, disability, etc.) in order to ensure proportionate representation on the jury.

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 and the presumption of innocence under the *Canadian Charter of Rights and Freedoms* (*R. v. Williams*, 1998; *R. v. Sherratt*, 1991; for a recent Ontario court case see *R. v. Muvunga*, 2013). Case law, through its interrogation of juror bias, has begun to explore the possibility that the impartial nature of a jury may be compromised in some cases of challenges for bias; peremptory challenges to jury membership permitted under the law, especially by the Crown, may in practice decrease representativeness of the jury (*R. v. Gayle*, 2001). The issue of bias is assessed through a court taking notice of, for example, racial bias, as a “social fact” (*R. v. Williams*, 1998).

In an independent review regarding the representation of First Nations peoples on Ontario juries, Iacobucci (2013, 31) argues that representative juries are important as they promote public confidence in the fairness of trials and the legal system. Further, when juries are not representative, public confidence regarding the fairness of trials may be undermined, and “[a] jury cannot act as the conscience of the community unless it is viewed favourably by the society that it serves” (Iacobucci, 2013, 31).

While there are recent Ontario policy directives 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 unexplored in the Canadian extant literature (Iacobucci, 2013, 31; *R. v. Sherratt*, 1991). Further, the degree to which the lack of jury representativeness affects other marginalized communities is seldom explored in the Canadian literature.

For example, despite the fact that almost half of all Canadians will be persons with disabilities (defined broadly) through the course of their lifetime (Statistics Canada, 2012), the issue of jury representativeness and disability is rarely discussed in the Canadian context. Certainly, few cases dealing with representativeness and disability ever make their way to the Courts in Canada, and most recently, representativeness issues have been litigated through problems pertaining to Indigenous representation on juries. The most recent Supreme Court authority, *R. v. Kokopenace* (2015) holds little promise for those who were hoping for amelioration of social conditions through the representativeness guarantees implicit in the *Canadian Charter of Rights and Freedoms*.

In this paper we will explore some of the extant literature on disability and jury representativeness, and outline the most recent Canadian jurisprudence on disability and representativeness, including a delineation of the scope of the representativeness guarantees. We then outline the most recent case from the Supreme Court of Canada dealing with jury representativeness – *R. v. Kokopenace*, 2015. Lastly, we will outline the results of a study we conducted using a student participant pool in order to illustrate some of the challenges facing
advocates of greater guarantees of jury representativeness for persons with disabilities. Ultimately, we conclude that the development of the jurisprudence together with prevailing attitudes on disability and juror representativeness provide a difficult context for advocacy in this area. Those who advocate for persons with disabilities need to continue to seek means of participation for communities of interest in the justice making process. Given the current jurisprudential context and the recent independent review addressing the issue of jury representativeness, the issue of jury representativeness remains a topic worthy of scholarly interrogation.

Scholarly Treatments of Representativeness
In Canada, the procedural aspects of legal process remain understudied in the context of persons with disabilities. Particularly understudied are decisions of fact at trial – i.e. the deliberations of judges and, in particular, juries. There are relatively few Canadian academic treatments of persons with disabilities as determiners of justice. The overwhelming majority of literature in North America pertaining to jury work investigates the roles of race and ethnicity. In the coming pages we consider studies of jury work and race (as opposed to disability), because these are the areas of representativeness that have been the focus of empirical study in North America. Following that discussion, we review two Canadian cases that have considered issues of representativeness and disability, and then review the recent Supreme Court of Canada case of R. v. Kokopenace.

A critical literature has begun to emerge which calls for reform in the context of representativeness. Most of these calls for reform have originated in the context of race, ethnicity, and cultural heritage. Papers calling for reform in the context of disability are noticeably absent from the literature. Certainly, some Canadian scholars have called for reform in the manner of peremptory challenges and questioning of bias in the formation of jury for a particular trial (Petersen 1993; Roach 1995; for case examples see R. v. Parks and R. v. Williams).

In the United States, studies of juries and representativeness are more common than in Canada. This is likely the case because the United States has a greater number of jury trials than Canada. The study of the representativeness of jury rolls is apparent in most common law jurisdictions, excepting Canada (Kairys et al. 1977). Major reports from Manitoba (AJI, 1991), and Ontario (Iacobucci, 2013), remain the most compelling studies of jury representation in Canada, though both occur in the context of Indigenous underrepresentation in Canada.

The issue of Indigenous underrepresentation on the Canadian jury was explored by Israel. Israel outlined problems facing Indigenous communities in achieving representativeness on the jury panel. For example, Israel noted that many source lists for prospective juries were not representative in and of themselves (Israel, 2003). Israel also notes that Sheriffs, who are often in charge of jury formation for a judicial jurisdiction, possess relatively unfettered discretion in forming the jury pool (Israel, 2003). Further, the use of mail and the rolling nature of jury service skews the pool away from representativeness when some populations might be slower to access and reply to calls for service (Israel, 2003). Israel surveys a number of reports including the AJI (1991) and the Donald Marshall Jr. Inquiry to illustrate that reform in jury representativeness is required. These arguments are echoed by Morton’s review of the R. v.
Gayle decision, noting that Canada’s approach to jury representation was unduly formalistic (Morton, 2003). Indeed, Morton described Canada’s approach to representativeness as an example of formal equality when what was needed was substantive equality (Morton, 2003).

In addition, a litany of studies exist demonstrating that race, ethnicity, and cultural heritage impact jury decision making (Sommers 2007; Hastie et al., 1983; McGowan & King, 1982; Kemmelmeir, 2005; Foley & Chamblin, 1982; Ugwuebu, 1979; Bowers et al., 2001; Bernard, 1979; Hans & Vidmar, 1982; Jones & Kaplan, 2003; Marder, 2002; Mitchell et al., 2005; Perez et al., 1993). Psychologists have also shown race-based effects in mock trial scenarios (Sommers & Ellsworth, 2000; Mazzella & Feingold, 1994).

In his review of jury representativeness in Ontario, Iacobucci (2013) notes many of the same concerns as Israel (2003). Iacobucci writes of the importance of ensuring representativeness because the jury is the fact finding body that is charged with protecting against oppressive laws: a jury has a role in educating the public because it legitimizes the criminal justice system through its role as the conscience of the community (Iacobucci, 2013, 20). The jury’s role is therefore one that ought to mirror the commitment of the community to justice (Iacobucci 2013, 31). The Iacobucci report echoes many of the findings of the AJI (1991) which also noted that jury representativeness in Manitoba was not being achieved in respect of Indigenous communities.

A recent review of Ontario and Manitoba jury representativeness cases found that in almost all instances, courts have been reluctant to give effect to representativeness-based claims by an accused (Jochelson et al., 2014). The most recent outlier case, a successful appeal by an accused in R. v. Kokopenace 2013, was overturned in 2015 by the Supreme Court of Canada. In our review of the case law, representativeness claims pertaining to disability only occurred in two reported cases within the last ten years (Buckingham v. The Queen 2007 and R. v. Francis, 2007).

Disability is accommodated in jury service in Canada to some extent, but no attempts to achieve representativeness are legislated. For example, Canada expressly allows persons who are deaf or blind to serve on the jury (Boyle, 2011). A constellation of legislation consistently provide accessibility-based equality for jurors with disabilities and attempt to remove discriminatory barriers in order to encourage participation after a juror with a disability is selected to serve (Boyle, 2011 citing the Criminal Code of Canada, the Canadian Evidence Act, the Canadian Charter of Rights and Freedoms and the Canadian Human Rights Act). The Criminal Code, in section 627 expressly states that a person with a physical disability who is qualified to serve on the jury should have the necessary supports, “technical, personal, interpretive or other” in order to serve effectively (this includes reading aids, sign language, interpretation and other services, for example). However, the guarantees do not assure a representation on juries and focus only on the service of a particular juror after she is chosen. Boyle notes that a prosecutor or an accused is entitled to challenge juror participation on the ground that, even with the aid of technical, personal, interpretative, or other support services, the juror is physically incapable of performing adequately (Boyle, 2011). The Criminal Code also allows that any support person to a juror with a disability can be prosecuted for a summary conviction should she disclose matters pertaining to the proceedings (Boyle, 2011). Boyle notes that even when a person with a
disability serves on a jury that the accommodations provided in Canada are not universal. Some note that a number of ameliorative practices in Canada should be standardized including pretrial documents being available in Braille, assistance in filing documents, and communications with the juror prior to the proceedings to provide clarifications and orientations, replete with captioned video for jurors (Bleyer et al., 1995). During voire dire procedures, some argue that judges must balance the need for competency against the possibility of stereotyping the performance abilities of a juror with a disability; this may necessitate the need for more sidebars and may prevent embarrassment and discrimination (Bleyer et al., 1995). Physical accommodations should also be carried out at all stages including interpretive aids and devices including real time computer assisted transcription and the use of service animals (Bleyer et al., 1995). The use of simple language should be fostered and the use of complex legalese should be discouraged (Bleyer et al., 1995). This wish list of accommodative state conduct is suggestive of a jury panel that would rarely be representative in a proportional sense of the Canadian population due to the barriers that jurors with disability face and also due to the fact that jurors with disabilities may be less likely to respond or receive requests for jury work and summonses (Jochelson & Bertrand, Forthcoming). Thus representativeness for Canadians with disabilities on the criminal jury is likely troubled both in the formation phase of the jury roll and in the qualification and implementation phases of jury work.

Recent Case Law – a truncated review
Representativeness-based claims in the context of disability appeared in two reported cases in the past ten years in Canada. The persuasiveness of these cases are less than clear in light of the most recent Supreme Court of Canada decision in R. v. Kokopenace, 2015. In R. v. Francis 2007 (Nova Scotia), an accused requested a change of venue since the original venue was not physically accessible. The accused was not disabled but he argued that the venue would prevent the formation of a representative jury since jurors with disabilities would not be able to serve. In making this claim, the accused was relying on the implicit conception of representativeness contained within sections 11(d) and 11(f) of the Charter as well as the provincial jury legislation. Justice Warner wrote that the situation denied the accused of a right to a jury panel randomly selected from the adult population (para. 28-30) and outlined that:

…the jury must not exclude a spectrum of society, if possible, without that exclusion being based upon a reason logically connected with, and justifiable under, the criminal trial process... Exclusion of a group, which has been randomly selected to the jury list or the jury panel ... whether excluded by intent or by effect, and where accommodation is possible without undue hardship, negates randomness, breaches the statutory right of the accused, and infringe [sic] on trial fairness (para. 29).

In Buckingham v. the Queen 2007 (Newfoundland) the Court relied on the Supreme Court of Canada’s decision in R. v. Sherratt, 1991. The Court noted that it agreed with the Supreme Court that collective decision-making through jury deliberation resulted in, largely, accurate fact finding, that the jury acts as the “conscience of the community”, and that “the jury can act as the final bulwark against oppressive laws or their enforcement” bearing an educational role that fosters “public societal trust in the system as a whole” (2007, para. 9). In Buckingham, the Court held that the use of the motor vehicle registries to inform jury lists excluded a number of groups
and in particular persons with disabilities; this troubled the representativeness guarantees contained in sections 11(d) and (f) of the Charter (2007, para. 16).

The potential of disability to influence assessment of jury representativeness by a court seems to have been significantly curtailed by the recent Supreme Court of Canada case of R. v. Kokopenace (2015). Clifford Kokopenace, an Indigenous person from the Grassy Narrows First Nation reserve in the District of Kenora, was convicted of manslaughter after a trial by judge and jury in 2008. Prior to sentencing, the accused’s counsel learned that the jury roll for the District of Kenora may not have adequately addressed inclusion issues with Indigenous on-reserve residents, and set out to question the representativeness of the jury. Kokopenace’s counsel alleged at the Court of Appeal that the jury roll used did not ensure inclusion of Indigenous on-reserve residents; he argued that his sections 11(d), 11(f) and 15 rights under the Charter had been violated. Two judges from the Court of Appeal held that Kokopenace’s sections 11(d) and 11(f) rights had been violated, and ordered a new trial. The third judge believed that reasonable efforts had been made to include Aboriginal on-reserve residents in the jury roll and would have dismissed the appeal. Kokopenace’s section 15 Charter claims were rejected by all three judges in the Court of Appeal. The Crown appealed the decision reached at the Court of Appeal, and brought the case to the Supreme Court of Canada, where Kokopenace reasserted his claims.

The Supreme Court of Canada examined the effects of sections 11(d) and 11(f) of the Charter. Sections 11(d) and 11(f) of the Charter state that:

Any person charged with an offence has the right:
(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal...
(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment (Charter 1982)

The majority stated that representativeness occurs when, through a fair selection process, a representative cross-section of society is appointed: “There is no right to a jury roll of a particular composition, nor to one that proportionately represents all the diverse groups in Canadian society” (R. v. Kokopenace 2015, para. 39). Therefore representativeness is not concerned with the ultimate composition of the jury roll, but rather the process used in its assembly (para. 40). Three features must be present in order to ensure that representativeness has occurred: the source lists used must draw from a broad cross-section of society; random selection from these sources must occur; and there must be adequate delivery of notices to those that are randomly selected (para. 40). If these three features are present and it is not found that the state intentionally excluded members of a particular group, then the jury roll in question can be considered representative (para. 40).

Section 11(d) is concerned with the independence and impartiality of a tribunal, and therefore if an issue with representativeness does not offend independence or impartiality, it will not be in violation of section 11(d). The majority limited comments to the concept of impartiality as that was the primary focus in this case. A tribunal must be impartial both at an institutional and individual level. In assessing this, it is asked whether a reasonable, informed person would have a reasonable apprehension of bias (para. 49). Should the process used to compile a jury roll
indicate bias at a systemic level, section 11(d) will be violated regardless of whether the jury itself is impartial (para. 49). The majority noted that:

There are two potential problems with representativeness that may impact on impartiality. First, the deliberate exclusion of a particular group would cast doubt on the integrity of the process and violate s. 11(d) by creating an appearance of partiality... Second, even when the state has not deliberately excluded individuals, the state’s efforts in compiling the jury roll may be so deficient that they create an appearance of partiality... However, where neither form of conduct exists, a problem with representativeness will not violate s. 11(d) (para. 50).

The majority noted that representativeness as seen in section 11(f) of the Charter must be subject to a broader interpretation. In being representative, a jury’s role as the "conscience of the community" is further legitimized, and public trust in the criminal justice system is promoted (citing R. v. Sherratt at pages 523-25, para. 55). Should representativeness be absent, the section 11(f) right to a trial by jury will be undermined since representativeness is a key characteristic of the jury and its broader role in fostering trust in the justice system under section 11(f) (para. 57). On some occasions when that representativeness issue also affects impartiality, section 11(d) will also be violated (para. 58).

The legal test concerned with whether the state has fulfilled its responsibility in compiling a representative jury must then look solely at the process used throughout jury selection and not the physical composition of the jury (para. 59). The majority writes that:

To determine if the state has met its representativeness obligation, the question is whether the state provided a fair opportunity for a broad cross-section of society to participate in the jury process. A fair opportunity will have been provided when the state makes reasonable efforts to: (1) compile the jury roll using random selection from lists that draw from a broad cross-section of society, and (2) deliver jury notices to those who have been randomly selected." (para. 61).

If the state were to deliberately exclude a particular subset of the population eligible for jury service, it would be in violation of the accused’s right to a representative jury, regardless of the size of group affected (para. 66). Deliberate exclusion cannot be seen as amounting to a reasonable effort as it undermines the integrity of the criminal justice system (para. 66). In the case of an unintentional exclusion, the state’s efforts in compiling the jury roll must then be considered in order to determine whether the accused’s rights have been upheld. Should the state make reasonable efforts, but unintentionally exclude a portion of the population that declines to participate, the state will still have met their representativeness obligation (para. 65). Should the state have not made reasonable efforts, the size of the population that has been excluded must be considered. In cases where a small segment of the population is excluded through a failure on part of the state to make reasonable efforts, the representativeness of the jury roll will still not be undermined as there is no right to proportionate representation (para. 66). There is still a fair opportunity for participation by a broad cross-section of society. The majority rejected the concept of a results-based test as proposed by Justices Cromwell and McLachlin, as described below (paras. 69-88). The concept of a 'functional approach' as proposed by
Justice Karakatsanis (as described below) was also rejected, primarily due to what the majority identified as vague language and the possibility that the state could be held accountable for factors outside its control (paras. 91-92).

The majority found that the efforts of Ontario to establish a representative juror list were adequate in light of the reserve communities’ failure to participate in aiding with the formation of the list. The majority found that Ontario committed itself to improving the representation of Indigenous people on juries:

…the province did not simply throw up its hands upon learning of the problems with delivery. Rather, it took an aggressive approach. After consulting … it increased the number of notices sent to on-reserve residents by nearly 50 percent (para. 121).

The majority noted that “the state's constitutional obligation stops when it has provided a fair opportunity for a broad cross-section of society to participate in the jury process. It has done so” (para. 126).

The Supreme Court agreed with the Court of Appeal's finding that the section 15 Charter rights of Kokopenace were not violated as there was no articulated disadvantage in the trial itself for the accused. The majority argued that Kokopenace should also not be able to advance a section 15 claim for potential jurors as the accused may have different, conflicting interests due to his status as an accused person. Public interest standing was therefore not granted, since other Indigenous persons who are not accused would not have their adjudicative interests examined and thus Kokopenace’s section 15 claims were dismissed (para. 128).

Justice Karakatsanis provided his own reasons for rejecting the claim. Justice Karakatsanis viewed representativeness as being primarily concerned with the function of the jury itself rather than the degree to which it resembles a certain cross-section of the community. The jury can only then function in society when it is acting on behalf of society's interests. The majority's view that representativeness relies only on a reasonable effort on part of the state was not aligned with Justice Karakatsanis's views, as a Charter breach should not be defined by state effort but by the adequacy of the process used (para. 134). In this, unintentional, substantial exclusion that occurs while using an appropriate process could possibly render a jury unrepresentative. Justice Karakatsanis then finds "that s. 11 requires the state to compile the jury roll through a random process that draws broadly from the community, without deliberate or substantial exclusion" (para. 134). In interpreting sections 11(d) and 11(f), Justice Karakatsanis did not find that this right entitled an accused to a jury roll that proportionately reflects all various characteristics and viewpoints in society, but rather a jury that is able to act on behalf of society (para. 142). The role of the jury must then be seen primarily as functional, and not as descriptive.

Justice Karakatsanis argued that representativeness required both broadly inclusive source lists and the delivery of jury notices. The idea that representativeness requires the state to address low response rates was rejected (paras. 169-172). While source lists should be broad and inclusive, Justice Karakatsanis did not believe it was possible to utilize a “perfect” source list, and therefore, an unintentional exclusion of some segments of the community would not amount to a constitutional defect (para. 166). With respect to delivery of notices, the state must only
establish that it used an adequate process by which members of that community would normally receive mail (para. 168). Justice Karakatsanis rejected Justice Cromwell's assertion that the state is obligated to address the low response rates among Aboriginal communities, and also rejected the assertion at the Court of Appeal that the state should encourage participation (para. 172). The state should not be required to encourage jury participation among those who are unwilling in order to satisfy an accused's right to a fair trial. In this case, Justice Karakatsanis agreed with the finding of the majority, but not with their interpretation of representativeness.

Justices Cromwell (writing the dissent) and McLachlin, in their dissents would have dismissed the appeal; they found that the jury roll was not representative, and that the facts as presented were an affront to the administration of justice and would undermine public confidence in the criminal justice system (para. 195). Justice Cromwell did not address Kokopenace's section 15 claim as he believed that both his sections 11(d) and 11(f) rights were violated, and he should therefore receive a new trial before a representative jury (para. 201). Considering the question of representativeness, Justice Cromwell found that random selection acts as a proxy for representativeness; this is only effective if the group of persons to whom random selection is applied is broadly based within the relevant community (para. 226). There was gross underrepresentation of Aboriginal on-reserve jurors within the jury roll assembled in this case - nearly 30 percent fewer Aboriginal on-reserve residents appeared on the jury roll as compared to a random sample of potential jurors from that district:

The process used in this case produced results that obviously and significantly departed from any result that could be obtained by a proper process of random selection (para. 233).

Justice Cromwell further argued that because representativeness was guaranteed under sections 11(d) and 11(f), it was therefore a right afforded to the accused and not to any particular group of community. These groups do then not have a corresponding right to be included on a jury roll, jury array, or petit jury (para. 244).

In order to achieve a representative jury roll that satisfies the representative obligation under sections 11(d) and 11(f), Justice Cromwell argued it was necessary to have both a substantially representative source list, and also that the group of persons returning questionnaires must be substantially similar to a random sample of that list (paras. 246-247). Should the group of persons returning questionnaires not be similar, the whole foundation of representativeness is then at risk because randomness is no longer an effective proxy (para. 247). Justice Cromwell rejected Justice Moldaver's argument of 'fair opportunity' as inconsistent with the principles outlined in the Charter, because it removed focus from the nature of the state's obligation (para. 249).

The “reasonable efforts” approach was also improper because:

The “reasonable efforts” standard makes it easy to lose sight of the fact that it is the state’s responsibility to comply with the Charter and that it is the right of an accused person to be tried by a jury selected in accordance with the Charter. It is the state’s constitutional obligation not to breach people’s Charter rights, not simply to make “reasonable efforts” not to do so. Moreover, the “reasonable efforts” standard glosses
over the question of whether the limitation of the right is the result of state action (para. 249).

In order to accurately assess representativeness, Justice Cromwell proposed that the analysis first begin by examining whether or not the jury roll substantially resembled a cross-section of society. In cases where the jury roll is not representative, the question becomes whether the actions by the state are sufficiently connected to the limitation of that right (para. 255). The nature of the state's obligation is not captured by a 'reasonable efforts' test, and this test gives the appearance that constitutional rights are optional or dependent on the degree of effort required (para. 256). Justice Cromwell acknowledges that in cases where the state has no ability to address the limits upon a guaranteed right, it cannot be held responsible; the test must then concern itself with whether there is a sufficient connection between the limited right and the state, the capacity of the state to address the circumstances causing the limitation, and whether the state has made reasonable efforts to do so (paras. 256-260). Justice Cromwell notes that the Court has always looked at both purpose and effect when determining the constitutionality of state actions:

I respectfully reject the Crown’s submission that the right to a representative jury roll simply means that the state cannot improperly exclude groups from the jury roll. Similarly, I cannot accept my colleague Karakatsanis J.’s position that “the unintentional exclusion of a small community... does not undermine the representativeness of the jury roll”: para. 180. The premises underlying both propositions are inconsistent with basic Charter principles... In my view, accepting the proposition that a Charter breach occurs only if the state’s conduct is intentional or otherwise improper would be a significant and unwelcome departure from this Court’s Charter jurisprudence (para. 257)

The result of the latest jurisprudence thus suggests that representativeness is an issue when it undermines, in impartiality or independence under section 11(d) of the Charter, or affects the jury’s role as conscience of the community that maintains public trust in the system under section 11(f) of the Charter. Reasonable efforts by the state to establish juror rolls will usually satisfy the representativeness guarantee, and non-response by affected jurors will not usually affect the reasonableness of the state’s efforts. The guarantee does not promise proportional representation and only ensures a competent jury that is capable of deliberation when the state has made reasonable efforts and undertaken a reasonable process in jury selection – only purposeful exclusion of juror types would seem to trouble the reasonable efforts standard. Yet even a failure of the reasonableness standard will not result in a representativeness affront if the affected population is so small that its exclusion would be unlikely to affect the outcome.

The conception of the jury as the conscience of the community is an intriguing legal construct. Some studies have shown that when it comes to Indigenous persons, respondents in surveys tend to generally agree with increased representation on the jury, in particular in situations where the accused or victim is Indigenous (Jochelson et al., 2014). Would participants want representation guarantees for persons with disability on the jury? Given the frequency of disability in Canadian society, would respondents in general want to see representation from disability communities as part of the justice making process?
We designed a survey to see if we could shed some light on the public perception of these broader policy-based questions. We outline our findings below. Generally, our results suggest that representativeness and disability were not a priority for our participants.

Method

Participants

Participants were 211 University of Winnipeg students who completed the study in exchange for course credit in Introduction to Criminal Justice. Twenty-three participants were not Canadian citizens and therefore not eligible for jury duty. As such, we chose to exclude their responses from analysis, which resulted in a total sample size of 188.

Participants ranged in age from 18 – 54 years with a mean age of 20.89 years (SD = 4.54), however, a majority of participants (95.2%) were 30 years or younger. The participants identified as 61.7 percent female, 37.8 percent male and 0.5 percent of unspecified gender. The study spanned a wide ethnic ancestry range with self-identification of ethnicity as follows: Aboriginal: 5.3%; African: 2.7%; East Asian: 1.6%; South Asian: 4.8; Southeast Asian: 4.3%; European: 67.6%; Hispanic: 2.1%; Middle Eastern: 3.2%; Pacific Islander: 2.1%; and Mixed ancestry: 6.4%. The approximate household income of participants also varied quite markedly. The participants described their household income as follows: 35.1% earned $0-25 000; 15.7% earned $25-50 000; 15.1% earned $50-75 000; 11.9% earned $75-100 000; 5.9 percent earned $100-125 000; 2.7% earned $125-150 000; 3.8 percent earned $150-175 000; 2.2% earned $175-200 000 and 7.6% earned above $200 000. Participants’ self-described religious beliefs were Aboriginal (traditional beliefs; 2.7%), Agnostic (7.5%), Atheist (22.5%), Buddhist (2.7%), Catholic (17.6%), Christian (unspecified; 28.3%), Hindu (1.1%), Jewish (3.2%), Muslim (3.2%), Sikh (3.2%), Spiritual (no label; 7.5%), and Other (0.5%).

Design

Participants completed an online survey designed to assess their perspectives on various issues related to jury representativeness. Included in the survey were questions regarding inclusion of persons with disabilities in jury work and attendance in court. We provided participants with a series of statements presented one at a time, and in random order, and asked them to rate their level of agreement with each statement on a scale of 0 – 100%, with 0 being complete disagreement and 100 being complete agreement. Though the full survey addressed many issues regarding representativeness, here we focus only on those issues related to disability and jury representativeness.

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1 Participants were provided with other options for gender, but with the exception of one unspecified, all identified as either male or female.
2 We note that household income was not parsed out any further, and thus could include students who live at home with parents as well as students living on their own.
Each time a question specifically addressed the issue of representativeness, participants were provided with the definition that, 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."

Each time differentiations between severity of mental disabilities were addressed in the questions (mild, moderate, and severe), participants were provided with the following definitions of mental disability in an attempt to avoid the necessity of clinical understandings of different mental disorders and instead focus on an individual’s level of functioning. The categories were designed so that mild mental disorder would be understood to be persons who were roughly as capable as the average juror in undertaking jury work. The definitions we provided are as follows:

*Mild mental disability* in this case includes having some difficulty reading or understanding very complex material on one’s own, but generally being able to understand what the average person could understand.

*Moderate mental disability* in this case includes greater difficulties reading or understanding very complex material on one’s own, including some material that the average person could understand.

*Severe mental disability* in this case includes having substantial difficulty reading and understanding material on one’s own, including most material that the average person could understand.

Note that definitions regarding the definition of a representative jury and the distinctions between different levels of mental disabilities were provided to participants each time the question referred to that particular aspect.

**Results and Discussion of Study**

In Tables 1-4 we outline the questions asked, the mean agreement level, and the standard deviation. After presenting each table we discuss the findings. Our discussion is broken down into four sections: disability and the larger community, disability and courtroom accessibility, disability and access to the jury box, and disability and discomfort of other jurors. Where two means were compared, repeated-measures t-tests were used for analysis. Where more than two means were compared, repeated-measures ANOVAs were used for analysis.
Disability and the Larger Community

Table 1: Level of agreement with defining the representativeness aspect of “larger community” for the purposes of jury membership as it pertains to different disabilities.

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</thead>
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<tr>
<td>&quot;Larger community&quot; should include, at least in part, proportionate jury membership of people with physical disability.</td>
<td>64.51a</td>
<td>26.18</td>
</tr>
<tr>
<td>&quot;Larger community&quot; should include, at least in part, proportionate jury membership of people with mild mental disability.</td>
<td>51.19b</td>
<td>25.98</td>
</tr>
<tr>
<td>&quot;Larger community&quot; should include, at least in part, proportionate jury membership of people with moderate mental disability.</td>
<td>43.96c</td>
<td>26.49</td>
</tr>
<tr>
<td>&quot;Larger community&quot; should include, at least in part, proportionate jury membership of people with severe mental disability.</td>
<td>34.97d</td>
<td>27.42</td>
</tr>
</tbody>
</table>

*Note: different subscripts indicate means that are significantly different from each other at p < .001.*

The first point to note is that there was a difference in participants’ agreement for inclusion in the larger community between jurors with physical and mental disabilities in a general sense: participants expressed greater agreement for the inclusion of juror members with physical versus mental disabilities. Also important to note is that the more severe the mental disability, the less agreement for inclusion in juror membership was expressed. However, even though greater agreement was expressed to include jurors with physical disabilities in the definition of ‘larger community,’ 64.51% agreement could not be described as strong agreement and participants overall expressed a lack of agreement for including jurors with mental disabilities in the definition of ‘larger community.’ Surprisingly, physical disability and mild mental disability categories would be understood by the participants as having “average” capacity to perform on the jury, so the modest agreement for physical disability and bare agreement for mild mental disability suggests a service penalty for the mere assessment of disability by our participant pool.

Disability and Courtroom Accessibility

These questions considered disability and accessibility to the courthouse in general apart from jury representation.
Table 2: Level of agreement regarding courtroom accessibility 1) as a general concept and 2) as it pertains to different levels of mental disability.

<table>
<thead>
<tr>
<th>Analysis</th>
<th>Statement</th>
<th>M</th>
<th>SD</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>The courthouse should be accessible to all people with physical disability.</td>
<td>80.63a</td>
<td>23.7</td>
</tr>
<tr>
<td></td>
<td>The courthouse should be accessible to all people with mental disability.</td>
<td>61.31b</td>
<td>28.2</td>
</tr>
<tr>
<td>2</td>
<td>The courthouse should be accessible to people with mild mental disability.</td>
<td>66.86a</td>
<td>27.57</td>
</tr>
<tr>
<td></td>
<td>The courthouse should be accessible to people with moderate mental disability.</td>
<td>60.95b</td>
<td>29.34</td>
</tr>
<tr>
<td></td>
<td>The courthouse should be accessible to people with severe mental disability.</td>
<td>49.08c</td>
<td>32.87</td>
</tr>
</tbody>
</table>

Notes:
1. Horizontal lines demarcate separate analyses.
2. Different subscripts indicate means that are significantly different from each other within each analysis at p < .001.

Accessibility was more favoured for physical as compared to mental disability (80.63 versus 61.31). For severe, moderate, and mild mental disability, agreement decreased as the severity of the disability increased (66.86, 60.95, 49.08 respectively). General courthouse accessibility echoed results of the jury representation in the context of the definition of “larger community” suggesting that the disability types and categories may be systematically ranked in a relative sense regardless of whether justice participation related to jury participation or courthouse accessibility (i.e. mere attendance at the courthouse).

Disability and Access to the Jury Box

We provided participants with a series of statement regarding accessibility of the jury box for persons with physical and mental disabilities. Data provided in Table 2 are for the results of analyses regarding participants' level of agreement toward accessibility of the jury box as a general concept (Analysis 1), based on the severity of the potential juror's mental illness (Analysis 2), and based on how much accommodation would be required for a physical disability (Analysis 3). We asked these questions in order to assess how much accommodation participants thought persons with disabilities should be afforded in differing circumstances and in different categories of disability.

Table 3: Level of agreement regarding 1) general accessibility of the jury box for persons with physical and mental disabilities, 2) accessibility of the jury box based on severity of mental disability, and 3) accessibility of the jury box based on level of accommodation required for a physical disability.
## Analysis

<table>
<thead>
<tr>
<th>Analysis</th>
<th>Statement</th>
<th>$M$</th>
<th>$SD$</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>The jury box should be accessible to all people with physical disability.</td>
<td>76.27a</td>
<td>26.13</td>
</tr>
<tr>
<td></td>
<td>The jury box should be accessible to all people with mental disabilities.</td>
<td>40.69b</td>
<td>29.94</td>
</tr>
<tr>
<td>2</td>
<td>The jury box should be accessible to people with severe mental disability.</td>
<td>30.32a</td>
<td>29.5</td>
</tr>
<tr>
<td></td>
<td>The jury box should be accessible to people with moderate mental disability.</td>
<td>51.27b</td>
<td>30.73</td>
</tr>
<tr>
<td></td>
<td>The jury box should be accessible to people with mild mental disability.</td>
<td>59.77c</td>
<td>29.98</td>
</tr>
<tr>
<td>3</td>
<td>The jury box should be accessible to people with physical disability depending on how much accommodation is required to facilitate access.</td>
<td>65.37a</td>
<td>28.66</td>
</tr>
<tr>
<td></td>
<td>The jury box should be accessible to people with physical disability regardless of how much accommodation is required to facilitate access.</td>
<td>70.29a</td>
<td>26.73</td>
</tr>
<tr>
<td></td>
<td>The jury box should be accessible to people with physical disability unless access requires accommodation that requires the spending of public funds.</td>
<td>49.45b</td>
<td>31.76</td>
</tr>
<tr>
<td></td>
<td>The jury box should be accessible to people with physical disability if access does not require accommodation that requires the spending of public funds.</td>
<td>55.81c</td>
<td>30.00</td>
</tr>
<tr>
<td></td>
<td>The jury box should be accessible to people with physical disability so long as it does not interfere with the ability of the other jurors to feel comfortable in completing their work</td>
<td>68.33a</td>
<td>28.79</td>
</tr>
</tbody>
</table>

Notes:
1. Horizontal lines demarcate separate analyses.
2. Different subscripts indicate means that are significantly different from each other within each analysis at $p < .001$.

Participants agreed more with accessibility to the jury box for persons with physical disabilities (76.72) as opposed to persons with omnibus mental disabilities (61.31). Once again, when we categorized those mental disabilities as mild, moderate, and severe, participants’ levels of agreements declined ($M_s = 59.77, 51.27,$ and $30.32,$ respectively), though the level of agreement for mild disability was approximately the same as for the omnibus level of mental disability.

We also inquired as to the level of accommodation that participants would afford to the group they were most willing to allow access to – persons with physical disabilities. Participants provided general agreement with questions invoking the general concept that the jury box should be accessible to persons with physical disabilities, but agreement declined when the questions specified that public funds would need to be spent to accommodate the person’s disability.
Disability and Discomfort of Other Jurors

These questions explored the agreement of respondents with situations where comfort and efficacy of juror work was in question.

Table 4: Level of agreement regarding accessibility for persons with mental and physical disabilities in the context of interference with other jurors’ 1) comfort levels and 2) ability to do their work.

<table>
<thead>
<tr>
<th>Analysis</th>
<th>Statement</th>
<th>M</th>
<th>SD</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>The jury box should be accessible to people with physical disability so long as it does not interfere with the ability of the other jurors to feel comfortable in completing their work.</td>
<td>68.33</td>
<td>28.79</td>
</tr>
<tr>
<td>2</td>
<td>The jury box should be accessible to people with mental disability so long as it does not interfere with the ability of the other jurors to feel comfortable in completing their work.</td>
<td>54.39</td>
<td>30.47</td>
</tr>
<tr>
<td></td>
<td>The jury box should be accessible to people with physical disability and the ability of other jurors to do their work as result should not be relevant.</td>
<td>59.25</td>
<td>31.20</td>
</tr>
<tr>
<td></td>
<td>The jury box should be accessible to people with mental disability and the ability of other jurors to do their work as result should not be relevant.</td>
<td>41.77</td>
<td>30.30</td>
</tr>
</tbody>
</table>

Notes:
1. Horizontal lines demarcate separate analyses.
2. Different subscripts indicate means that are significantly different from each other within each analysis at p < .001.

Generally speaking, participants provided greater agreement regarding accessibility of the jury box for persons with physical versus mental disabilities whether comfort level or efficacy of other jurors was in question. However, in both instances, participants’ agreement was lower for both physical and mental disabilities when “the ability of other jurors to do their work as a result” was at issue, and in fact, because the average rating regarding for mental disability was below the midpoint (41.77%), mental disability seems to again be less valued in the context of the comfort and efficacy of other jurors for our respondents.

General Discussion

The overall pattern in the data was that participants saw a greater role for jury participation for persons with physical disabilities than mental disabilities. Even when the mental disability was described as mild and roughly equal to the average juror, representativeness on the jury was less agreed to than physical disability representation. The agreement with jury participation fell with increasing severity of the mental disability. There was not a strong agreement for representation of jurors with disabilities in the context of discomfort and inefficacy experienced by the other jurors, and universal accommodation in that context received relatively modest
agreement for physical disabilities and mild disagreement for mental disabilities. Universal accommodation of physical disabilities was moderately agreed to but when the use of public funds became an issue, respondents were neither strongly in agreement nor disagreement with access. Courthouse accessibility, in general, mirrored the relative agreement of whether the “larger community” represented in a jury should include those with physical and ranked (mild, moderate, severe) mental disabilities.

As previously noted, participants were less supportive of accommodation and accessibility for mental illness in a general sense, but their support decreased as the severity of the mental disability increased. We note that an alternative interpretation of this latter finding is possible based on how we defined mild, moderate, and severe mental disability in terms of the ability of the juror to understand material. For example, we defined severe mental disability as meaning that this juror would have “…substantial difficulty reading and understanding material on one's own, including most material that the average person could understand.” It could be that participants’ lack of agreement was not to do with the mental illness, per se, but based on the fact the juror would have trouble understanding the material presented in court and therefore would not be competent jurors. Again, we provided these definitions in an effort to avoid participants needing a clinical level of understanding of mental illnesses, but future research could further tease this apart by asking about participants’ agreement for accessibility in the context of specific types of mental illness. For example, maybe they would be supportive of accessibility for jurors with mental illnesses when those illnesses are not perceived as affecting a juror’s ability to understand material presented in court. However, we maintain our results overall support the interpretation that participants were less favourable towards accessibility for mental versus physical disabilities as we found this pattern in the results even when we asked questions about mental versus physical disability in a general sense, and in the context of mild mental disability.

Another important point to note is the incredible variation in participants’ responses. For every single question, the full range of responses was selected (i.e., there was at least one participant who rated a ‘0’ and one who rated ‘100’ for every question). This variability is important to note because it indicates that there are very differing opinions on the topic.

In general, respondents agreed with representation for people with physical disabilities more than mental disabilities, even when people with mental disabilities were described as being equally competent in comparison with an “average” juror. A conclusion one can draw is that respondents discriminated in their willingness to see jurors with physical disabilities, and even more so with mental disabilities, participate (with decreasing agreement as the disability becomes more severe).

This study was conducted with a student sample, and thus we caution that these results are unlikely to be representative of the general population. While our sample had reasonable gender balance and variation in ethnic ancestry and household income, there was very little variation in age. As is common in student samples, the average age is quite young ($M = 20.89$) and only 8.0% of the sample were above the age of 25. Therefore, future research with a more age-diverse sample would be useful for purposes of generalizability. Another issue with student samples in the context of this type of research is noted by Rose and Ogloff (2001). They argue
that student participant pools are likely to be more educated than the general population and more likely to understand instructions, so one may surmise that these effects could be exacerbated in a general population with broader demographics. If other populations were more supportive of disabilities we might see differing results, but in general this student population was educated not only in the fundamentals of criminal justice education but also basic guarantees in Canada, including the equality guarantees under the Charter. In this context, the results are surprising.

Synthesis of Jurisprudence and Findings of the Study

The results of our study seem to show a discrimination effect for representation by our participant pool that even seems present in the context of categories of disability that would be interpreted to be sufficiently competent intellectually to serve on the jury (physical and mild mental disability). The bulk of Canadian and American studies in the area have focused mainly on making jury work accessible but have paid relatively little attention to ensuring that juries be representative in respect of disability. Further, the Supreme Court’s approach to representativeness in Kokopenace 2015 provides a set of guarantees that may lead to formalistic equality: the means of selection must lead to functional partiality or a lack of independence for representativeness within section 11(d) of the Charter to be violated. In terms of section 11(f) of the Charter, where the focus is on the jury as the conscience of the community and instilling public trust in the jury system, reasonable efforts must be made by the state in forming jury lists and non-participation by discrete groups will not fall short of representativeness; even deliberate non-inclusion of small groups will not trouble 11(f) because their inclusion would likely not affect the result. The current state of the jurisprudence then is not considerate of the participatory nature of representativeness, seeing the matter as something that is a technical requirement that the state owes to accused. In other words, if our participant pool results are read together with the latest jurisprudence, advocacy for the representativeness in the context of the Canadian jury seems to be destined to occur in an inhospitable environment.

Certainly, the case for further representativeness is easily made. People with disabilities are likely to be slower to respond to calls for jury service, and may indeed not be on all lists, particularly when the lists drawn from by the state are motor vehicles registration or voter lists (since persons with disabilities tend to vote at lower rates). This is unlikely to meet the standard of deliberate exclusion. Further, if persons with disability tended to not respond to calls for service whether individually or through groups that represent them, the state will not be held to have failed in its representativeness guarantees. Indeed, everything about the current situation seems to suggest that there is no fault on the part of the state in ensuring representativeness given that accommodative guarantees have been legislated in Canada.

Yet there are compelling statistical reasons to support greater representativeness of disability on the jury. In the context of accuseds with disability the reasons are self-evident and are based more on trial fairness ethics. However, generally, given that the jury represents the conscience of the community, disability representativeness seems to be something worth working towards. In 2012, Statistics Canada undertook a study of disability in Canada entitled Canadians in Context-People with Disabilities (Stats Canada, 2012). According to the report 3.8 million
Canadians reported having a disability in 2012; this corresponds to 13.7 percent of Canadians (Stats Canada, 2012). If one compares this to Statistics Canada data in 2011, the only ethnic groups which rank higher in terms of percentages in Canada than persons with disabilities, are those who identify as Canadian (32.16%), English (19.81%), French (15.42%), Scottish (14.35%), and Irish (13.83%) (Stats Canada 2011). Indigenous identification including First Nations, Metis, and Inuit amounted to 4.3% according to 2011 Census data (Stats Canada NHS, 2011). It is self-evident that these statistics are not being reflected proportionately on Canada’s juries and it is also the case that the representativeness guarantee does not require that juries be representative in this sense.

Indeed, in Canada, service disqualifying procedures are quite common when a juror can show undue hardship in service – a matter easier to establish for Canadians with disabilities (Boyle, 2011). Jury service can also be challenged on the grounds that a juror, even with the aid of accessibility services under section 627 of the Criminal Code of Canada, is physically unable to perform properly the duties of a juror (Boyle, 2011). In addition, persons with disability find additional risks in using accessibility support persons. If any support service worker of a juror with a physical disability discloses information of the trial, the support worker may be found guilty of a summary conviction offence (Boyle, 2011). The legislative and social conditions are therefore in place to systematically exclude or dissuade disabled persons from juror service.

What then are the potentials for change and advocacy in the context of representativeness on the Canadian jury for persons with disabilities? There is some obvious currency in the dissenting reasons in Kokopenace. Justices Cromwell and McLachlin’s view that deliberate or substantial exclusion of populations from the compilation of a jury roll could trouble the representativeness guarantee has potential; it could eliminate errors in roll compilation when they are formed on the basis of under-inclusive state lists, for example, because such lists would not mirror a proper random sample of Canadian society. These justices ask us to examine the purpose and effect of state actions in forming the roll, thus unintentional exclusion would not necessarily excuse the state from its duties unless the state has no ability to address the issue.

Another possibility might rest in the use of section 15 in future cases. The issue has not been effectively raised yet in Canada. After Kokopenace (2015), it was established that the section 15 issue would more effectively be raised by non-accuseds with disabilities, whose interests with inclusion on the jury are unrelated to the needs of an accused. The failure of the courts in Kokopenace to consider section 15 seems a narrow reading of section 15, and appears to separate the rights of discrete communities (e.g. disability communities or Indigenous communities) to participate in justice making from the right of the accused to a fair trial. In the context of the Charter, it is hard to understand how these conceptions are not in some ways linked. Surely a fair trial should require a representative jury in a substantive sense at a societal level (as conscience of the community) not just in a particular sense as something the accused needs for an efficient acquittal. A jury that is formed from lists that in effect (though perhaps not intentionally) exclude certain populations should be seen to trouble section 15 because section 15 does indeed concern itself with effect and purpose driven legal exclusions. To not adhere to those same values under section 11 representativeness based challenges, and to then fail to consider section 15 issues in cases such as Kokopenace is to give effect to very dilute conceptions of equality – indeed this approach bends towards formal rather than substantive
equality. Other scholars have written of the waning use of section 15 in Canada’s courts in recent years (Ryder, 2010). Perhaps a resurgence of section 15 considerations may reinvigorate the representativeness guarantees of the Charter. At the least, section 15 values should inculcate trial fairness and the jury process under section 11 of the Charter.

Conclusions

The current state of representativeness guarantees in Canada seems tied to formalistic conceptions of the right to a fair trial and presumption of innocence under section 11 of the Charter. The guarantee, so far, has only been interpreted to be a right of the accused. Yet, as the conscience of the community, the jury must surely have some other Charter-based import. So far, legal constructions of equality have not substantively entered the Supreme Court’s conceptions of representativeness. Earlier court decisions on disability and representativeness (like Francis, Buckingham, and to some extent Kokopenace 2013) were illustrative of the potential of substantive equality values to inform the section 11 adjudication – problematic juror rolls and the inability for some populations to participate in the jury process were considered constitutionally problematic. These earlier adjudications seem to have been overruled by the approach adopted by the majority of the Supreme Court.

Our participant pool study demonstrated that respondents did not place tremendous import on the representativeness of a jury in the context of disability, especially in the context of mental disability, even when that disability connoted “average” juror competence. The respondents did not eagerly agree with accommodation for jurors with disabilities.

Both the current state of the law in Canada and the results of our study suggest that arguing for a representativeness guarantee in Canada that seeks substantive equality will be a difficult journey for advocates. There is unlikely to be tremendous public outcries seeking these reforms, and the law seems to ultimately hold the state to a standard of “reasonable efforts” where the selection process does not trouble juror impartiality and independence. The current legal environment is also dismissive of representativeness reforms called for by the AJI (1991) as well as the more recent Iacobucci report (2013). Perhaps there is some potential redress in a future section 15 case where a non-accused Canadian obtains standing to challenge the common practices of jury formation in Canada. Until then, jury representativeness will be relegated to a procedural right for an accused in a jury trial.

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Address for Correspondence: e-mail rjochelson@me.com
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