

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Smith*, 2021 NSSC 333

Date: 20211206

Docket: CRD No. 506022

Registry: Halifax

Between:

Her Majesty the Queen

v.

Cory Malcolm Smith

Restriction on Publication: Sections 486.4 & 486.5

DECISION - JURY SELECTION PROCESS

Judge: The Honourable Justice John P. Bodurtha

Heard: October 1-8, 2021 in Digby, Nova Scotia

Written Decision: December 6, 2021

Counsel: Chelsea Cottreau & Josie McKinney, Crown Counsel
Raymond Jacquard, Defence Counsel

By the Court:

Introduction

[1] This jury trial took place in Digby, Nova Scotia, from October 1-8, 2021, during the fourth wave of the COVID-19 pandemic. It occurred at a time where the highly transmissible Delta variant was taking a foothold in the province and the number of individuals infected with the virus was steadily increasing. The Province's Chief Medical Officer of Health and Premier were actively encouraging Nova Scotians to get vaccinated in an effort to control the spread of COVID-19. The trial itself straddled the long-anticipated move to Phase 5 in Public Health's timeframe for recovery.

Background

The Facilities

[2] This jury trial took place at the Digby Pines Resort in Digby, Nova Scotia, because the Digby courthouse could not accommodate the jury panel based on the current physical distancing requirements. Digby Pines is a rustic resort in the small town of Digby. A two-level conference centre on the resort was converted into a makeshift courtroom with a conference room on the lower level acting as the jury deliberation room.

[3] The makeshift courthouse met the Court and Public Health guidelines for hearings during COVID-19. However, the makeshift jury room raised concerns about the protection of the jurors from the potential risk associated with vaccinated and unvaccinated individuals spending numerous hours together. The room was small with only one point of entry requiring jurors to pass by each other when accessing their seats and when entering and exiting the room. Restroom facilities and a fridge were located outside the jury room. There was no Lexan separating the individual jurors in the deliberation room nor in the courtroom. There did not appear to be a modern ventilation system within the room. The jurors would be subjected to these conditions for numerous hours throughout the course of the six-day trial. They would be required to deliberate together, spend breaks together, eat lunch together and also share the same restroom facilities.

Pre-Trial Discussions Regarding Vaccination

[4] During a pre-trial conference with counsel in preparation for this jury trial, I raised the issue of whether jurors who were not fully vaccinated against the COVID-19 virus (fully vaccinated meaning having received two doses of a vaccine approved by Public Health) should be excused pursuant to s. 632(c) of the *Criminal Code*, R.S.C., 1985, c. C-46. I provided counsel with the caselaw I had at the time and advised that I would hear their submissions and make a decision at our next pre-trial conference.

[5] At the next pre-trial conference, counsel agreed with my proposal that jurors who had not received full vaccination against the COVID-19 virus should be excused pursuant to s. 632(c) of the *Criminal Code*. This proposal was based on the latest information received from the Province's Chief Medical Officer of Health. There was no evidence called on this issue and the decision was made based on the science that had come forward and from the guidance of the Chief Medical Officer of Health that the safest way to protect oneself and others was to be vaccinated.

[6] Both Crown and defence agreed that allowing unvaccinated jurors could potentially impact the accused's right to be tried within a reasonable time by increasing the probability of the trial being disrupted or delayed due to a COVID-19 outbreak among the jurors and other court participants. Counsel agreed that the Court should inquire into the vaccination status of jurors. I advised counsel that I would be providing reasons to follow and these are those reasons.

[7] On the day of jury selection, during general exemptions, I advised the jury panel that those who had not received full vaccination against COVID-19 should come forward. Those who came forward on that basis were initially stood aside, out of an abundance of caution, due to having a small jury panel from which to select jury members. I wanted to ensure that there would still be a sufficient jury panel from which to choose jury members after conducting general exemptions, specific exemptions, and a challenge for cause. Upon establishing that enough members remained in the jury panel to form a jury, I individually advised the unvaccinated jurors that I was exercising my discretion pursuant to s. 632(c) of the *Code* to excuse them from this jury trial.

Analysis

Protection of Jurors

[8] These are not normal times. In responding to the COVID-19 pandemic, the Nova Scotia Supreme Court has gone through many iterations of policies outlining protective measures that enable the court to continue operating while providing a safe environment for the public, staff, and the judiciary. For instance, the court has moved from the suspension of jury trials, to an essential-services model for in-person hearings, to virtual hearings, to a hybrid model of virtual and in-person hearings, to a gradual transition back to in-person hearings when it was safe to do so. Measures were put in place by the judiciary to enable it to conduct safe, in-person hearings within the various courthouses across the province. These measures were based on the layered approach which is the safest and most effective way to reduce the risk of being exposed to COVID-19. These measures, outlined in the Courts' COVID-19 Recovery Plan, include, but are not limited to: reducing the number of participants in the courtroom, reconfiguration of courtrooms, physical distancing, regular use of hand sanitizer, enhanced cleaning of work surfaces, installation of Lexan panels, masking requirements, and limiting the number of people in public court spaces, such as elevators. I note that the majority of the prevailing public health measures that the Court follows were put in place before the emergence of the Delta variant, which, according to the science, is more easily transmitted than its predecessors.

[9] I agree with the statement of the Court in *R. v. Aiello*, 2021 ABQB 772, that the measures are a minimum, not a maximum, and the most effective way of preventing the spread of COVID-19 is vaccination. The Court said at para. 24:

... However, it is only recently that full vaccination has become readily and universally available. While our jury process is designed to be physically distant and compliant with public health measures currently prevailing, those measures are a minimum, not a maximum. Vaccination is the most certain, safe, and obvious way of preventing the spread of COVID 19 and attenuating the risk it poses to the most important parts of our life, including the proper administration of criminal justice.

[10] I agree with Justice Devlin, in *Aiello*, that judicial notice can be taken that “the vaccination is a safe and highly effective means of preventing the spread of the coronavirus, the development of COVID 19 infections, and severe illness in those who do become infected.” (See para. 3)

[11] Jury trials in the rural districts require off-site facilities to safely accommodate large jury panels. The jury room in the conference centre at the resort in Digby was inadequate to mitigate the risks posed by the presence of an unvaccinated juror.

[12] It is incumbent on the Court to protect members of the public who are summonsed to serve as jurors. Summonsed jurors have no choice but to attend for jury selection. Serving on a jury is an imposition upon members of the community but, at the same time, is an important civic duty in a free and democratic society. To provide jurors a jury room with less health protections than when they voluntarily choose to go to restaurants, schools, businesses, or sporting events (see Government of Nova Scotia, “Coronavirus (COVID-19): Nova Scotia COVID-19 proof of Vaccination”, online: <<https://novascotia.ca/Coronavirus/proof-of-full-vaccination-policy/-business-and-organization-vaccination-policies>>) is unsatisfactory and undermines public confidence in the justice system. With the increasing requirement in many jurisdictions to provide proof of vaccination and abide by mask mandates to access public institutions, public spaces, businesses, or events deemed non-essential under the Public Health Order, for the Courts to take a less protective stance would, in the eyes of the public, bring the administration of justice into disrepute.

[13] Jury trials are an expensive undertaking and a significant commitment of judicial, legal and public resources. Failure by the Court to take all possible steps to mitigate any risk of disruption to the court process, due to a potential COVID-19 infection, would bring the administration of justice into disrepute in the eyes of the public. In Ontario, Chief Justice Morawetz of the Ontario Superior Court has issued an order that all jurors in that jurisdiction be fully vaccinated: *Order of Chief Justice Geoffrey B. Morawetz*, August 31, 2021.

[14] In the circumstances of this off-site trial, to have an unvaccinated juror on the jury would unnecessarily increase the risk of compromising the health and safety of the other jurors and, indeed, all trial participants. This increased risk to jurors would be present throughout the trial, from jury selection to the completion of the trial: *Aiello*, para. 12. Although no evidence was called on this point, the majority of the world is endeavouring to vaccinate as many of their citizens as possible, because it is scientifically accepted that unvaccinated individuals are more susceptible to contracting (and then spreading) the virus. This is accepted by the Province’s Chief Medical Officer of Health who continually encourages and stresses the importance of vaccination to Nova Scotians.

[15] These were the conditions facing the Court and counsel when it was agreed to ask about the vaccination status of jurors for the trial at the Digby Pines Resort.

[16] In *R. v. Frampton*, 2021 ONSC 5733, Phillips J., when addressing the issue of accommodating an unvaccinated juror based on protection measures in place, other than vaccination, to ensure everyone's safety, stated at para. 13, and I concur:

13 A second, and more compelling, reason to reject the non-vaccination measures is that they are simply not the best way. The available science makes clear that vaccination is the superior approach to minimizing risk of Covid-19 illness both per individual and on a collective basis. The stakes are high. Covid-19 is potentially fatal. In endeavouring to minimize risk of transmission, why would we opt to use a method that is not the best method? Surely, the reputation of the administration of justice would be compromised if a court declined to adopt the optimal approach toward preserving the health of those compelled by law to participate in the judicial process.

See also paras. 9-12, where Phillips J. notes the fallibility and impracticality of daily testing requirements and the difficulty in maintaining physical distancing.

Charter Issues

[17] In *Aiello*, Devlin J. held that excusing unvaccinated jurors pursuant to section 632(c) of the *Criminal Code* would not violate the right to a jury trial pursuant to section 11(f) of the *Charter*. He observed:

[5] ...I have no evidence before me, and indeed can posit none, that would suggest that an absence of vaccination is more or less prevalent in any one or more social, ethnic, or other demographic group.

[18] During the selection process, I similarly encountered the same results with respect to unvaccinated individuals as Devlin J., in *Aiello*. There were a handful of individuals who came forward on the basis that they were not fully vaccinated. While those individuals spanned the age and gender spectrums, the aspect of diverse ethnic representation was lacking, and this was reflected in the entire jury panel. Having fewer individuals span the ethnic spectrum was a result of the ethnic composition of the jury district.

[19] A primary concern of the Court and counsel was ensuring that the accused received a timely hearing. The Supreme Court in *R. v. Jordan*, 2016 SCC 27, and *R. v. Cody*, 2017 SCC 31, has emphasised that accused persons are entitled to a

trial within a reasonable time and all participants in the justice system must work proactively to prevent and minimize delay. If an accused person's trial is delayed because an unvaccinated juror becomes infected with COVID-19 or transmits COVID-19 to other jury members, an accused could legitimately argue that the state acted unreasonably in creating the situation that derailed and further delayed the trial: *Aiello*, at para. 14. I would add that, should the presence of an unvaccinated juror threaten to derail the hearing by causing other participants to refuse to participate in the trial, any resulting delay could be argued as being caused by the State. I am not dismissing the fact that individuals who are vaccinated may still become infected with the virus (and also transmit it), but it has been accepted by the scientific community and our Chief Medical Officer of Health that the unvaccinated are significantly more susceptible to COVID-19. In my opinion, the protection of this *Charter* right to have the trial heard in a timely manner outweighs any resulting impact on privacy interests. Similarly, the Court in *Aiello* found:

7 This judicial discretion to safeguard the proper administration of justice is paramount over any provincial privacy legislation. Moreover, privacy interests must yield to rights protected by the *Canadian Charter of Rights and Freedoms*.

Privacy Interests

[20] Privacy interests exist on a sliding scale. I find that the privacy interest in whether someone is vaccinated would sit at the low end of the scale, unlike one's core biographical information, which would lie at the other end. Nova Scotians are now asked to provide proof of their vaccine status in most public places, including a long list of non-essential events, services, and activities. It is not uncommon for potential jurors requesting an exemption to disclose personal information related to their health, financial, or family circumstances (see *R. c. Barnabé-Paradis*, 2021 QCCS 4147, at para. 10). For this trial, I only asked potential jurors who were not vaccinated to come forward under the general exemptions. If they were not vaccinated, they were initially told to stand aside and then ultimately excused. Each conversation regarding the general exemptions was only in earshot of counsel and the accused, with those who were unvaccinated being stood aside for medical reasons. There was no inquiry into why they were not vaccinated and, if participants chose not to inform the Court of their vaccination status for personal privacy reasons, they were not selected for the jury. The decision-making process

as to why they were not vaccinated was not revealed, nor were further inquiries made, because it was of no concern to the Court: *Frampton*, para. 17.

[21] An additional factor regarding unvaccinated jurors that was raised in *Aiello*, and of which I am cognizant in the matter before me, is the potential for vaccinated jurors to be concerned about the vaccination status of other jurors throughout the course of the trial. Jurors may have underlying health conditions, or have individuals at home who are susceptible to COVID-19. The thought of being in closely-confined quarters for numerous days, being unaware of the vaccination status of their fellow jurors could become a distraction that might undermine their focus on the trial. I agree with the comments from *Aiello*, at paras. 16-17:

16 Fourth, jurors must feel secure in carrying out their duties. Triers of fact in criminal cases must not have extrinsic concerns play upon their minds in the course of their work. I find that members of the jury who are unsure as to one another's vaccination status would be reasonably concerned and apprehensive about this factor throughout the proceedings. This distraction could well undermine their focus on the trial. While likely unquantifiable, such a distraction would implicate the essence of the right to be tried by an impartial jury.

17 In both of these respects, I agree with Justice Phillips who recently concluded as follows in *R v Frampton*, 2021 ONSC 5733 at para 7:

To my mind, in the context of the burgeoning "fourth wave", allowing an unvaccinated person to serve as a juror would irresponsibly introduce risk to the trial. An unvaccinated juror is a potential conduit for the Covid-19 virus to make its way into the jury room. Obviously, such a result would derail the proceeding. Indeed, worrying about such an outcome would likely become a constant distraction.

Representative Jury

[22] Even though the parties in this situation consented to the process, some cases have suggested that excusing jurors who are not fully vaccinated against COVID-19 could infringe on the accused's right to a representative jury. These unique circumstances, in which the Court finds itself (conducting a jury trial in a conference centre in rural Nova Scotia during a global pandemic, with an evolving deadly virus that the world has been grappling with for close to two years) are central to my opinion that the administration of justice is better served by having fully-vaccinated jurors. It is also in keeping with an accused's *Charter* right to a trial within a reasonable time. Further, I see no persuasive reason to find that it creates a threat to the representativeness of the jury.

[23] In *Aiello*, the Court held at para. 10:

Excusing unvaccinated individuals does not reduce the representativeness of the jury in any discernible manner. There is, therefore, no right to have unvaccinated individuals on a jury.

[24] *R. v. Kokopenace*, 2015 SCC 28, is the leading case on the meaning of a “representative jury.” Moldaver J., for the majority, stated at para. 2:

In my view, representativeness focuses on the process used to compile the jury roll, not its ultimate composition. Consequently, the state satisfies an accused's right to a representative jury by providing a fair opportunity for a broad cross-section of society to participate in the jury process. A fair opportunity will be 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. When this process is followed, the jury roll will be representative and the accused's *Charter* right to a representative jury will be respected.

[25] Moldaver J. made clear that the meaning of representativeness is circumscribed, at para. 59:

Representativeness focuses on the adequacy of the jury selection process. It does not require the state to ensure that any particular perspective is represented on the jury roll, nor does it require the state to ensure that its source lists proportionately represent all groups that are eligible for jury duty.

[26] He went on to note that requiring a proportionately representative jury would pose many practical challenges for the conduct of criminal trials and undermine the Court's long-held respect for juror privacy: paras. 71-76.

[27] *Kokopenace* specifies that the right to a representative jury plays a role in both sections 11(d) and 11(f) of the *Charter*. In the context of section 11(d), representativeness helps guarantee an independent and impartial tribunal. The majority stated, at para. 51:

The narrow way in which representativeness is defined in Canadian jurisprudence means that impartiality is guaranteed through the process used to compile the jury roll, not through the ultimate composition of the jury roll or petit jury itself. A jury roll containing few individuals of the accused's race or religion is not in itself indicative of bias.

[28] Representativeness is central to the section 11(f) *Charter* right to a jury trial. Representativeness “legitimizes the jury’s role as the ‘conscience of the community’ and promotes public trust in the criminal justice system.” (*Kokopenace*, at para. 55, citing *R. v. Sherratt*, [1991] 1 SCR 509, at pp 523-35; *R. v. Church of Scientology of Toronto*, [1997] O.J. 1548 (Ont. C.A.), at pp. 118-120). A problem with representativeness will not necessarily violate section 11(d). However, because “representativeness is a key characteristic of the jury, its absence will automatically undermine the s. 11(f) right to a trial by jury”: *Kokopenace*, at paras. 57-58.

[29] Representativeness is undermined when a segment of the population is deliberately excluded from participating in a jury. The majority in *Kokopenace*, at para. 66, stated:

... if the state deliberately excludes a particular subset of the population that is eligible for jury service, it will violate the accused's right to a representative jury, regardless of the size of the group affected. It is self-evident that the state will not have made reasonable efforts if it deliberately excludes part of the population. Deliberate exclusion undermines the integrity of the justice system and cannot be tolerated. However, if it is a question of unintentional exclusion, it is the quality of the state's efforts in compiling the jury roll that will determine whether the accused's right to a representative jury has been respected. If the state makes reasonable efforts but part of the population is excluded because it declines to participate, the state will nonetheless have met its constitutional obligation. In contrast, if the state does not make reasonable efforts, the size of the population that has been inadvertently excluded will be relevant. A failure to make reasonable efforts in respect of a small segment of the population will not undermine the overall representativeness of the jury roll because there is no right to proportionate representation. When only a small segment of the population is affected, there will still have been a fair opportunity for participation by a broad cross-section of society.

[30] The concept of a “distinctive group” in the narrow context of jury representativeness is discussed in *R. v. Church of Scientology of Toronto*, and cited with approval in *Kokopenace*. Rosenberg J.A. for the majority of the Ontario Court of Appeal warned of the risk of shutting out different perspectives and populations from the jury trial at para. 158:

I hesitate to attempt to articulate an all-inclusive test of distinctiveness such as "some immutable characteristic". In my view, it is preferable to deal with each case having regard to the purposes of the representativeness requirement as set out by L'Heureux-Dubé J. in *Sherratt*. The essential quality that the

representativeness requirement brings to the jury function is the possibility of different perspectives from a diverse group of persons. The representativeness requirement seeks to avoid the risk that persons with these different perspectives, and who are otherwise available, will be systematically excluded from the jury roll.

[31] For the purposes of the *Kokopenace* test for representativeness, the focus is not on “who is being included but instead [...] the process for inclusion.” (See *Kokopenace*, at paras. 60-61). The representation of distinctive groups is best achieved through random selection, not by targeting such groups for inclusion. In *R. v. Chouhan*, 2021 SCC 26, Moldaver and Brown JJ., argued that measures that enhance randomness, such as the abolition of discretionary peremptory challenges, increase representativeness and should, in turn, increase jury diversity (see paras. 41-43). Conversely, measures that decrease randomness, such as “exempting anyone in the jury pool who wishes to be excused”, weakens representativeness: *Wall v. Horn Abbott Ltd*, 2006 NSCA 36, at para. 42.

[32] However, certain restrictions on jury representativeness are tolerated and accepted. For example, jury rolls are selected from geographic areas which may not be representative of broader Canadian society or the discrete community where the offence was committed. Sheriffs have the authority to exempt individuals from jury service if it poses hardship, which often excludes people who are self-employed or live in remote areas. Finally, there are statutory limitations on juror eligibility (see *Kokopenace*, at para. 44).

[33] In *Chouhan*, a narrow majority led by Moldaver and Brown JJ. affirmed the *Kokopenace* principles on jury representativeness. As a rebuttal to Abella J.’s broad interpretation of judges’ expanded stand aside power, they stated at paras. 79-80:

This Court has, with good reason, declined to interpret the imperatives of jury representativeness and impartiality as requiring diversity among the members of the petit jury. As a constitutional matter, diverse juries depend not on gerrymandered juries, but on diverse jury panels. And diverse jury panels are preserved not by the use of stand asides to remove jurors by reason of their particular background, but by rules that do not undermine their diversity.

This last point — the crucial importance of diverse jury panels to secure diverse juries — merits special emphasis. Here lies the prime importance ascribed by this Court in *Kokopenace* to randomness, since that equal chance to be selected for the jury depends fundamentally on the randomness of the jury selection process. We endorse the explanation of one commentator for why, as a matter of logic, any

departure from randomness will necessarily lead to lesser, not greater, representativeness on the jury.

Statutory Exclusions of Particular Groups from Juries

[34] In *Scientology*, the appellant argued the exclusion of fellow non-citizens from the jury under the Ontario *Juries Act* resulted in an unrepresentative jury roll and violated her section 11(f) right to a jury trial. Rosenberg J.A. held that this exclusion did not impact the representativeness of the jury:

159 Exclusion of non-citizens does not infringe the representativeness or fair cross-section requirement in this sense. There was no evidence that non-citizens as a group share any common thread or basic similarity in attitude, ideas or experience that would not be brought to the jury process by citizens. The expert evidence led by the appellants was somewhat misleading in this respect. From my review of the evidence, it seems that the expert tended to use non-citizenship opinion as a proxy for minority opinion. The evidence, however, simply does not bear out the inference that exclusion of non-citizens disproportionately excludes minorities from the jury.

[35] Rosenberg J.A. rejected the argument brought by the intervenor that excluding non-citizens would undermine the racial representativeness of the jury, because there was no evidence that non-citizens were notably more diverse than the citizens of Metropolitan Toronto (see paras. 161-162). Rosenberg J.A. took the opportunity to clarify that statutory exclusions based on occupation and marital status did not impact representativeness (see paras. 167-171).

[36] The accused in *R. v. Newborn*, 2019 ABCA 123, challenged the exclusion of people with a criminal conviction, pursuant to the *Juries Act*, as unconstitutional. This argument was based on the grounds that a disproportionate number of Aboriginal jurors would potentially be excluded. Despite accepting this impact on Aboriginal jurors, the unanimous Court held that the broad exclusion was constitutionally justified under section 11(d) of the *Charter* because it maintained the public's confidence in the jury's impartiality and the criminal justice system (see paras. 13-16). A more limited exclusion, as proposed by the accused, would not resolve the disproportionate impact on Aboriginal jurors.

Representativeness and Juror Vaccination Status

[37] In *R. v. Barac*, 2021 ONSC 6605, George J. held that the argument that excluding the unvaccinated would remove “independent minded people” from the jury pool is “entirely analogous” to the argument in *Scientology* that excluding non-citizens would impair representativeness and impartiality (see para. 25). Unvaccinated people cannot be said to comprise a “particular group of people” whose exclusion from the jury would impair the accused’s section 11 *Charter* rights. Being unvaccinated, like being a non-citizen, is not a proxy for minority opinion (*Barac*, at paras 23-26, citing *Scientology*).

[38] In the case before me, counsel agreed with excluding unvaccinated jurors. Based on my review of the law, I conclude that this procedure does not infringe on the accused’s *Charter* right to a representative jury. There was no evidence presented to me to suggest that unvaccinated individuals’ thinking processes and attitudes differed from those of vaccinated jurors to the extent that the representativeness of the jury would be compromised.

Conclusion

[39] In most cases, Courts have held that jurors’ vaccination status does not impact jury representativeness (see *Aiello, Frampton, Barac, Barnabé-Paradis*, and *R. v. Roche Garcia*, 2021 BCSC 1936). Courts and all participants in the legal system should not lose sight of the fact that the standard for representativeness is not perfection (see *Barnabé-Paradis*, at para. 11), especially during a global pandemic.

In considering all of the circumstances relating to this jury room, in this location, and at this particular time during the pandemic, I exercised my authority under section 632(c) of the *Code* to exclude any person who was not fully vaccinated for COVID-19 from serving on the jury. The vaccination requirement was an additional precautionary measure to maximize the jurors’ safety and to protect the accused’s right to a trial within a reasonable time by taking reasonable steps to avoid its disruption. This measure was in the best interests of the administration of justice and constituted a reasonable cause to excuse unvaccinated jurors.

Bodurtha, J.