

ONTARIO
SUPERIOR COURT OF JUSTICE

5 B E T W E E N :

HER MAJESTY THE QUEEN

- and -

10 ANDRE THEODORE WAREHAM

15 *****

VOIR DIRE

BEFORE THE HONOURABLE MADAM JUSTICE H. M. PIERCE

on MONDAY, MARCH 14, 2011

at THUNDER BAY, ONTARIO

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APPEARANCES:

E. Burton

R. Kozak

Counsel for the Crown

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S. Hinkson

Counsel for the Defendant

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U P O N R E S U M I N G . . .

5 MS. BURTON: Good afternoon.

MR. KOZAK: Good afternoon Your Honour.

THE COURT: Good afternoon counsel.

MR. KOZAK: Yes, Your Honour...

THE COURT: Mr. Kozak?

10 MR. KOZAK: Yeah, thank you. Just confirming Your Honour, arising from an issue that was highlighted before the court this morning, and that is the issue of a voir dire being necessary today for Your Honour to give consideration, is the present jury panel convened for the matter of *Her Majesty the Queen v. Andre Wareham*, is that jury panel a representative jury panel and thus a properly constituted jury panel in light of the considerations raised in the recent Ontario Court of Appeal decision released Thursday of last week. That was on the 10th of March, 2011. For the Court record Your Honour, that is the case of *Elizabeth Pierre and Marlene Pierre v. Dr. Shelagh McRae, Coroner*. I'll provide the citation to our reporter and the other parties to that litigation was the *Nishnawbe Aski Nation, Rhoda King and Berenson King and Dr. David Eden, the Coroner*. And again, this is Ontario Court of Appeal decision that was released on March the 10th, 2011.

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30 To assist the court in deciding that voir dire issue, we have before the court two representatives of Court Services Division available to give

5 evidence Your Honour. Mr. Don Blaquiere, B-L-A-Q-U-I-E-R-E is the manager of Court Operations of Court Service Division northwest region and he is prepared, prepared to provide evidence to this court. As well to assist him, either together or independently Your Honour, is Yvette, Y-V-E-T-T-E Hinterbrandner, H-I-N-T-E-R-B-R-A-N-D-N-E-R. She is a client services representative of Court Services Division. The initial request of Mr. 10 Blaquiere is whether or not Ms. Hinterbrandner could be present to provide assistance when he doesn't have answers and I indicated that would be a matter for Your Honour to decide whether the, you want to hear them independently or in conjunction. The Crown's perspective, we'd like to get to the 15 information as soon as possible and we have no opposition to the two of them being allowed to provide the evidence simultaneously to the court or for her, Ms. Hinterbrandner to provide information to Mr. Blaquiere which he can testify to. You'll have to obviously hear from Mr. Hinkson as to his position with respect to that.

THE COURT: Mr. Hinkson?

25 MR. HINKSON: Yes, and for the record Your Honour it's Hinkson, initial S on behalf of Mr. Wareham. Yeah, and I have no objection to that, and to Ms. Hinterbrandner being in the body of the court and assisting in terms of areas where Mr. Blaquiere is not familiar with. And if it gets to the heart of 30 the matter, it would be greatly assistant.

THE COURT: Are you suggesting Mr. Kozak that the witnesses would be sworn and testify simultaneously or what...

MR. KOZAK: No, I thought just perhaps Mr. Blaquiere could provide the evidence and if he requires assistance of Ms. Hinterbrandner, she could provide that and he would be the one bound to give that evidence. I think that would be my preference Your Honour.

THE COURT: Is there any issue with respect to credibility in the sense that one witness should be excluded from the court while the other is giving evidence?

MR. HINKSON: I don't have that concern Your Honour. I guess what may arise maybe, if there is an area where Ms. Hinterbrandner has a greater knowledge base than Mr. Blaquiere, I mean if she could testify if it's something whereby it's a significant amount of information he does not know about in that whole area. But aside from that I'm not worried about her hearing what his testimony is. I'm not worried about that in that respect. I'm not requiring an order excluding witnesses.

THE COURT: And as to the Crown, is there any concern about excluding of witnesses?

MR. KOZAK: Not for this voir dire Your Honour.

THE COURT: All right. I appreciate that different concerns arise on the trial. Very well. Do counsel suggest we begin with Mr. Blaquiere?

MR. KOZAK: That's my suggestion, yes.

THE COURT: All right. Mr. Blaquiere, if you could come forward please and be sworn?

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EXAMINATION IN CHIEF BY MR. KOZAK:

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Q. Thank you very much Your Honour. Mr. Blaquiere I understand you are the manager of Court Operations?

A. I am.

10 Q. Okay. And I understand that you have some familiarity either by your personal knowledge or by consultation purposes, of the process that's involved for the District of Thunder Bay with respect to the preparation of a jury panel list?

A. I do.

15 Q. Okay. Now, Mr. Blaquiere, I just want to share with you my understanding and that's based on the decision recently released by the Ontario Court of Appeal and from paragraph 24 of that decision the following statement is made and I'm just going to seek your assistance with respect to your own experience and the knowledge you have from other sources. Again,
20 paragraph 24:

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Under the *Juries Act* the Sheriff in a county or district prepares a jury roll each year. The jury roll consists of randomly selected group of Canadian citizens resident in the province who have been sent and who have returned a jury service notice. The persons randomly selected to receive jury service notices are taken from municipal assessment lists.

30

I'll carry on Mr. Blaquiere, the next paragraph deals with an issue that was live before the Court of Appeal and that's at paragraph 25:

The names of First Nation persons living on reserves however are not found on municipal assessment lists. Thus the *Juries Act* prescribes a separate procedure for insuring the First Nations persons on reserves are including in the jury roll.

And the Court then quotes s. 6.8 of the *Juries Act*.

In selecting of persons for entry in the jury roll in a county or district in which the, an Indian Reserve is situate, the Sheriff shall select names of eligible persons inhabiting the reserve in the same manner as if the reserve were a municipality and for the purpose, the Sheriff may obtain the names of inhabitants of the reserve from any record available.

So again, that's my knowledge of how a jury panel is composed. If you can just share with us the information you have relevant to northwest Ontario as to those two procedures, whether or not those, that is the fashion in which the jury panel is prepared here?

A. It is the fashion but there are differences. The first major difference is we effectively don't have a Sheriff here so the work is conducted by Court Services Division. There are 15 First Nations which the process that I'm about to outline applies to.

THE COURT: Fifty or fifteen?

A. Fifteen, 1-5.

THE COURT: Thank you.

A. There is a formula that is captured in policy that we follow and for example one of the First Nations that I looked at in, in the binder had 251 residents. So from that we multiply that by 2 percent which again is, is policy. We take that figure and then we multiply that by 30 percent, which is the result of a directive which came from corporate office in

November of 2008. And that produces a raw figure, a total number. In the case of the 251 residents, that number was 7.

Court Services then needs to determine a process by which those 7 people are contacted. So a notice goes out by letter in bulk to

5 random members and those random members are taken from old band lists from the reserves and from a few, they are old lists from

Indian and Northern Affairs. Each person on the list, each of the 251 people on the list, gets a number and those numbers are

placed into a hat or a box and whatever the total is, in this

10 case 7, 7 numbers are randomly drawn from that, from that hat or the box. The numbers are then matched up to the voters lists and

those 7 people receive the documentation. The lists or lists,

the population lists or the old electoral lists are listed on, by

alpha so that it makes it fairly easy to do. Those people that

15 were identified on the lists receive questionnaires and the

questionnaires are, or forms, are official MAG or Ministry of the Attorney General forms and they go out with three letters. The

first is a letter from the Attorney General outlining the

process. The second is a letter from the Supervisor of Court

20 Operations and it's Janette Sprovieri in this case, from Superior

Court and the second letter is translated into Ojibway where it is relevant, so that compromise, or composes the third letter.

The letters go out in bulk but each of the individual names are captured on the top, on the letterhead and they're sent to

25 General Delivery in the specific community via Canada Post. The

expectation is that the individuals will complete the

questionnaires and return them to the, to the Jury Centre in the self-addressed stamped envelope provided and the Jury Centre is

in London, Ontario. There's also a fairly comprehensive process

30 that Court Services does to, to get the updated electoral lists,

which are obviously important for determining the randomly

selected people. CSD faxes out a letter to each chief and band,

requesting an updated band electoral list at approximately the end of September each year. CSD then follows up with a phone call to each band approximately five days later and requests a response. Many times the officials or the officers that would make the decision whether or not to send the updated electoral lists are not available so CSD then calls back and tries to make appointments and times for those phone calls. Repeated efforts are made to get electoral lists and then at some point we simply wait to see which bands are willing to provide that information. As an example, this year, and in which is 2010, Court Services received two new lists out of the 15 First Nations communities and the bulk of the other reserves declined to provide the updated lists due to confidentiality or the fact that the information was protected under the *Privacy Act*. As a result of that, in order to fulfill our random selection process, Court Services is forced to use old electoral lists or even old lists from Indian and Northern Affairs. And that's the process.

Q. Now, thank you Mr. Blaquiere. You've confirmed the District of Thunder Bay's response and that was an area that the Court of Appeal had highlighted starting at paragraph 66 of its decision and following, that up until the year 2000 it was Indian and Northern Affairs Canada that actually forwarded that information to the, the jury for, sorry the Jury Panel Centre which I understand is in London, Ontario?

A. That's correct.

Q. Okay. And so that's the efforts that have taken place in the District of Thunder Bay then?

A. That is correct.

Q. Okay. And just for the Court's benefit, the 15 First Nation territories you've confirmed that the most recent information received was 2010, two of the First Nation

territories in the District of Thunder Bay provided their updated electoral lists as of 2010?

A. That is correct.

Q. And the 13 remaining did not provide current
5 information and that information you've confirmed is dated...

A. That is...

Q. ...information?

A. ...correct.

Q. Okay. Do you have access to the, how old the
10 remaining 13 jurisdictions, the electoral lists are, from those?

A. We could probably provide that information. I don't have it on hand.

Q. Okay. That's no problem, as long as that information is accessible. So just to understand the formula that is based, you've provided an example that in a community of
15 251 residents there was two factors that were multiplied. I'm wondering if you're able to explain the formula, what the 2 percent is all about and what the 30 percent is all about?

A. Those are policy directions we've from, from
20 corporate office. I'm not, I'm not familiar with the rationale behind the 2 percent. At the time it was, it was suggested that that, the percentages would reflect the percentage of Aboriginal members in the overall population but I don't have that official...

Q. Oh, okay?

A. And the 30 percent was just a directive from Ms. Norris that came out in, in November of 2008. Again, I'm not sure of the rationale behind it but we were expected to comply with that formula and we have ever since.

Q. Okay. Now, following up on the information
30 you've just provided to the Court, you've indicated that three letters would be sent to the individuals that were randomly

drawn, based on that formula and that would include three letters and I heard you describe two and I'm wondering if that third letter was a translation? You'd indicated the first of the three letters was a letter from the Attorney General?

5 A. That's right.

Q. The second is from the Supervisor of Court Operations and the third letter, was that the Ojibway translation then?

A. That is correct.

10 Q. Okay. And you've indicated those are sent by General, General Delivery then?

A. Yes, those are sent by Canada Post to General Delivery.

15 Q. Okay. Now, is there any information available as to whether any number of those get returned as in General Delivery not picked up and they become, returned to the Court Division?

A. We don't have access to that information, I'm sorry.

20 Q. Okay. And is there anything in the policy that would dictate if, if something is returned whether or not then another person of that community to, to equal the same number of the randomly drawn is, another one is sent out so that the response is equal the numbers of randomly drawn individuals?

25 A. Not that I'm aware of, no.

30 Q. Now within the Ontario Court of Appeal decision there is mention of what had been taking place in the District of Kenora and it indicated there was an attendance in First Nation communities of court officials to try to flush out further information from those communities, First Nation communities. Has such, that taken place in the District of Thunder Bay?

A. I'm not aware of, of what, what Kenora is doing. I only know what, what we do here in Thunder Bay.

Q. Okay. So I'll just indicate to you, in this Court of Appeal decision it indicated in the year 2007, again
5 this deals with Kenora, court officials traveled to 14 remote First Nation communities in the District of Kenora. This effort produced only 8 more band electoral lists. This was, just so you have the context, this was what had been done in the District of Kenora after there was the verbal request for band lists. So
10 there was actually attendance in the community. Are you familiar if that has taken place in the District of Thunder Bay?

A. That has not taken place.

Q. Okay. Now, there was also a mention in the Court of Appeal decision that statistical analysis was conducted
15 with respect to a particular jury roll and I'll share with you that information. It indicates and for the Court's benefit this is contained in paragraph 69 of the Court of Appeal decision.

Of a population of over 12,000 First Nation persons living on reserves in the District of Kenora, only
20 44 were listed on the 2007 jury roll.

Is there any statistical information available for the District of Thunder Bay as to, firstly how many First Nation persons are living on reserves and secondly how many would have
25 been listed on the most current jury roll?

A. Given the questionnaires and responses go to the Jury Centre, I'm not privy to any statistical information in relation to that.

Q. Okay. Now just so the court record is clear
30 Mr. Blaquiere, within the Court of Appeal decision at paragraph 71 there is some mention and I just want to make sure that the

information Her Honour has is the most current information. This is the statement from the Court of Appeal.

5 There is no reason to think that the unrepresentativeness of the jury roll in the District of Kenora is unique. After 2000 the Provincial Jury Centre no longer received band electoral lists for the reserves in the District of Thunder Bay. No evidence was produced in connection with either inquest...

10 ...and, Your Honour, I'm sorry, Mr. Blaquiere, that doesn't deal with what's before Her Honour but this is previous matters before that court. So again...

15 ...no evidence was produced in connection with either inquest that court officials in the District of Thunder Bay had made any greater efforts than their counterparts in the District of Kenora to obtain up to date band lists.

20 So my question to you then is, firstly, after the year 2000, are you aware if the Provincial Jury Centre had been receiving any band electoral lists or was that information was only received at your level?

A. The band electoral lists?

Q. Yes?

25 A. That's, those were received at Court Services Division here. I'm not aware that they were sent to the Jury Centre.

30 Q. Okay. And so the information you've provided with respect to the statistic, the formula being used, that was used here at the District of Thunder Bay? It wasn't a formula that's being used in London at the Jury Centre?

A. I'm only aware of the direction we received here in Thunder Bay so and again, those were, were taken from,

from policies that came from corporate office so I'm not aware about the Jury Centre.

Q. Okay. So perhaps then trying to link the District of Thunder Bay information with the Jury Centre in London, if you can perhaps take us to the next step then, let's say for example your representative community of 251 residents, if all 7 individuals had provided positive responses to the questionnaires, what would happen with that information of those seven jury, potential jury members?

A. If it is a case that a jury is required for, for a case, notification is given to the Jury Centre and a list of 150 names are generated from the Centre to Court Services and notices go out from the Jury Centre to the individuals on that list of 150 and jury selection is made on that basis.

Q. Okay. Now how would the Jury Centre, if at all, become aware of the randomly drawn individuals who responded positively to the questionnaire?

A. I'm not sure if their inner workings. The responses to the questionnaires would have gone directly from the First Nation residents to, to the Jury Centre so...

Q. Okay, so that's...

A. ...I'm not sure...

Q. ...information they would have received directly from, from those potential members?

A. That's correct. That's correct.

Q. And do you know if there is any statistical analysis shared between the District of Thunder Bay and the Jury Centre with respect to comparing the number of questionnaires sent out by Thunder Bay District and how many are received in the Jury Centre London?

A. I'm not aware of any.

Q. Now, just dealing again with this recent Court of Appeal decision, there was four questions that were raised in an inquest context that I'm going to pose to you one by one so that we can, the Court can make a decision based on the issues raised at that decision and what's happening in the present case today as to whether or not we have a representative panel or not. So the first question is, what efforts were made and in this case the question was, by the Sheriff and so I guess we'll just exchange, what question, efforts were made by Court Services to select names of eligible persons for the jury roll that reside on Indian reserves in the Thunder Bay District? I think you've answered this question but let's perhaps summarize that one question once more. So again what efforts were made by Court Services to select the names of eligible person for the jury roll that reside on Indian reserves in the Thunder Bay District?

A. Again, the formula was applied to determine the number of candidates required from each of the First Nations and the questionnaires were then mailed out with, with the three letters, the Attorney General's letter and the letter from the Supervisor of Court Operations, and, and the translation of the Supervisor's letter. And then Court Services would, would follow up on a number of occasions and the officer, Ms. Hinterbrandner who was in charge of that, tracks those contacts and has them on a spread sheet to show the efforts made by Court Services.

Q. Okay. The second question that the Court of Appeal was considering is what records were used. In that case it says Sheriff, but what records were used by Court Services to obtain names of the residents on the Indian reserves that exist in the Thunder Bay District? You've already answered this question once but again, just to summarize your evidence?

A. Certainly for the updated electoral lists, we drew from those. When those weren't available we drew from older

electoral lists but in a few cases involved lists from Indian and Northern Affairs that dated back many years.

Q. Okay. Now, the next question might require some statistic or access to information. The third question the court was considering was how many jury questionnaires or notices were sent to First Nation on reserve residents? So do you have access to that information?

A. We, we could produce it. I don't have it in mind but there's a tracking system for each, the number of letters that were sent out to each of the 15 First Nations and that could be produced.

Q. That could be produced, thank you.

A. Yes, it can.

Q. And then the fourth question the court was asked to consider was how many First Nation individuals from Indian reserves are on the current jury roll? Is that information available from any source?

A. It's not available to us. That would have to come from the Jury Centre.

Q. And that's in London then?

A. That's in London, Ontario, correct.

Q. Now with respect to the last two answers, and perhaps if we could, it might be pressing you but the answer to how many jury questionnaires were sent to First Nation on reserve residents in the District of Thunder Bay, how long would it take for that answer to become available?

A. End of the day, easy.

Q. And the other one involves in answer from, from, not from your office but from the Jury Centre, if you have this information that's great. The answer, the question I'm asking is, how long would it take to obtain the answer to this

question? How many First Nation individuals from Indian reserves are on the current jury roll?

A. I'm, I just don't know.

Q. And that's a fair, fair answer because you're not supervising that office.

A. Um-hm.

Q. Now finally Mr. Blaquiere, there is a presently convened panel, the list is before the court, 150 names. Are you aware in this present panel whether or not there are, there is individuals from First Nation territories represented on this panel?

A. I, I don't know.

Q. And just so it's clear, would that information, if it, if it was on this panel list, would that be found in the address information or potentially where would that information be found?

A. I would imagine it would have to be obtained from the Jury Centre.

Q. Okay?

A. They're the ones that issue the list of 150 names and I assume they would be the ones to have the information on each, each eligible candidate.

Q. Okay. And with respect to the address information, are you aware of, let's go through First Nation communities, person from the Fort William First Nation, are you familiar whether their address would show up as Fort William First Nation or show up as the City of Thunder Bay or are you aware of how that information would, would show up...

A. I...

Q. ...as an address?

A. ...I simply don't know that. I don't.

Q. Okay. And just if we want to conduct our own self analysis of the list, if you could share with us one by one the name of the 15 First Nation territories captured within the District of Thunder Bay please?

5 A. I could, I don't have that in mind but I can certainly provide it immediately after.

Q. Okay. So I believe the Court might be interested, we are certainly interested in that information.

A. The 15...

10 Q. The 15 First Nation territories?

A. Not a problem.

Q. Those are my questions. There will be some examination, cross-examination.

THE COURT: Mr. Hinkson?

15 MR. HINKSON: Thank you Your Honour.

CROSS-EXAMINATION BY MR. HINKSON:

20 Q. Mr. Blaquiere, if I understand you correctly, you gave the example of two reserves which are part of the electoral selection utilized, is that right?

A. I gave the example, like my statistical example?

Q. That's right?

25 A. It was just one reserve.

Q. One reserve?

A. Yes.

30 Q. But in terms of responses received back when you sent out the letters, you received a response from two reserves?

A. That's correct. We received updated electoral lists from two, that's correct.

Q. All right. And how long has that been like that?

A. How long has the response...

Q. Well, how long has it been since you've only received two responses back? How many years?

A. The letters went out in September and they came back not that long after so it would have been late 2010.

Q. What about last year?

A. Last year I'd have to check the statistics. I only checked for this year, I'm sorry, it was on short notice.

Q. But is it, listening to you, it sounds like you don't get a large response back from the reserves in terms of electoral lists.

A. I think that's a fair comment.

Q. All right. And in your, then generally speaking you're not really operating with all 15 reserves generally speaking?

A. With, certainly not with updated lists from all 15 reserves, that's certainly true, yes.

Q. So even taking away the updated lists and all, in terms of responses back, you're not getting responses back from all 15?

A. That's correct.

Q. And this has been going on for a number of years?

A. It has.

Q. That, are you talking about more than ten years? Are we talking 2000 or...

A. I'm talking from before I joined the Ministry so, but my understanding from people who have been around that long is the trend is consistent. The response rate has been low.

Q. Okay. So since you've been employed there,
it's...

A. Yes.

Q. ...been, historically it's been like that?

5 A. It has, yes, that's correct.

Q. And obviously the Federal Government is aware
of this problem?

A. I assume so.

Q. And up to this point in time, up to this date,
10 the date that you come to court today, there has not been any
effort to address that issue?

A. Not that I'm aware of. We simply follow the
formula and the policy as dictated out of corporate office and,
and deal with the results that we get.

15 Q. And corporate office, for example you have this
formula, 2 percent and 30 percent. You have no idea where that
percentage and that, where that comes from?

A. I'm sorry, I don't know.

Q. Okay. And nobody has really talked to you
20 about this?

A. I've had informal discussions with my director
and as I said, that's where I suggested it was likely the, a
reflection of the, of the percentage of Aboriginal people in the
larger population. But I have not seen that in any formal
25 document.

Q. And when you say larger population, are you
talking about...

A. The province.

Q. ...the province?

30 A. Yes.

Q. You're not talking the area of Thunder Bay?

A. No.

Q. All right. Whereas, in reality that percentage could be higher than the 2 percent?

A. It would.

Q. So there's no real correlation between that 2 percent number and the population of the, the native population in Thunder Bay?

A. As I say, I've not seen any information or documentation that would, that would explain that at all so I don't know.

Q. And just so I understand the process for the reserves, letters would be going out or contacts would be made with the, with the band for a list of electoral, or the members of the, of the band?

A. Both. Both. The contact is made with the band and in an attempt to obtain updated electoral lists and then contact is made with individuals who are randomly selected to be issued a questionnaire to respond back to the Jury Centre. So both, both take place, yeah.

Q. Okay. And the contact was made with the band itself, was that by letter?

A. Yes.

Q. And...

A. Actually it's by fax and then by letter and then by follow-up phone call.

Q. All right. And since this has not been effective from any, obviously from the majority of the bands, what efforts have been done to go beyond that, address that issue? None that I take it from your, what you're telling...

A. Well apart from multiple follow-ups and requests to obtain the electoral lists, nothing that I'm aware of.

Q. Okay. And again, this is historic in nature? Like it's not, it's not just this year, it's kind of, it's kind of a chronic situation?

A. Yes, the, when Indian and Northern Affairs used to provide the lists, they stopped in 2000 and since that time it's been incumbent upon us to obtain, obtain the lists ourselves.

Q. Okay. And now you talk about when they don't respond back to you rely, you relied on old lists?

A. Correct.

Q. And those old lists come to 2000?

A. Some, some of them, some of them do. Some of them are more contemporary.

Q. But when you say old, obviously they're not current?

A. They're, they're not this year's lists, that's correct.

Q. And obviously therefore the accuracy of the people on the list, the numbers, we don't know how accurate they really are?

A. That's, yeah, exactly. It's all we have but that's what we use.

Q. And I take it therefore that would mean that the population on the reserves could be higher than what, what you could guesstimate it to be?

A. I don't think the issue is the statistical population on the reserves. I think we get that from, from an independent source so that in terms of applying the formulas, those numbers, we don't rely on old band lists for those numbers. We just rely on the old band lists for selecting the names, for those that decline to send in updated lists.

Q. But by the, I guess the fact of the matter is though you're relying on documents and information which are, which are very stale in terms of the electoral lists?

A. I'm, they're not current. Whether or not they're very stale I'm not in a position to say, I don't know. But they're not current...

Q. Okay.

A. ...apart from the two that sent in.

Q. Okay. And is it fair to say that no efforts are made by sending people inside the reserves to try and get the information?

A. Not to date, to my knowledge.

Q. A brief indulgence Your Honour?

THE COURT: Yes.

MR. HINKSON: Q. Now you were aware I take it of this, of this case before hand I take it? Were you aware of the issue with the Coroner's office?

A. I was given it about an hour ago.

Q. Now this issue arose back in 2009 and I take it, it must have been a source of discussion amongst the members of your Ministry and also your, your superiors? Are you aware of that at all, any discussion with your superiors at all about this issue?

A. About the issue in the, in the case?

Q. That's right?

A. No. I wasn't, sorry.

Q. So Mr. Gordon and so forth never, you never had any discussions with Gordon about this whole issue?

A. We, we had discussions about, about jury lists and so on when, because it's an annual event, we send out the documentation annually to the First Nations. So there was, there was senior management meetings and so on and so forth surrounding

that process and making sure we were in compliance with the policy and so on.

Q. Even though when this whole issue was raised back in I'd say early 2009 about the, the composition of the jury array, that was never part of your discussion, discussion amongst management?

A. I have no memory of that, no, I don't.

Q. Okay?

A. As I say, our focus was on ensuring compliance with direction from corporate office.

Q. Okay. And when you compliance with corporate office, you're talking about the 2 percent number and 30 percent number?

A. That's correct.

Q. You weren't really concerned about the numbers of people who were responding back to the requests for...

A. We weren't aware of those numbers. They go to the, to the Jury Centre so I'm not aware of the response rate.

Q. So, so you didn't, were not aware that the bands were not responding back to the...

A. I, we had no knowledge of that. The, the only interaction we had with the bands was their declining for the most part to submit updated electoral lists. I have no idea the number of individuals that responded or did not respond to the Jury Centre.

Q. So, okay, but you just knew the number of bands who had not responded?

A. Who were not submitting an enhanced list, that's correct, yes.

Q. And so when this whole issue came up in the, 2009, no efforts were made to re-address or address this issue at all?

A. Other than the directive we received from corporate office, no.

Q. And, and you yourself are, you get to view the jury lists and panels themselves that come to this court room, this court house?

A. Not as a regular part of my duties, no.

Q. It was never brought to your attention that the number of natives on the panels were, was rather low or absent?

A. It wasn't raised with me, no.

Q. Okay, thank you. No further questions.

THE COURT: Any re-examination Mr. Kozak?

MR. KOZAK: No, Your Honour.

THE COURT: Thank you Mr. Blaquiere. You may step down.

MR. KOZAK: Q. Oh, I'm sorry, there is some further evidence that we're hoping to receive that might assist the court, is the 15 First Nation bands?

A. Yes.

MR. KOZAK: Q. How much longer would it take to get that information?

A. This is the, this is the tracking sheet that I mentioned that Ms. Hinterbrandner does...

MR. KOZAK: Okay, I'll just read into the court record then Your Honour, 15 band names Your Honour. I'll just read them in one by, one by one.

THE COURT: Thank you.

MR. KOZAK: I'll just have to spell the first one.

I won't try to pronounce it Your Honour. It's three words. The first is A-N-I-M-B-I-I-G-O-O.

The second name is with an apostrophe in the centre so I'll start with Z-A-A-G-I'I-G-A-N and the last name I'm comfortable in pronouncing, Anishinaabek,

5 A-N-I-S-H-I-N-A-A-B-E-K. That's number 1 Your Honour. Number 2 is Aroland, A-R-O-L-A-N-D. The third name Your Honour, again I'll just spell in the first two words, B-I-I-N-J-I-T-I-W-A-A-B-I-K. THE COURT: I'm sorry, I-W...

10 MR. KOZAK: Sorry, I-W-A-A-B-I-K. Zaaging is the second word, Z-A-A-G-I-N-G and the third is Anishinaabek, A-N-I-S-H-I-N-A-A-B-E-K. That's number 3. Then carrying on to number 4, Fort William First Nation. Number 5 Your Honour is Ginoogaming, G-I-N-O-O-G-A-M-I-N-G. The next First Nation Your Honour is Gull Bay, just as it sounds, G-U-L-L B-A-Y. The next is Lac Des Mille Lacs, L-A-C D-E-S M-I-L-L-E L-A-C-S. The next is Long Lake Number 58. The next Your Honour is Martin Falls, M-A-R-T-I-N Falls. Next Your Honour is Ojibways of the Pic River, O-J-I-B-W-A-Y-S of the P-I-C River. Next Your Honour, Pays Plat, P-A-Y-S P-L-A-T. Next Your Honour, Pic Mobert. Next Red Rock. Second last Your Honour, Bingwi Neyaashi Anishinaabek, three words, B-I-N-G-W-I, second word N-E-Y-A-A-S-H-I...

20 THE COURT: N-E-Y...

MR. KOZAK: Yeah...

25 THE COURT: ...S-H-

MR. KOZAK: ...I'm sorry, N-E-Y-A-A-S-H-I.

THE COURT: A-A-S-H-I.

MR. KOZAK: S-H-I, yes.

THE COURT: Okay.

30 MR. KOZAK: And then Anishinaabek, A-N-I-S-H-I-N-A-A-B-E-K. And the last Your Honour is White Sand

First Nation territory. So those are the 15 First Nation territories.

THE COURT: Thank you.

MR. HINKSON: Q. Your Honour, just one question I had of Mr. Blaquiere, maybe he can tell me from the body of the court, if I could pose a question Your Honour?

THE COURT: Yes, go ahead.

MR. HINKSON: Q. Just the population of the two bands that you know responded back?

A. We could get that for you...

COURT REPORTER: I'm sorry Your Honour, I didn't hear the answer.

THE COURT: The answer was, "We can get it for you in a couple of minutes."

A. 410 for Aroland and 783 for Gull Bay.

MR. HINKSON: Thank you.

THE COURT: Thank you. Any further questions for Mr. Blaquiere?

MR. KOZAK: No, none Your Honour.

MR. HINKSON: Not from myself Your Honour.

THE COURT: Thank you. Ms. Hinterbrandner?

MR. KOZAK: Is there any information you have to add?

MS. HINTERBRANDNER: No.

MR. KOZAK: That's the evidence on the voir dire Your Honour. I know there's some answers that aren't, weren't available. They are answers that will be required out of London so I'm not sure if Your Honour requires further information to consider this issue and if so we'll have to obtain an estimate as to when that information would be available for the Court.

THE COURT: Are counsel prepared to make submissions on the evidence before the court?

MR. HINKSON: I, I am Your Honour.

THE COURT: As to the Crown?

MR. KOZAK: Yes Your Honour, we, we are.

THE COURT: All right. I will hear submissions then.

SUBMISSIONS BY MR. KOZAK:

Your Honour the Court of Appeal is, provides clear direction to the courts. I, I'll be quite clear Your Honour. I don't want to advocate one position or another that there has been compliance with the direction. We've heard from Mr. Blaquiere what has taken place or at least the policies that have taken place. There are pieces of information that certainly would assist the court to coming to conclusions and that information perhaps Your Honour can glean are from questions that I had asked for which no answers were available and that deals with the issue of letters that hadn't been received by the addressee on General Delivery. There's no information available as to how many of those had been returned. There is no information with respect to statistical information before the court at this point in time as to how many responses they've received from those selected band, randomly drawn band members. The court has now received the 15 listed communities. You have before you a jury list and I did not see any of those First Nation communities in my perusal of the

150 names on that list. Oh, I leave it to Your Honour whether or not perhaps this jury list should become an exhibit on the voir dire. I believe that we're referring to it now in light of some testimony so...

THE COURT: Yes, I think that is wise. The jury list will be marked as Exhibit A on the voir dire.

MR. KOZAK: I just have my copy. I'm sure there's other copies that could be marked as an exhibit.

THE COURT: Yes, there is a copy.

MR. KOZAK: I know Madam Clerk was reading from one...

THE COURT: Thank you.

MR. KOZAK: ...this morning.

EXHIBIT A TO VOIR DIRE: Copy of jury list - produced and marked

MR. KOZAK: Some of the information that is certainly relevant before the Court of Appeal that is not before this court is what is the First Nation population in the District of Thunder Bay and how many of those members are contained in the jury roll. That information is not before the court but I believe that is a factor for Your Honour's consideration into the issue of whether or not we have a representative panel.

I leave the matter entirely in Your Honour's hands from the Crown's perspective. We certainly would want to proceed with a trial only if the Court is confident that we have a properly convened panel. It is not the Crown's wish to try Mr. Wareham before a panel that would cause any issue that the Court of Appeal would overturn any decision made by

5 that jury panel so certainly the Crown's concern is
if this case is going to proceed, it should proceed
in a fashion that's unassailable by any higher
Court and that we proceed with the direction we've
received from the Ontario Court of Appeal. Yes,
just to confirm on the record something that I did
review and canvas with counsel Your Honour,
formally this is not a challenge under the *Criminal*
10 *Code* for the jury panel under 629. There are
certain listed grounds for which a panel could be
challenged. None of those are existent before the
Court today so this is a matter of the Court's
inherent jurisdiction dealing with an issue raised
by the Ontario Court of Appeal. Subject to any
15 questions Your Honour has, those are my
submissions.

THE COURT: Thank you. Mr. Hinkson?

MR. HINKSON: Yes Your Honour, I concur with the
20 comments made by my friend but also there is I
think one that really jumps out at you when you
heard the testimony of Mr. Blaquiere that out of 15
bands only 2 really are brought into the mix of the
whole scheme of things in terms of the jury array
and if one considered that the composition of the
25 jury should be representative of the whole
community, if we're talking about 2 bands out of
15, and we don't know what percentage that is of
even of the whole population of the native
population in the area. What compounds the
30 situation even more so is that it's been going on
for a lengthy period of time and the fact that we
know that there have been problems in terms of

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responses from the bands, has not been addressed or re-addressed by the Federal Government in terms of the problem of the representation of natives in terms of the panel itself. So hence we have a situation which has been going on for a lengthy period of time. It, the status quo seems to be maintained but not looked into. We therefore cannot conceivably have a representative jury of one's peers for this community if the pool from which it is chosen from is severely diluted. It would seem that even though that the issue had been raised back in early 2009 from the, in this particular case at the lower level, there have been no efforts to really even address the issues of the electoral composition and the jury array.

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So really in effect what's been happening in the past has not been addressed, even when we speak to the matter today before this Court, these issues were raised beforehand and the powers that may be sought not to address them. That being the case Your Honour, then it's my submission that there's not, could not be a properly constituted jury in this case if the roll itself is not representative of the community of Thunder Bay and specifically not being not representative of individuals who constitute the native population. And that being the case Your Honour, I cannot see how we could therefore then conduct a trial which requires a properly constituted jury where we'd be lacking in that area. Those are my submissions Your Honour.

THE COURT: Thank you. Any reply Mr. Kozak?

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MR. KOZAK: Your Honour, just, just to make sure and it's something I perhaps should have put on the court record, the facts that we're dealing with here Your Honour do not specifically deal with, the trial matter itself doesn't deal with First Nation issues but that shouldn't factor in Your Honour's decision but I just want to make it clear on the court record, we're dealing with a person, an accused person that's not an Aboriginal person. The deceased is not an Aboriginal person but nonetheless, the issue should be decided independently of whether the trial involves a First Nation person or, or not so it's the Crown's position the decision should be independent of that.

THE COURT: Thank you.

PIERCE, J.: ORALLY

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[1] The issue raised on the voir dire in this case is whether the jury panel as currently formulated is representative of the community as a whole. The issue has come to the attention of counsel and the Court as a result of the Court of Appeal's decision in *Pierre v. McRae* released last week.

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[2] The evidence on the voir dire establishes that since the year 2000 the Department of Indian Affairs has not forwarded current lists, band lists for the First Nations in the District of Thunder Bay. Since that time the Court Services Division has undertaken a process of requesting from each

band their current list and the evidence before me is that of the 15 reserves in the Thunder Bay District, only 2 have replied by submitting their band list in the year 2010, which is the most recent year to which this process applies.

[3] Additionally, randomly selected individuals are contacted by letter addressed to them at General Delivery at their respective bands. The evidence is that 2 percent of the individuals in each band are selected randomly and the correspondence requesting a response to jury notice is sent to them. It is not known how many of those responses are forwarded to the Jury Centre in London, Ontario.

[4] It is also the case that the Court Services Division has attempted to work from old lists in order to contact individuals who may be eligible for jury duty on the reserves but it is unknown how effective that mechanism is, given that these lists are dated.

[5] It is evident to me on the testimony before the Court that the process for selecting members of the First Nation communities to serve on jury panels is not representative of the population of the District of Thunder Bay in that only 2 bands have forwarded, 2 out of 15 bands have forwarded their current list for that purpose and a small number of individuals are contacted and we do not know what the response rate is from the individuals.

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5 [6] Therefore of the jury panel as comprised,
(which I might say offers no assistance as to
whether there are any individuals resident on the
reserves in the Thunder Bay District), I am drawn
to the conclusion that the panel is not
representative in the sense that is contemplated by
the Court of Appeal in *Pierre v. McRae* and
understanding that this voir dire is distinct from
10 the challenge to the array contemplated in the
Criminal Code.

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The Honourable Madam Justice Pierce