Court File No. 35475

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

Her Majesty the Queen

Appellant

-and-

Clifford Kokopenance

Respondent

FACTUM OF THE INTERVENER, NISHNAWBE ASKI NATION

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PART I – OVERVIEW

1. In this appeal, Ontario takes the extraordinary position that there is no constitutional requirement for First Nation residents to be represented on jury rolls. Ontario submits that section 6(8) of the *Juries Act*, RSO 1990 c J.3, the sole means by which people who live on reserves may become jurors, could be repealed tomorrow without impacting the validity of provincial rolls. In Ontario's view, the Crown has no duty to deal honourably with First Nations in compiling the jury roll. It states that consultation with Aboriginal Peoples regarding jury representativeness "is a policy decision and not a constitutional imperative."[1]

2. This Honourable Court has decried the estrangement of Aboriginal Peoples from the justice system in a series of decisions originating with *R v Gladue*.[2] In *R v Ipeelee*, this Court observed that the crisis of Aboriginal justice has gotten worse, not better.[3] The record in this appeal shows that decreased involvement with juries is part of that trend.[4] The Honourable Frank Iacobucci concluded that First Nations are "significantly underrepresented" on Ontario juries, and that this a symptom of the dysfunctional relationship between the justice system and Aboriginal Peoples.[5] In view of the Crown's position in this case, this should not be surprising.

3. Nishnawbe Aski Nation ("NAN") submits that the resolution of these systemic issues depends on the development of respectful government-to-government relationships. It is unconscionable for the Crown to impose an alien justice system on First Nations without guaranteeing the procedural rights of First Nation residents in that system. Ontario's position on this appeal is untenable for three reasons. First, it would eviscerate the meaning of jury representativeness as it has evolved in our jurisprudence. Second, it marginalizes the special relationship between Aboriginal Peoples and the Crown. Third, it ignores the context of Aboriginal disadvantage and exclusion from the justice system, in which the assertion of Crown sovereignty is the overarching causal factor. NAN submits that the Crown has an extraordinary obligation to work with First Nations to address systemic rights deficits that are the legacy of colonialism.

PART II – STATEMENT OF POSITION

4. NAN adopts the facts as stated by the Respondent. NAN would answer the questions raised by the Appellant as follows:

i. Jury representativeness means a fair opportunity for the inclusion of distinctive community perspectives, with regard to the special relationship between Aboriginal Peoples and the

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[1] Appellant's factum, paras 55, 71.
[2] [1999] 1 SCR 688 (SCC) [*Gladue*].
[3] 2012 SCC 13 at para 62 [*Ipeelee*].
[4] *R v Kokopenace*, 2013 ONCA 389 at paras 67, 73 [*Kokopenace*]; *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci*, (Toronto: February, 2013) at para 49 [Iacobucci Report].
[5] Iacobucci Report, *supra* at paras 15, 54.

Crown and the unique circumstances of First Nation residents. The state must implement a mechanically sound process to ensure the representativeness of its jury rolls. Any jury roll generated from an unsound selection process is a violation of ss. 11(d) and (f) of the *Canadian Charter of Rights and Freedoms* ("the *Charter*")[6] that must be justified under s. 1.

ii. Ontario's selection process in this case was inadequate when viewed contextually.

iii. NAN supports the submissions of the Respondent with respect to remedy.

PART III – STATEMENT OF ARGUMENT

A. NAN'S MANDATE AND EXPERIENCE

5. NAN is the political territorial organization representing the political, social and economic interests of 49 member First Nations throughout the province of Ontario. NAN territory encompasses James Bay Treaty No. 9 and Ontario's portion of Treaty No. 5. NAN territory has a total land mass covering two-thirds of Ontario, spanning an area of 210,000 square miles, west to the Manitoba border, east to the Quebec border and north of the 51st parallel to James Bay and Hudson Bay. It has an approximate population of 45,000.

6. NAN territory is "ground zero" of the problem of First Nation exclusion from juries in Ontario, as well as the broader crisis within the justice system in Northern Ontario.[7] NAN represents 29 of the 46 First Nations in the Kenora District, the setting for this appeal.

7. As recognized by Justice Iacobucci in his Independent Review of First Nation Representation on Ontario Juries ("the Iacobucci Report"), "NAN has been instrumental in helping to focus public and judicial scrutiny on the issue of Aboriginal underrepresentation on Ontario Jury rolls and in setting up this Independent Review".[8] This included:

i. Writing to the Ontario Attorney General to raise the issue of First Nations underrepresentation in 2008 after the "Peacock Affidavit" was filed at the Inquest into the Death of Jamie Goodwin and Ricardo Wesley, where NAN was a party;[9]

ii. Commencing judicial review proceedings to challenge the validity of the jury roll in the Inquest into the Death of Reggie Bushie (culminating in the Court of Appeal for Ontario's decision in *Pierre v McRae*; *sub nom NAN v Eden*);[10] and,

iii. Intervening in this appeal in the Court below, where NAN played an integral role in building the record as the Court of Appeal received fresh evidence as the court of first instance on the issue of jury representativeness.

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[6] *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[7] Iacobucci Report, *supra* at para 368.
[8] Iacobucci Report, *supra* at paras 53-62.
[9] Affidavit of Rolanda Peacock, *AR*, v 10, p 205-206.
[10] 2011 ONCA 187 [*Pierre*].

8. The Order-in-Council that struck the Iacobucci Review specifically recognized NAN's pre-eminent role in advancing the issue of First Nation jury representation,[11] and NAN actively participated in proceedings before Justice Iacobucci.[12] Presently, the Deputy Grand Chief of NAN responsible for Justice, Alvin Fiddler, is the co-chair of the Iacobucci Implementation Committee, the entity responsible for implementing Justice Iacobucci's recommendations.[13]

B. THE CROWN'S OBLIGATION TO ENSURE JURY ROLL "REPRESENTATIVENESS"

i. The right to a representative jury

9. Representativeness and impartiality are the foundational elements of a properly constituted jury. Representativeness is an end in itself, as it allows the jury to act as the "conscience of the community" and instil public confidence in the justice system. The selection of jurors from a representative roll is also a means of ensuring impartiality. As such, the right to a representative jury is guaranteed by the *Charter* under both the s. 11(d) right to an impartial tribunal and the s. 11(f) right to a trial by jury.[14] These rights are components of the right to a fair trial, which is "the foundation upon which our justice system rests" and which "can neither be denied nor compromised".[15]

10. Of course, the representativeness right is inherently qualified. Absolute representativeness is an impossible ideal for a number of reasons.[16] The Court of Appeal therefore recognized that the right to a representative jury is really the right to a jury chosen through a fair process. The Court unanimously held that the selection process must provide a "fair opportunity" for the distinctive perspectives that make up the community to be included in the jury roll.[17] NAN submits that the essence of this requirement is a mechanically sound process that is objectively capable of generating a representative jury roll, considering any relevant information the state knew or ought to have known, and assuming reasonable cooperation.

11. In contrast, Ontario takes the position that the right to a representative jury is simply a negative freedom from deliberate exclusion.[18] The only positive obligation that Ontario sees for itself is to make reasonable efforts to access and use "a broad-based list" in preparing the jury roll."[19] In Ontario's view, that list need not include First Nation residents because there is no need for proportionate representation on the

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[11] Iacobucci Report, *supra* at 95 (Order in Council 1388/2011).
[12] Iacobucci Report, *supra* at paras 62-63.
[13] http://www.attorneygeneral.jus.gov.on.ca/english/juries_implementation_committee.asp
[14] *Kokopenace*, *supra* at paras 25-28; *R v Sherratt*, [1991] 1 SCR 509 (SCC) at 523-525 [*Sherratt*]; *R v Church of Scientology*, 33 OR (3d) 65 (Ont CA) at 118-119 [*Church of Scientology*].
[15] *R v Harrer*, [1995] 3 SCR 562 (SCC) at para 40.
[16] *Church of Scientology*, *supra* at 120-121.
[17] *Kokopenace*, *supra* at para 31.
[18] Appellant's factum, paras 37, 54.
[19] Appellant's factum, paras 37, 62, 64.

jury roll.[20] This logic is not internally coherent. It conflates the representativeness of the ultimate jury roll with the representativeness of the lists that are used to generate it. Taken to its logical conclusion, it would authorize the total exclusion (by omission) of First Nation residents from Ontario juries.

12. This Court has observed that provincial legislation guarantees representativeness through a "random selection process, coupled with the sources from which this selection is made".[21] Systematically omitting sources of First Nation residents is a form of sampling bias that undermines that guarantee. Sampling bias occurs where some members of the intended population (in this case, eligible jurors resident on reserves) are less likely to be included than others. A biased sample is inherently non-random. The process of generating a jury roll from a biased source list is therefore non-random as well. It does not constitute selection from a "representative cross-section of the community".[22] Regardless of whether the bias is deliberate, or effected by means of action or omission, it is fatal to random selection. For sampling purposes, proportional representation is thus essential with respect to the *source lists* used for jury roll selection and is the ideal that must be pursued at that stage of the jury preparation process.

13. This does not impose a standard of perfection on the Crown.[23] However, given that jury representativeness is a fundamental feature of trial fairness,[24] it does impose a standard of competence. At the stage of generating source lists, results clearly do matter. Although a random selection process cannot guarantee the ultimate representativeness of the roll, the selection process cannot be random if it does not operate on representative lists. By changing the subject to proportional representation on the final jury rolls,[25] Ontario is seeking to abdicate its stewardship of the process used to generate those rolls. In fact, the Court of Appeal and the Crown agree that jury rolls must be selected randomly. However, the principle of randomness, and therefore representativeness, is defeated if the "broad-based" list used to select the roll systematically excludes certain groups.

14. Any assessment of Crown efforts in preparing the jury roll must account for the fundamental need to ensure the integrity of the selection process. Ontario acknowledges that "poor results may require the state to look into the reasons why, and to make reasonable efforts to address the cause," but also suggests that it has

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[20] Appellant's factum, paras 55, 71.
[21] *Sherratt, supra* at 525.
[22] Appellant's factum, para 54; *Sherratt, supra* at 524.
[23] Representativeness is easily measured at the stage of compiling source lists, because it does not require an inquiry into the demographic characteristics of particular individuals, as it would in analyzing the jury roll itself. Instead, the question is simply whether there are any systematic omissions from the list. Only then is further inquiry required, at which point the issue is whether the excluded groups, *as a whole*, are likely to possess distinctive characteristics that affect the representativeness of the sample.
[24] *R v Williams*, [1998] 1 SCR 1128 at para 47 [*Williams*]; *Pierre, supra* at para 28; *R v Stillman*, [1997] 1 SCR 607 at para 72.
[25] As noted by the Respondent, this was never suggested in the majority judgment: Respondent's factum at para 49.

no responsibility "beyond the process of getting questionnaires into the hands of recipients."[26] NAN submits that this would make a mockery of the representativeness right. In a criminal trial, a representative jury is the right of an accused person who is facing an asymmetric and adversarial contest with the state; a contest that is faced disparately by Aboriginal Peoples. It is no fault of the accused if the state's process fails to generate a representative jury roll, but it is the accused that faces the consequences. If the state does not follow up on the notices it sends, nobody else can.

15. Accordingly, the Court of Appeal recognized that the state's obligation is not confined to simply compiling lists of names for random selection to the jury roll. The state must also make reasonable efforts to facilitate the delivery, receipt, and return of jury notices and to enter eligible respondents on the roll.[27] Results matter at these stages as well, in that they inform the context of what the state knew or ought to have known, and hence the reasonableness of its efforts. The test proposed by NAN applies at every stage: the state's efforts must be objectively likely to facilitate representativeness in the context of its imputed knowledge and the assumption of reasonable cooperation. Anything less would fail to acknowledge the fundamental importance of the trial fairness rights in s. 11. NAN submits that a jury roll generated from an unsound selection process is a violation of ss. 11(d) and (f) of the *Charter* that must be justified under s. 1.[28]

ii. The context of Aboriginal estrangement

16. In addition to the duties set out above, NAN submits that Ontario has an extraordinary obligation to give effect to constitutional rights respecting the administration of justice on First Nations. These arise from the extraordinary circumstances of First Nation communities. The obligations have two sources: the well-known estrangement of Aboriginal Peoples from the justice system, and the special relationship between First Nations and the Crown. These implicate both the individual's fair trial rights under s. 11 of the *Charter* and the community's right to equal participation in the justice system under s. 15.

17. As submitted above, the state is always obliged to provide a mechanically sound process for selecting the jury roll. The soundness of that process is informed by the feedback received by the state and any other knowledge that it possessed or ought to have possessed. With respect to the representation of First Nations,

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[26] Appellant's factum at paras 3 and 61.
[27] *Kokopenace*, *supra* at para 45-51.
[28] Unlike the American test for jury representativeness, which requires collection of race/ethnicity information from prospective jurors and a contentious demographic analysis of the underlying community (see *Duren v Missouri*, 439 US 357), NAN's submission focuses solely on the contextual integrity of the process employed by the state. Given that jury representativeness is the right to a fair selection process, a *Charter* violation is not established by examining the roll itself. Instead, a challenge to the roll must show that the state made systemic errors with respect to the inclusion of distinctive groups in the selection process. Since the ultimate composition of the roll cannot be guaranteed by random selection and is not protected by the representativeness right, the question of whether the unsound process actually resulted in an unrepresentative roll is not relevant to the existence of a *Charter* breach. If the process is unsound, the breach is established and must be justified under s. 1.

a significant contextual factor within the knowledge of the state is the estrangement of Aboriginal Peoples from the justice system. In his Independent Review, Justice Iacobucci reflected on the interaction between Aboriginal estrangement and participation on juries, stating:

> it became apparent almost immediately from the start of the Independent Review that the problems with improving the representation of First Nations peoples on juries are inextricably connected with problems arising from the justice system's treatment of members of First Nations generally.[29]

The Iacobucci Report noted that from the perspective of Aboriginals, the jury has often been used as an "instrument of injustice", including to punish behaviour viewed by the British as disloyal and to persecute the customary practices of First Nations on the grounds that they constituted criminal conduct.[30]

18. The s. 11(d) *Charter* right to an impartial jury is an anti-discrimination right in addition to a fair trial right. In *R v Williams*, McLachlin J (as she then was) noted that the s. 11(d) right must fall at the core of the equality guarantee under s. 15. In *Williams*, this Court recognized that widespread racism against Aboriginals includes stereotypes relating to criminal propensity. It adopted the finding of the Royal Commission on Aboriginal Peoples that this racism had translated into systemic discrimination in the justice system.[31] In *Gladue*, this Court noted that Aboriginals are overrepresented in virtually all aspects of the justice system and that Aboriginal estrangement had reached crisis proportions.[32] Most recently, in *Ipeelee*, this Court came to the troubling conclusion that the "crisis" had actually gotten worse, and directed that:

> courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.[33]

19. Writing for the majority in *Ipeelee*, LeBel J held that these underlying conditions form the context for understanding case-specific information.[34] NAN submits that this historical perspective must also inform the context of Ontario's process for ensuring jury roll representativeness. In particular, it must be considered in any causation analysis. Ontario appears to have profoundly misread the Iacobucci Report in claiming it demonstrates that the state was unable to control the causes of its failure to create a fair process for compiling the jury roll.[35] As described above, Ontario would deprive the representativeness right of meaning through its argument that the state has no control, and by implication no responsibility, for issues that arise after the

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[29] Iacobucci Report, *supra* at para 352; see also at paras 14-15, 54.
[30] Iacobucci Report, *supra* at para 79.
[31] *Williams*, *supra* at paras 47-48, 58.
[32] *Gladue*, *supra* at paras 58-65.
[33] *Ipeelee*, *supra* at para 60.
[34] *Ipeelee*, *supra* at paras 59-60.
[35] Appellant's factum, para 61. The Report emphasizes that current practices followed by Court Services officials are inadequate, that steps must be taken to obtain an accurate record of individuals living on Reserve, and that "it is clear that much more needs to be done": Iacobucci Report, *supra* at para 374. These concerns mirror findings of the majority of the Court of Appeal, which noted a host of failures well within Ontario's immediate control: *Kokopenace*, *supra* at paras 94, 103-108, 162-188, 201-212, 258-277.

compilation of source lists. That position is even more troubling in the context of Ontario's demonstrated failure to facilitate First Nation responses, and its historical responsibility for the root causes of estrangement. What the Iacobucci Report really demonstrates is that some (but not all) of the obstacles to First Nation participation on juries arise from social and economic conditions, geography, and cultural differences.[36] NAN submits that these factors must be considered in their historical context.

20. As noted in *Ipeelee*, any analysis of social conditions must account for the colonial relationship between Aboriginal Peoples and the Crown. A historical analysis also highlights the fact that the very existence of remote "Indian reservations" is an artifact of colonialism. They only exist in lieu of traditional First Nation territories because Aboriginal Peoples were displaced by European settlers. The creation of Reserves was consideration in the treaties that allowed the Crown to claim First Nation land without conquest. There is thus a direct, causal relationship between the historical actions of the Crown and the current social and geographical circumstances of First Nations. It does not lie in the mouth of the Crown to state that the problems it helped create are now out of its control.

21. With due consideration to this context, *Charter* values dictate that Ontario must be held to a unique standard of effort with respect to ensuring First Nation representation on jury rolls. Many of the Crown policies that have historically contributed to the disadvantage faced by First Nations were animated by good intentions.[37] *Charter* values require more than good intentions. The Crown must take responsibility for its colonial history, in part by engaging in respectful consultations with First Nations. The only obstacle identified by Justice Iacobucci with respect to First Nation participation on juries that exists independently of colonialism is cultural difference. The impact of this factor has been exacerbated by "well-intentioned" but unilateral Crown policies.[38] Like all the other factors that affect First Nation participation on juries, the effect of cultural difference could be addressed (if not eliminated) by incorporating First Nation perspectives. Indeed, NAN respectfully submits that frank government-to-government dialogue is an obligation imposed by the Honour of the Crown.

iii. The Honour of the Crown is engaged

22. The Honour of the Crown applies to obligations that are specifically owed to an Aboriginal group.[39] NAN submits that the Honour of the Crown is engaged because the jury selection process requires the state

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[36] NAN's submissions in this regard are described in the Iacobucci Report, *supra* at paras 261-289.
[37] Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back*, (Ottawa: Ministry of Supply and Services Canada, 1996) at 271-273. "Good intentions" led to legislative provisions that barred Indians from leaving reserve lands without the permission of an Indian agent, prevented Indians from hiring lawyers, outlawed cultural traditions, exiled Indian women from their communities for marrying non-Indian men, and justified the residential school policy.
[38] Truth and Reconciliation Commission of Canada, *They Came for the Children*, (Winnipeg: 2012) at 1-4, 10.
[39] *Manitoba Metis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14 at para 72 [*Manitoba Metis*].

to interact differently with individuals who exercise their treaty right to live on Reserves. The Honour of the Crown reflects the constitutional principle that "[i]n all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably."[40] This Court has recognized that the duty arises because European laws and customs were superimposed on pre-existing Aboriginal societies. It exists to reconcile those pre-existing interests with the assertion of Crown sovereignty:

> Aboriginal peoples were here first, and they were never conquered; yet, they became subject to a legal system that they did not share. Historical treaties were framed in that unfamiliar legal system, and negotiated and drafted in a foreign language. The honour of the Crown characterizes the "special relationship" that arises out of this colonial practice. As explained by Brian Slattery:
>
> > . . . when the Crown claimed sovereignty over Canadian territories and ultimately gained factual control over them, it did so in the face of pre-existing Aboriginal sovereignty and territorial rights. The tension between these conflicting claims gave rise to a special relationship between the Crown and Aboriginal peoples, which requires the Crown to deal honourably with Aboriginal peoples.[41]

23. The Honour of the Crown doctrine has been criticized for failing to question the legitimacy of the Crown's assertion of sovereignty.[42] However, this Court has explained that the principle "did not arise from a paternalistic desire to protect the Aboriginal peoples; rather, it was a recognition of their strength."[43] To provide a meaningful return on the pre-existing sovereign rights of Aboriginal Peoples, the Crown must strictly honour the rights it undertook to provide in consideration. In this case, two treaty interests are engaged: the right of First Nation members to live on Reserves,[44] and the right to nevertheless participate in an impartial justice system.[45] The Honour of the Crown applies because in order to allow First Nation members who reside on Reserves to enjoy both rights at the same time, the state *must* treat them differently from other potential jurors.[46] Section 6(8) of the *Juries Act* may be viewed as a means of implementing these two rights.

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[40] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 17 [*Haida Nation*].
[41] *Manitoba Metis, supra* at paras 66-67.
[42] It has been labelled a crypto-Christian term with "clearly paternalist epistemological and political effects" that avoid the underlying normative question of whether the Crown had any right to simply declare itself the sovereign of territories that had been occupied for centuries by peoples who were never defeated in war: see Mariana Valverde, "'The Honour of the Crown is at Stake': Aboriginal Land Claims Litigation and the Epistemology of Sovereignty", (2008) 1:3 UCI L Rev 955 at 965-974; see also John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v British Columbia*", (1999) 37 Osgoode Hall LJ 537.
[43] *Manitoba Metis, supra* at para 66.
[44] First Nations' connection to their land has an important cultural component; it is not just a fungible commodity: *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85 at para 46 [*Osoyoos*].
[45] The Respondent is a member of Grassy Narrows First Nation. His band has a right to live on Reserve pursuant to Treaty No. 3, which promises to set aside land for use as Reserves and provides that the Indians governed by the Treaty "shall have right to pursue their avocations of hunting and fishing". In addition, the Treaty specifically states that the Indians shall be subjects of the Queen, obey the law, and "assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded." Under the modern principles of treaty interpretation enunciated in *R v Badger*, [1996] 1 SCR 771 at para 41, Treaty No. 3 can only be read to contemplate that the Indians would live on Reserves and maintain their traditional relationship with the land, but also participate fully in the justice system.
[46] The differential treatment of Reserve residents under s. 6(8) of the *Juries Act* was noted by LaForme JA: *Kokopenace, supra* at para 128. Contrary to Ontario's submission, s. 6(8) cannot be altered without being replaced by a similar provision, for the simple reason that First Nation residents are not inscribed on the municipal lists used for sourcing potential jurors from the rest of the population. As argued above, the outright failure to include First Nation residents on source lists would make random sampling

24. The Honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal Peoples.[47] In *R v Marshall*, this Court held that it would be dishonourable to interpret a treaty to confer a trading right while withholding access to the resources it was contemplated would be traded.[48] Instead, treaties must be interpreted in a manner that gives meaning and substance to promises made by the Crown. In this case, it would be unconscionable for the state to agree to set aside land for Aboriginal people to live on Reserves, partially in consideration for participation in the colonial justice system, yet fail to guarantee fair trial rights and the right to meaningfully participate in that justice system precisely on the basis of Reserve residence. As noted by LaForme JA, "the honour of the Crown is engaged to the extent that this historical context must be kept in mind when assessing Ontario's conduct for constitutional sufficiency."[49]

25. The Crown owes fiduciary duties to First Nations with respect to the creation, disposition and expropriation of Reserve lands because it involves assuming discretionary control over a specific Aboriginal interest.[50] Here the Crown, through its process for creating the jury roll, assumes control over the means by which First Nation people both enjoy fair trial rights and meaningfully participate in the justice system.

26. The reasonableness of the state's efforts to ensure First Nation representation on jury rolls must be assessed in light of the Honour of the Crown. This distinct obligation requires a continuous assessment of the results of the state's efforts with respect to First Nations. Where there are measurable deficits in First Nation representation, the state must make corresponding efforts aimed at addressing those deficits in the following year's roll. It is necessary to continuously evaluate the results of the state's efforts at inclusion, in order to determine whether additional efforts are required. The "reasonableness" cannot be assessed absent an assessment (in each successive year) of whether the efforts were successful, and how they could be improved.

27. The Appellant states that Honour of the Crown "is an important part of this Court's reconciliation toolbox."[51] Respectfully, NAN asserts that the Honour of the Crown is not a remedy of this Court; it is a characteristic of a relationship.[52] This process of fair dealing entails different duties in different circumstances.[53] In the present context, NAN agrees with LaForme JA that the consultation principles from

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impossible and violate the representativeness right. Given the estrangement of Aboriginal Peoples from the justice system and the remoteness of many Reserves, Ontario also has increased and unique obligations towards First Nation residents at the follow-up stages of jury roll preparation.

[47] *Manitoba Metis, supra* at para 73.

[48] *R v Marshall*, [1999] 3 SCR 456 at para 52.

[49] *Kokopenace, supra* at para 127.

[50] *Osoyoos, supra* at para 46*; Wewaykum Indian Band v Canada*, 2002 SCC 79 (CanLII) at paras 78-81, 98-104.

[51] Appellant's factum, para 66.

[52] In the context of land claims,"[r]econciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*": *Haida Nation, supra* at para 32 (emphasis added).

[53] *Haida Nation, supra* at para 18.

land claim jurisprudence are relevant to an assessment of the state's efforts.[54] The Honour of the Crown requires that the state's efforts be respectful of the special historical relationship between the Crown and Aboriginal People. As emphasized by the Iacobucci Report, a "government-to-government relationship… must underlie the relationship between Ontario and First Nations going forward in dealing with justice and jury representation issues."[55] Unfortunately, the type of considerate engagement process undertaken by the Independent Review itself was entirely absent from Ontario's efforts in this case.[56]

C. A CONTEXTUAL INTERPRETATION OF CROWN EFFORTS

28. NAN submits that Ontario's efforts in preparing the 2008 jury roll for the District of Kenora were deficient at every stage of the process when assessed against the constitutional standards outlined in this factum. In particular, NAN agrees with LaForme JA's finding that "MAG's approach to the resolution of the problem of representativeness of on-reserve Aboriginals on jury rolls has been to leave the process in the hands of junior members of the public service". As noted by LaForme JA:

> despite the recognition that First Nations have existing governments, the province left a lower-level bureaucrat – who was neither trained in her duties nor on the reality of First Nations' relations with Ontario – to facilitate the bulk of the efforts in approaching the Chiefs of First Nations for updated band lists, inconsistent with the status of First Nations as governments…. In my view, MAG's delegation of its responsibilities to area CSD workers on this critical problem was not a reasonable approach. The question could be asked: if 46 municipalities in a given judicial district were showing the same critical results as First Nations reserves were in this case, would Ontario have gone about resolving the problem through the sole efforts of a junior bureaucrat?[57]

29. The Crown's failures had real consequences for the administration of justice. As the trier of fact, a jury brings to bear on its decision a sense of justice shared by the larger community.[58] The Kenora district jury roll was deprived of the distinct perspectives of a distinctive segment of that larger community. In the context of First Nation communities, it is impossible to interpret the right to a representative jury without reference to the communal experience of First Nation residents and their unique relationship to the Canadian justice system and the Crown.

PART IV & V – COSTS & INTERVENER'S POSITION

30. NAN seeks no costs and asks that no costs be awarded against it. NAN submits that the appeal should be dismissed. NAN respectfully requests permission to present oral argument for up to 30 minutes.

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[54] *Kokopenace*, *supra* at paras 130-134.
[55] Iacobucci Report, *supra* at para 356.
[56] Iacobucci Report, *supra* at paras 58-59; *Kokopenace*, *supra* at paras 133, 195-204, 273, 275.
[57] *Kokopenace*, *supra* at paras 195, 201-202.
[58] Law Reform Commission of Canada, *Working Paper 27: The Jury in Criminal Trials*, (Ottawa: Minister of Supply and Services Canada, 1980) at 10.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

July 30, 2014

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PART VI – TABLE OF AUTHORITIES

Cases		Paragraphs in Factum
1.	*R v Gladue*, [1999] 1 SCR 688 (SCC)	2, 18
2.	*R v Ipeelee*, 2012 SCC 13	2, 18, 19, 20
3.	*R v Kokopenace*, 2013 ONCA 389	2, 9, 10, 15, 19, 23, 24, 27, 28
4.	*Pierre v McRae*, 2011 ONCA 187	7, 13
5.	*R v Sherratt*, [1991] 1 SCR 509 (SCC)	9, 12
6.	*R v Church of Scientology*, 33 OR (3d) 65 (Ont CA)	9, 10
7.	*R v Harrer*, [1995] 3 SCR 562 (SCC)	9
8.	*R v Williams*, [1998] 1 SCR 1128 (SCC)	13, 18
9.	*R v Stillman*, [1997] 1 SCR 607 (SCC)	13
10.	*Duren v Missouri*, 439 US 357 (Sup Ct USA)	15
11.	*Manitoba Metis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14	22, 23, 24
12.	*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73	22, 27
13.	*Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85	23, 25
14.	*R v Badger*, [1996] 1 SCR 771 (SCC)	23
15.	*R v Marshall*, [1999] 3 SCR 456 (SCC)	24
16.	*Wewaykum Indian Band v Canada*, 2002 SCC 79	25

Secondary Material

1.	*First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci*, (Toronto: February, 2013)	2, 6, 7, 8, 17, 27
2.	Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back*, (Ottawa: Ministry of Supply and Services Canada, 1996)	21

PART VII – STATUTES, REGULATIONS, AND RULES RELIED UPON

Canadian Charter Of Rights And Freedoms, **Being Part I of the *Constitution Act, 1982***	***Charte canadienne des droits et libertés,*** ***constituant la partie I de la loi constitutionnelle de 1982***
PROCEEDINGS IN CRIMINAL AND PENAL MATTERS.	AFFAIRES CRIMINELLES ET PÉNALES
11. Any person charged with an offence has the right	**11.** Tout inculpé a le droit:
…	**…**
(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;	**(d)** d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;
…	**…**
(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;	**(f)** sauf s'il s'agit d'une infraction relevant de la justice militaire, de bénéficier d'un procès avec jury lorsque la peine maximale prévue pour l'infraction dont il est accusé est un emprisonnement de cinq ans ou une peine plus grave;
Equality rights	**Droits a l'égalité**
EQUALITY BEFORE AND UNDER LAW AND EQUAL PROTECTION AND BENEFIT OF LAW	EGALITE DEVANT LA LOI, EGALITE BENEFICE ET PROTECTION EGALE DE LA LOI
15. (1) Every individual is equal before and	**15. (1)** La loi ne fait acception de personne et

under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

AFFIRMATIVE ACTION PROGRAMS

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

PROGRAMMES DE PROMOTION SOCIALE

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

***Juries Act*, RSO 1990, c J.3**

***Loi sur les jurys*, RSO 1990, c J.3**

Jury service notices

6. …

Indian reserves

(8) In the selecting of persons for entry in the jury roll in a county or district in which an Indian reserve is situate, the sheriff shall

Avis de sélection de juré

6. …

Réserve indienne

(8) Pour dresser une liste de jurés pour un comté ou un district où se trouve une réserve indienne, le shérif sélectionne le nom des

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.

habitants de la réserve habiles à être membres d'un jury comme si la réserve était une municipalité et, à cette fin, il peut obtenir le nom des habitants de la réserve en consultant tout registre disponible.

Treaty 3 between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods

October 4, 1873

…And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and also to lay aside and reserve for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, in such a manner as shall seem best, other reserves of land in the said territory hereby ceded, which said reserves shall be selected and set aside where it shall be deemed most convenient and advantageous for each band or bands of Indians, by the officers of the said Government appointed for that purpose, and such selection shall be so made after conference with the Indians; provided, however, that such reserves, whether for farming or other purposes, shall in no wise exceed in all one square mile for each family of five, or in that proportion for larger or smaller families; and such selections shall be made if possible during the course of next summer, or as soon thereafter as may be found practicable, it being understood, however, that if at the time of any such selection of any reserve, as aforesaid, there are any settlers within the bounds of the lands reserved by any band, Her Majesty reserves the right to deal with such settlers as She shall deem just so as not to diminish the extent of land allotted to Indians; and provided also that the aforesaid reserves of lands, or any interest or right therein or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained.

…

Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.

…

And the undersigned Chiefs, on their own behalf and on behalf of all other Indians inhabiting the tract within ceded, do hereby solemnly promise and engage to strictly observe this treaty, and also to conduct

and behave themselves as good and loyal subjects of Her Majesty the Queen. They promise and engage that they will in all respects obey and abide by the law, that they will maintain peace and good order between each other, and also between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians or whites, now inhabiting or hereafter to inhabit any part of the said ceded tract, and that they will not molest the person or property of any inhabitants of such ceded tract, or the property of Her Majesty the Queen, or interfere with or trouble any person passing or travelling through the said tract, or any part thereof; and that they will aid and assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded…

Traités Nº 3 conclu entre Sa Majesté la Reine et la tribu des Saulteux de la nation des Ojibeways et un point situé à l'angle Nord-Ouest du lac des Bois

4 Octobre, 1873

…Et Sa Majesté la reine convient par les présentes et s'engage de mettre de côté des réserves de terres arables, l'attention voulue étant portée aux terres cultivées à présent par les dits Indiens, et aussi de mettre de côté et réserver pour le bénéfice des dits Indiens, pour être administrées et contrôlées pour eux par le gouvernement de Sa Majesté pour le Canada, de la manière qui semblera la meilleure, d'autres réserves de terres dans le dit territoire cédé par les présentes, lesquelles dites réserves seront choisies et mises de côté où il sera jugé le plus convenable et le plus avantageux pour chaque bande ou bandes des Indiens, par les officiers du dit gouvernement nommé pour cette fin, et tel choix sera fait après conférence avec les Indiens; pourvu cependant que telle réserve, pour cultiver ou autres fins, n'excède pas en tout un mille carré pour chaque famille de cinq, ou dans cette proportion pour des familles plus ou moins nombreusses ou petites, et tel choix sera fait, s'il est possible, durant le cours de l'été prochain, ou aussitôt après qu'il sera trouvé praticable, étant entendu cependant que si, au temps de tel choix de réserves comme susdit, il y a des colons dans les limites des terres réservées par une bande. Sa Majesté se réserve le droit de traitrer avec ces colons comme il semblera juste, de manière à ne pas diminuer l'étendue de terres accordée aux Indiens, et pourvu aussi que les réserves susdites de terres ou tout intérêt ou droit sur elles ou en dépendant, puisssent être vendus, loués ou aliénés autrement par le dit gouvernement pour l'usage et le bénéfice des dits Indiens, avec le consentement préalablement donné et obtenu des Indiens qui y ont droit.

…

Sa Majesté convient de plus avec les dits Indiens qu'ils, les dits Indiens, auront le droit de se livrer à la chasse et à la pêche dans l'étendue du pays cédé comme décrit ci-haut, sujet à tels règlements qui pourront être faits de temps à autre par son gouvernement du Canada, et excepté telles étendue qui pourront être nécessaires ou requises pour la colonisation, les mines, la coupe du bois ou autres fins par son dit gouvernement du Canada ou par aucun de ses sujets dûment autorisés à cet effet par le dit gouvernement.

…

Et les chefs soussignés, en leur nom et au nom de tous les autres Indiens habitant le pays cédé par le présent, promettent solennellement et s'engagent d'observer strictement ce traité, et aussi de se conduire

et d'agir comme de bons et loyaux sujets de Sa Majesté la reine. Ils promettent et s'engagent d'obéir et se soumettre à la loi sous tous les rapports, à maintenir la paix et le bon ordre entre chacun et aussi entre eux-mêmes et d'autres tribus d'indiens, et entre eux-mêmes et d'autres sujets de Sa Majesté, Indiens ou blancs, habitant maintenant ou par la suite toute partie du dit pays cédé; et qu'ils ne molesteront pas la personne ou la propriété de tout habitant de tel pays cédé, ou la propriété de Sa Majesté la reine, ou n'arrêteront ni ne troubleront toute personne passant ou voyageant dans le dit pays ou aucune partie et qu'ils aideront et assisteront les officiers de Sa Majesté à traduire devant la justice et punir tout Indien violant les stipulations de ce traité ou enfreignant les lois en vigueur dans le pays ainsi cédé…