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SENT BY FACSIMILE AND MAIL

September 10, 2008

The Honourable Chris Bentley
Attorney General for Ontario
Ministry of the Attorney General
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Dear Minister Bentley:

Re: NAN-ALST Coalition and the Legality of Jury Rolls in Ontario

Our firm has been retained by a coalition of First Nations consisting of Nishnawbe Aski-Nation and Aboriginal Legal Services of Toronto. We are writing to request that immediate steps be taken to conduct a formal inquiry into the legality of the jury selection system that has been employed in the Territorial District of Kenora since 2000 and, more generally, across the Province of Ontario. The context for concern is that it would appear, at least for the entire judicial district of Kenora (if not elsewhere), that First Nations community members have been systematically excluded from jury rolls as a result of the failure of the responsible authorities to access lists of registered First Nations community members. At stake, of course, from the perspective of First Nations, is the right to a trial by a jury of one's peers along with the right of First Nations across this Province to participate in the justice system.

As you may know, Nishnawbe Aski-Nation ("NAN") is a political territorial organization that is responsible for 49 First Nations Communities in Northern Ontario with a total population of approximately 45,000 First Nations members. NAN territory in the North spans approximately two thirds of the Province of Ontario. Aboriginal Legal Services of Toronto ("ALST") is a multi-service Aboriginal Legal Service Agency providing services to First Nation communities across the province. Both Nishnawbe Aski-Nation and Aboriginal Legal Services of Toronto have a great deal of experience in addressing justice issues for Northern Aboriginal communities and have a sincere interest in ensuring that jury rolls prepared in Northern Ontario communities are prepared in a manner that ensures lawful and proper representation for First Nations people.

On September 8 and 9, 2008, pre-inquest motions were heard before presiding Coroner, Dr. Eden, in the Coroner's Inquest into the Deaths of Jamie Goodwin and Ricardo Wesley. Our office acts on behalf of the Wesley family at the Coroners Inquest. During the motions, concerns were raised by

the Wesley family with respect to the adequacy of the jury roll used in the Kenora District. In that regard, the affidavit of Ms. Rolanda Peacock, Acting Supervisor of Court Operations for the Territorial District of Kenora ("District"), was filed in the proceedings by Coroner's counsel. Attached for your convenience is a copy of the Ms. Peacock's affidavit.

On its face, the affidavit confirms that, since 2000, the Kenora District's jury roll has been prepared in a manner that is in contravention of the *Juries Act*. In particular, steps taken by Kenora Court Services in compiling the current jury roll do not appear to comply with section 6(8) of the *Juries Act*. Section 6(8) reads as follows:

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 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.

The affidavit reveals that no First Nations population lists were relied upon from 2000 to 2006. The explanation offered is that the Federal authorities, through Indian and Northern Affairs Canada, ceased providing lists to provincial authorities in year 2000. In 2007, Court officials travelled to 14 of the 45 First Nation communities in the Kenora District. **As a result, most First Nations communities in the North are excluded from jury rolls. There are only 44 First Nations individuals (out of a total First Nations population of 12,111) on the Kenora District's current jury roll.**

It is noteworthy that in similar circumstances the Ontario Court of Justice declared a mistrial in a criminal trial when it was determined that the sheriff in Lambton County (Sarnia area) failed to comply with the statutory regime of the *Juries Act* by failing to ensure proper inclusion of First Nations people on the jury roll (*R. v. Nahdee*, [1993] O.J. No. 2425). The *Nahdee* decision also demonstrates that while the problem of exclusion from juries may be more acute in remote northern First Nation communities, it is unlikely that the problem is isolated to these communities.

Tom Fitzgerald, Director-Aboriginal Criminal Justice, is counsel for the presiding Coroner, Dr. Eden, and was present when submissions were made on the record on the legality of the Kenora District's jury roll. Mr. Fitzgerald can provide further information on Ms. Peacock's affidavit and concerns expressed at the pre-inquest motion of September 9, 2008.

As you are no doubt aware, the *Juries Act* is designed to ensure that a jury will be representative of the community in which a trial takes place and that the constitutional right to a trial by jury of one's peers will be respected. Section 6(8) is specifically intended to ensure that representativeness of the jury extends to First Nations. Canadian law recognizes the importance of a representative jury. Securing a representative jury enhances impartiality and furthers important societal or community interests by instilling confidence in the criminal justice system (*R. v. Gayle*, [2001] O.J. No. 1559). The process used in the Kenora District (and possibly elsewhere) appears to deny First Nation people their constitutional right to be tried by an impartial jury of their peers made up from a representative jury pool. First Nations in the North are being denied their rightful roles as equal participants in the justice system. The sad irony is that while First Nations are undoubtedly over-represented before our courts and in our jails – it is now apparent that they go unrepresented as triers in the justice system of the North.

In 2005, the Ontario government committed itself to a “New Approach to Aboriginal Affairs”. The new approach was to be guided by several foundational principles, including the recognition that Aboriginal communities have different circumstances and different needs, and that Aboriginal people must have greater participation in matters that directly affect their communities. Aboriginal people residing on Indian reserves have a right to be included on jury rolls and Aboriginal accused have the right to be tried by a jury of their peers. A formal inquiry into Ontario’s jury roll practices may reveal that a new approach to including First Nation individuals in jury rolls is needed.

In light of the above, the Nishnawbe Aski-Nation and Aboriginal Legal Services of Toronto request that you, as the Attorney General of Ontario, conduct a formal inquiry and report back to the NAN – ALST coalition on the current legality of the jury rolls in Ontario generally and the Kenora District specifically. Such a report must include an explanation on what has transpired since year 2000.

Since the allegation is that the federal authorities have declined to cooperate with provincial authorities in information-sharing in respect of the compilation of jury rolls, we are copying this correspondence to the appropriate federal Ministers and look forward to their early responses and cooperation.

On behalf of my clients, I can assure you that both the Nishnawbe Aski-Nation and Aboriginal Legal Services of Toronto will make every reasonable effort to cooperate in addressing what appears to be a serious injustice.

Thank you for your consideration.

Yours very truly,



Julian N. Falconer

cc.

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