File No. 35475

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

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

and

CLIFFORD KOKOPENACE

Respondent

and

ABORIGINAL LEGAL SERVICES OF TORONTO INC., THE ADVOCATES' SOCIETY, NISHNAWBE ASKI NATION, DAVID ASPER CENTRE FOR CONSITTUTIONAL RIGHTS, WOMEN'S LEGAL EDUCATION AND ACTION FUND INC., NATIVE WOMEN'S ASSOCIATION OF CANADA and CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES

Interveners

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FACTUM OF THE INTERVENER, THE ADVOCATES' SOCIETY

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Intervener, The Advocates' Society ("TAS"), is a professional association for trial and appellate lawyers in Ontario. TAS is mandated to, among other goals, provide advocacy education, promote legal reform, and promote access to, and improve, the administration of justice. TAS files this factum to address the questions raised on appeal concerning the meaning

and interpretation of "representativeness", and the appropriate remedy to the shortcomings in jury representativeness.

2. On the appeal to the Ontario Court of Appeal, Justice LaForme determined that the right to a representative jury was supported by ss. 11(d) and (f) of the *Charter*. Further, the representativeness right guaranteed by the *Charter* must inform the entire process of jury selection. It was recognized that only if the process commences with a properly representative jury roll, can the petit jury randomly derived from it have the requisite representative quality. To this end, the Court found that the province, in compiling the jury roll, must make reasonable efforts to provide a fair opportunity for the distinctive perspectives of First Nations on-reserve residents to be included, having regard to all the circumstances and keeping in mind the objective served by the representativeness requirement.

3. TAS respectfully submits that Justice LaForme was correct in deciding that the representativeness requirement ought to require the province take out-of-the-ordinary steps to ensure a representative jury roll. This is an important practical measure required in order to acknowledge the special place held by First Nations persons in the Canadian constitutional framework, and their unique relationship with the Crown. Furthermore, failure to take special steps to remedy systemic underrepresentation would only perpetuate the experience of exclusion and discrimination of First Nations people within the criminal justice system.

4. To this end, TAS submits a proposed protocol to address the issue of jury representativeness where the accused is a First Nations person.

B. Statement of Facts

5. TAS takes no position with respect to the facts as advanced by the parties or with respect to the factual aspects of this appeal and defers to the parties on the factual record.

PART II – QUESTIONS IN ISSUE

6. With respect to Question (A), which relates to the meaning of jury representativeness and how it is to be assessed, TAS submits that the meaning of "representativeness" and how it is to

be assessed must incorporate and reflect the well-established principle that a jury be composed of one's peers.

7. With respect to Question (C), which relates to the appropriate remedy should there be found to be an issue with jury representativeness, TAS submits that where the accused is a First Nations person, the province should take out-of-the-ordinary steps to ensure a representative jury roll. TAS has advanced a proposed protocol as part of those steps to remedy a shortcoming in jury representativeness where the accused is a First Nations person.

PART III – STATEMENT OF ARGUMENT

A. A representative jury must reflect a jury of one's peers

8. The right to a jury of one's peers is, in part, derived from the English common law right of a foreign accused to be tried by jury *de mediatate linguae*, partly composed of persons of the same cultural background as the accused. Historically, representativeness was used to promote impartiality, legitimacy and fairness where the accused was atypical or unrepresentative of the community at large.

> James J. Gobert et al, *Jury Selection: The Law, Art, and Science of Selecting a Jury*, 3rd ed, (Thompson Reuters, 2009); Book of Authorities, Tab D

9. In the United States, the requirement for representativeness is protected by the Sixth Amendment to the Constitution and a criminal defendant has the right to be tried by jurors of the district where the crime was alleged to have been committed. American courts have held that a jury must be drawn from a "representative cross-section of the community". The United States Supreme Court has determined that no group can be systematically excluded from the jury panel from which the jury is drawn.

> *Duren v Missouri*, 439 US 357 at 364 (1979); Appellant's Book of Authorities, Tab 4

10. In Canada, the requirement that a jury be representative is integral to its proper functioning. In *Regina v Sherratt*, Justice L'Heureux-Dube, speaking on behalf of the majority of the Court stated:

> The perceived importance of the jury and the *Charter* right to jury trial is meaningless without some guarantee that it will perform its duties impartially and represent, as far as possible and appropriate in the circumstances, the larger community. Indeed, without the two characteristics of impartiality and representativeness, a jury would be unable to

> perform properly many of the functions that make its existence desirable in the first place. Provincial legislation guarantees representativeness, at least in the initial array. The random selection process, coupled with the sources from which this selection is made, ensures the representativeness of Canadian criminal juries.
>
> *R v Sherratt*, [1991] 1 S.C.R. 509 at 525; Appellant Book of Authorities, Tab 46

11. Almost 35 years ago, the Law Reform Commission of Canada emphasized that a jury containing a "cross-section of the community" supports its function as the "conscience of the community" and that in applying the law to reach a fair and equitable decision, the jury may depart from a strict application of the law to impart "broad community sentiments of fairness" and "a sense of justice shared by the larger community". Incorporating community values in judicial decisions through a jury that is representative of a cross-section of the community creates balance and mitigates against bias and prejudice. Moreover, where a member of a minority group participates in jury deliberations, racial prejudices are more likely to be suppressed and a more balanced outcome achieved.

> *The Jury in Criminal Trials* (Ottawa: Law Reform Commission of Canada, 1980); Book of Authorities, Tab E
>
> Valerie P. Hans and Neil Vidmar, *Judging the Jury* (Plenum Press, 1986), at 50-51; Book of Authorities, Tab H

12. It is critical that First Nations people not be excluded from the jury selection process and not be deprived of the opportunity to be tried by their peers. TAS' proposed protocol would function to prevent and remedy against this failure in order to ensure fairness and representativeness of a jury.

B. Discrimination of First Nations peoples in the criminal justice system requires a solution

13. A practical solution to the current systemic deficiencies with respect to jury representativeness for First Nations accuseds is critical. First Nations peoples' participation in and interaction with the criminal justice system has been marked by a history of exclusion, discrimination and oppression. The experience of discrimination and exclusion was highlighted by Justices Cory and Iacobucci on behalf of the court in *Regina v Gladue* when they observed:

> Not surprisingly, the excessive imprisonment of aboriginal people is only the tip of the iceberg insofar as the estrangement of the aboriginal peoples from the Canadian criminal justice system is concerned. Aboriginal people are overrepresented in virtually all aspects

> of the system. As this Court recently noted in *R. v. Williams*, [1998] 1 S.C.R. 1128, at para. 58, there is widespread bias against aboriginal people within Canada, and "[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system".
>
> *R v Gladue*, [1999] 1 S.C.R. 688 at para 61; Book of Authorities, Tab A

14. The overrepresentation of First Nations people in Canadian prisons is a longstanding and persistent crisis. In its 1996 Report, the Royal Commission on Aboriginal Peoples concluded at 309:

> The criminal justice system has failed the Aboriginal peoples in Canada – First Nations, Inuit and Metis people, on-reserve and off-reserve, urban and rural – in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.
>
> Report of the Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (1996); Book of Authorities, Tab G

15. Systemic discrimination against First Nations people continues to negatively impact upon their perception of and participation in the criminal justice system. The aims of a representative jury promote improved fairness, inclusion, education and acceptance of outcomes. These are precisely the elements that are wanting from the First Nations' experience in the criminal justice system. In his 2013 report, the Honourable Frank Iacobucci stated at para 211:

> Unfortunately, the criminal justice system represents deep-rooted pain and oppression for many First Nations peoples. The system is perceived not only as a tool to subjugate traditional approaches to conflict resolution in favour of assimilation into the mainstream society, but also as a mechanism by which a myriad of historical wrongs have been perpetrated upon First Nations. Today, First Nations peoples see themselves either as spectators to or victims of the justice system, whereas historically they were direct participants in the resolution of conflict within their own communities. To be asked to participate in Canada's justice system is seen by many First Nations people as contributing to their own oppression and, therefore, repugnant. These sentiments are not surprising, as many experts and authors have recognised the failure of the justice system for First Nations.
>
> Report of the Independent Review Conducted by The Hon. Frank Iacobucci, *First Nations Representation on Ontario Juries* (February, 2013) [Iacobucci Report]; Book of Authorities, Tab F

16. The Ontario Superior Court of Justice recently stayed charges, including second degree murder in *Regina v Wabasen*, where the accused was a First Nations person and the jury roll was unrepresentative. Relying upon the judgment of the Court of Appeal in *Regina v Kokopenace*, the Court held that for the Crown "to do nothing in the face of such a major problem is unacceptable and certainly not a reasonable approach to take". In response to the violation of the

accused's constitutional right to a trial by an impartial jury, the Court issued a temporary one year stay of the proceedings in order to permit an opportunity for a jury to be chosen from a revised jury roll.

R v Kokopenace 2013 ONCA 389; Book of Authorities, Tab B
R v Wabasen 2014 ONSC 2394 at paras 30 and 34; Book of Authorities, Tab C

17. TAS' proposed protocol would support this type of remedy. Further, unlike in this case, the proposed protocol would allow for the issue of representativeness to be raised prior to trial.

C. Proposed protocol for First Nations accuseds to remedy unrepresentativeness

18. Where the accused is a First Nations person, TAS submits that the province should be required to take out-of-the-ordinary steps to attempt to secure a representative jury roll. The special place held by First Nations persons in the Canadian constitutional framework, and their unique relationship with the Crown, dictates that the Crown enhance its efforts to ensure compliance with the principles of fundamental justice.

19. TAS submits the following proposed protocol for jury composition:

i. In all cases where the accused is a First Nations person, the Crown should be required to provide, in advance, first party disclosure as to the composition of the jury roll, as well as the steps taken to ensure that the jury roll is representative;
ii. An opportunity would then be afforded for the accused to argue that the jury roll is unrepresentative;
iii. Provided that the accused is able to advance an argument that is not frivolous that the accused's right to a representative panel has been unconstitutionally denied, the Crown should then be required to establish, on a balance of probabilities, that it has taken reasonable steps, in accordance with the principles articulated by Justice LaForme in the Ontario Court of Appeal; and
iv. Where the Crown cannot establish that reasonable efforts were made, it is submitted that the accused's *Charter* rights have been breached and the appropriate remedy is a stay of proceedings, pursuant to s. 24(1) of the *Charter*, or such other remedy that may be appropriate having regard to all the circumstances.

R v Kokopenace 2013 ONCA 389 at paras 49-51; Book of Authorities Tab B

20. The proposed protocol creates a positive obligation on the Crown to provide minimal disclosure to a First Nations accused of the composition of the jury panel and the methods by which it was assembled. The protocol offers a practical solution to remedy the current systemic difficulties that operate to exclude potential First Nations jurors. A minimal requirement is placed on the accused to advance an argument that is not frivolous to establish that the Crown has failed to meet its obligations, in order to trigger the burden on the Crown to establish, on a balance of probabilities, that it has taken all reasonable efforts to ensure representativeness.

21. The proposed protocol would ensure that the government remain vigilant with respect to its efforts to ensure a representative jury roll, and would provide the individual affected by any deficiency in those efforts with a practical remedy that would require the Crown to establish, in appropriate cases, that it had made reasonable efforts. Since the facts in each case will differ, the Crown could argue that the specific roll used to empanel the accused persons' petit jury or jury panel was, on its unique facts, appropriately created. If disclosure is provided, and the accused person chose not to bring a motion requiring the Crown to justify the government's efforts, the accused would be estopped from subsequently arguing that the panel was deficient.

22. This remedy would be limited to cases with a legitimate issue. There would be no "floodgate" of litigation. The proposed protocol is limited to First Nations persons, by virtue of their special place in the Canadian constitutional framework and their relationship with the Crown. This remedy would not spark numerous s. 11(b) motions seeking a stay due to unreasonable pre-trial delay. Crown disclosure and the "not frivolous" test would dispel unmeritorious applications. Requiring that the application be brought as a pre-trial motion, with adequate notice, would ensure that motions are dealt with expeditiously.

23. This practical solution would minimize the cost and delay associated with the current system of raising this issue on appeal, after the jury verdict is known. It would also provide a realistic incentive for the Crown to continuously make efforts to ensure as representative a panel as is reasonably possible.

PART IV – ORDER REQUESTED

24. TAS requests an opportunity to present ten minutes of oral argument, or such time as this Honourable Court deems appropriate.

25. TAS does not seek costs, and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTIED ON THIS 17th DAY OF JULY, 2014.

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PART V – TABLE OF AUTHORITIES