Court of Appeal File Nos.: C49961
C48160

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

-and-

CLIFFORD KOKOPENACE

Appellant

-and-

CLARE SPIERS

Appellant

NISHNAWBE ASKI NATION

-and-

BUSHIE FAMILY AND PIERRE FAMILY

Intervenors

FACTUM OF THE INTERVENOR NISHNAWBE ASKI NATION

April 2, 2012

Falconer Charney LLP
Barristers at Law
8 Prince Arthur Avenue
Toronto, ON M5R 1A9

Julian N. Falconer
(L.S.U.C. #29465R)
Sunil S. Mathai
(L.S.U.C. #49616O)

Tel: (416) 964-3408
Fax: (416) 929-8179

Lawyers for the Intervenor

TO: **SACK GOLDBLATT MITCHELL LLP**
20 Dundas Street West
Suite 1100
Toronto, Ontario
M5G 2G8

Jessica R. Orkin

Tel: (416) 979-4381
Fax: (416) 979-4430

Lawyer for the Appellants, Clifford Kokopenace and Clare Spiers

AND TO: **DOUCETTE BONI SANTORO**
20 Dundas Street West
Suite 1100
Toronto, Ontario
M5G 2G8

Delmar Doucette

Tel: (416) 597 6907
Fax: (416) 342 1766

Lawyer for the Appellant, Clifford Kokopenace

AND TO: Anthony Moustacalis
121 Richmond Street West
Suite 1000
Toronto, Ontario
M5H 2K1

Tel: (416) 363-2656
Fax: (416) 363-4920

Lawyer for the Appellant, Clare Spiers

AND TO: **CROWN LAW OFFICE – CRIMINAL**
Ministry of the Attorney General
720 Bay Street, 10th Floor
Toronto, Ontario
M5G 2K1

Michal Fairburn
Gillian Roberts
Deborah Calderwood

Tel: (416) 326-4658
Fax: (416) 326- 4656

Lawyers for the Respondent, Her Majesty the Queen

AND TO: **ABORIGINAL LEGAL SERVICES OF TORONTO INC.**
415 Yonge Street, Suite 803
Toronto, Ontario
M5B 2E7

Jonathan Rudin
Christa Big Canoe

Tel: (416) 408-4041
Fax: (416) 408-4268

Lawyers for the Intervenors, Bushie Family and Pierre Family

AND TO: **THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS**
University of Toronto – Faculty of Law
39 Queen's Park Crescent East, RM 301
Toronto, Ontario
M5S 2C3

Kent Roach
Cheryl Milne

Tel: (416) 946-5645
Fax: (416) 978-2648

Lawyers for the Intervenor, The David Asper Centre for the Constitutional Rights

AND TO: **ATTORNEY GENERAL OF CANADA**
Department of Justice
Exchange Tower
130 King Street West
Suite 3400, Box 36
Toronto, Ontario
M5X 1K9

Roy Lee

Tel: (416) 952-2946
Fax: (416) 973-4328

Court of Appeal File Nos.: C49961
C48160

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

-and-

CLIFFORD KOKOPENACE

Appellant

-and-

CLARE SPIERS

Appellant

NISHNAWBE ASKI NATION

-and-

BUSHIE FAMILY AND PIERRE FAMILY

Intervenors

Table of Contents

"A conviction resulting from an unfair trial is contrary to our concept of justice. To uphold such a conviction would be unthinkable." - *R v. Stillman*, [1997] 1 S.C.R. 607 at para. 72.

PART I: OVERVIEW

1. Nishnawbe Aski Nation ("NAN") is advancing the position, in the context of an unrepresentative jury roll, that the "due diligence" test articulated in *R.* v. *Nahdee*[1] be abandoned (hereinafter the "*Nahdee* test"). The *Nahdee* test, relying on good intentions and alleged difficulties in obtaining up to date band or electoral lists, is inconsistent with a traditional constitutional analysis under sections 7 and 11 of the *Canadian Charter of Rights and Freedoms*. The right to a representative jury goes to the very essence of trial fairness and ought not to be diminished by focusing on the due diligence efforts of court staff.

2. Like any other accused facing a jury trial, members of First Nations are entitled to a representative jury, a right enshrined in sections 7 and 11 of the *Charter*. A representative jury, at a minimum, is one that is selected from a jury roll that does not systematically exclude First Nations Reserve community members.

PART II: FACTS

3. NAN adopts the facts as set out in paragraphs 3 to 45 of the Appellants' factum and relies on the following additional facts.

(a) Nishnawbe Aski Nation

4. NAN (formerly known as "Grand Council Treaty 9") was established in 1973 as the political territorial organization representing the political, social and economic interests of its

[1] [1993] O.J. No. 2425.

communities to all levels of government on a nation-to-nation basis.[2] NAN territory encompasses James Bay Treaty 9 territory and Ontario's portion of Treaty 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 the coast of James Bay and Hudson Bay.[3]

5. NAN represents 49 First Nations Reserve communities throughout the province of Ontario. Of the 46 Reserves located in the Kenora Judicial District, 30 are represented by NAN.[4]

6. The Chiefs of the 49 First Nations communities are the members of the NAN not-for-profit corporation. The Chiefs meet two to three times a year in assembly to mandate, by resolution, the direction and initiatives of NAN. NAN's Board of Directors is comprised of the Grand Chief and three Deputy Grand Chiefs, all elected positions.[5]

(b) <u>The Attorney General's communications with NAN regarding obtaining lists for jury rolls</u>

7. NAN does not keep band lists for its constituent First Nations Reserve communities.

8. Since September 2001, Kenora Court Services Division ("CSD") employee, Laura Loohuizen, has primarily been responsible for the work related to s. 6(8) of the *Juries Act*, for the Judicial District of Kenora. For several years prior to and including 2000 (for the preparation of the 2001 jury roll), staff at the Provincial Jury Centre ("PJC") had annually obtained lists from Indian and Northern Affairs Canada ("INAC"), of persons with registered Indian status.[6] In

[2] Affidavit of Deputy Grand Chief Terry Waboose, sworn June 27, 2011, at para. 3 and 7, Motion Record of the Proposed Intervenor, Nishnawbe Aski Nation ["MR"], pgs. 9-10.
[3] Affidavit of DCG Waboose, sworn June 27, 2011, at para. 5, MR, pg. 9.
[4] Affidavit of DCG Waboose, sworn June 27, 2011, MR, at para. 6.
[5] Affidavit of Goyce Kakegamic, sworn December 26, 2011, at para. 6.
[6] Affidavit of Goyce Kakegamic, sworn December 26, 2011, at para. 8.

August 2001, INAC advised that it would no longer be providing the PCJ with the INAC lists. Ms. Loohuizen had to rely on other means to obtain lists of persons with registered Indian status.

9. On July 5, 2002, Ms. Loohuizen sent a letter to former Deputy Grand Chief Goyce Kakegamic, the Deputy Grand Chief responsible for the justice portfolio, inquiring as to whether NAN could provide the Kenora CSD with "current band lists of voters, who are over 18 years of age and Canadian citizens."[7]

10. On August 26, 2002, Ms. Loohuizen sent a facsimile to Deputy Grand Chief Kakegamic enclosing the July 5, 2002, letter and requesting a response to the correspondence. Deputy Grand Chief Kakegamic acknowledges having received the letters but does not recall providing a response.[8] NAN completed a thorough search of its correspondence files related to the justice portfolio and no written response was found.[9]

11. These two communications were the only attempt made by the CSD to contact NAN leadership with respect to obtaining band lists from August 2002 to December 2007, (2007 being the year that the 2008 jury roll was prepared).

(c) <u>The Honourable Frank Iacobucci's Systemic Review</u>

12. The Honourable Frank Iacobucci was appointed as an Independent Reviewer, by Order in Council dated August 11, 2011, to review the process in Ontario for including persons living in Reserve communities on the jury roll. According to the terms of the Order in Council, the mandate of the Independent Reviewer is as follows:

> The Independent Reviewer shall conduct a systemic review and report on any relevant legislation and processes for including First Nations persons living on reserve on the jury roll from which potential jurors are selected for all jury trials and coroners inquests, in order to make recommendations:

[7] Affidavit of Goyce Kakegamic, sworn December 26, 2011, at para. 8, Exhibit A.
[8] Affidavit of Goyce Kakegamic, sworn December 26, 2011, at para. 10.
[9] Affidavit of Goyce Kakegamic, sworn December 26, 2011, at para. 10.

a. to ensure and enhance the representation of First Nations persons living on reserve communities on the jury roll; and

b. to strengthen the understanding, cooperation and relationship between the Ministry of the Attorney General and First Nations on this issue.[10]

13. Currently, Mr. Iacobucci and his review team have attended ten Reserve communities in order to consult with Chiefs, Council members, Elders, justice committees, legal workers and community members.

14. In the Kenora judicial district, Mr. Iacobucci and his review team, accompanied by NAN, met with the following communities: Kasabonika First Nation on February 1, 2012; Keewaywin First Nation on January 30, 2012; Mishkeegogamang First Nation on March 26, 2012; Sachigo Lake First Nation on March 30, 2012; Sandy Lake First Nation on March 7, 2012; Poplar Hill First Nation on March 29, 2012; and Webequie First Nation on February 2, 2012.[11]

15. In the Cochrane judicial district, Justice Iacobucci and his review team, accompanied by NAN, met with the following communities: Constance Lake First Nation on February 29, 2012, and Moose Cree First Nation on February 15, 2012. Finally, in the Timmins judicial district, Mr. Iacobucci and his review team, accompanied by NAN, met with the Mattagami First Nation on February 14, 2012.

16. NAN's work in relation to the review is ongoing. As the Order in Council states, "NAN has resolved as a political and territorial organization to work with the Ontario government and the Independent Reviewer to enhance the representation of First Nations persons living on

[10] OC 1388/2011.
[11] http://www.falconercharney.com/Falconer/cases.html#consultations

reserve communities in its territories."[12] Mr. Iacobucci's report is to be delivered to the Attorney General on August 31, 2012.

PART III: ISSUES AND LAW

17. NAN submits the following issues for consideration on this appeal:

(a) Whether this Honourable Court should abandon the *Nahdee* test; and,

(b) Whether the 2008 Kenora Jury Roll is *Charter* compliant?

(a) This Honourable Court should abandon the *Nahdee* test

(i) NAN's position

18. The *Nahdee* test and its progeny have focused on the good faith efforts of court personnel in determining whether a jury roll is representative.[13] Following the *Nahdee* test, the lower courts have created a *de facto* curative provision wherein the good faith due diligence of local court staff has been found to rectify an unrepresentative jury roll.[14] A jury roll that is not representative will violate sections 7 and 11 of the *Charter*.[15] It is NAN's position that good faith or due diligence cannot cure an unrepresentative jury because jury representativeness is a fundamental feature of trial fairness.[16]

---

[12] OC 1388/2011.

[13] *R. v. Nahdee*, [1993] O.J. No. 2425 (Sup Ct); *R. v. Nahdee*, [1994] 4 C.N.L.R. 158 (Sup. Ct); *R. v. Wareham* [2012] O.J. No. 767 (Sup Ct); *R. v. Ransley*, [1993] O.J. No. 2828 (Sup Ct).

[14] *R. v. Wareham* [2012] O.J. No. 767 (Sup Ct); *R. v. Ransley*, [1993] O.J. No. 2828 (Sup Ct).

[15] *Re: B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 – the right to a representative jury is encompassed in section 7 under the principles of fundamental justice: "Sections 8 to 14, in other words, address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are designed to protect, in a specific manner and setting, the right to life, liberty and security of the person set forth in s. 7. It would be incongruous to interpret s. 7 more narrowly than the rights in ss. 8 to 14. The alternative, which is to interpret all of ss. 8 to 14 in a "narrow and technical" manner for the sake of congruity, is out of the question"

[16] A fair trial includes the right to a representative jury, see *R. v. Williams*, [1998] 1 S.C.R. 1128 at para. 47; *NAN* v. *Eden*, 2011 ONCA 187 at para. 28; see also *R. v. Stillman* [1997] 1 S.C.R. 607 at para. 72.

19. In *R. v. Sheratt*, the Supreme Court of Canada held that provincial jury acts ensure representativeness in the initial jury panel because of the "sources from which" the jury panel is selected.[17] Essential to the Supreme Court's decision in *Sheratt* is that the "sources from which" names are selected will ensure representativeness. The herein appeal challenges this assumption because the "sources" currently relied upon do not, in fact, ensure the inclusion of First Nations Reserve community members.

20. In determining whether a jury roll satisfies the constitutional requirement of representativeness, NAN submits that it is inappropriate to focus the analysis on the due diligence or good faith intentions of the sheriff or court staff. If the provincial system has the effect of excluding First Nations Reserve community members from the jury roll then the system has failed and the jury roll is not constitutionally representative.

(ii) The Road to Hell is Paved with Good Intentions

21. While the Respondent will undoubtedly emphasize the good intentions and due diligence of court staff in submitting that the *Charter* and *Juries Act* have been complied with, many of the worst deprivations of First Nations people's rights have been achieved through "well intentioned" policies.

22. One of the ironies of Canadian history is that many of the federal and provincial government policies that have contributed to the disadvantages faced by First Nations people and communities were animated by "good intentions". These "good intentions" were often clothed in concepts such as protection, civilization and assimilation, and found their expression in

[17] *R. v. Sheratt*, [1991] 1 S.C.R 509.

legislation such as the 1857 *Act to Encourage the gradual Civilization of Indian Tribes in the Province and to amend the Laws respecting Indians*.[18]

23. "Good intentions" supported *Indian Act* provisions that *inter alia* barred Indians from leaving reserve lands without the permission of an Indian agent, prevented Indians from hiring lawyers to make claims against the government, outlawed Indian cultural ceremonies and exiled Indian women from their communities if they married non-Indian men. Regrettably, Canadian courts were complicit in the enforcement of these provisions, also purportedly based on "good intentions."[19] The most tragic example of the impact of "good intentions" is the Indian Residential Schools policy.[20]

24. NAN respectfully submits that, given these experiences of First Nations people and the inherent vulnerabilities of First Nations to political policies cast as "being for their own good", the intentions of court staff should not be controlling or determinative in any analysis of whether a *Charter*-compliant jury roll has been prepared.

(iii) Results based test for Charter compliance

25. Relying on jurisprudence from the United States, this Honourable Court in *Church of Scientology* held that the exclusion of certain segments of society could violate s. 11 of the *Charter* if the exclusion robbed the jury roll of a different perspective from a diverse group of people:

---

[18] Royal Commission on Aboriginal Peoples (1996), *Looking Forward, Looking Back* (Ministry of Supply and Services Canada) at p. 271-273.

[19] The "enfranchisement" of Indian women was upheld by this Honourable Court in *Bedard*. These provisions described as UNHCR found them to be "an unjustifiable breach" of an Indian woman's rights under article 27 of the *International Covenant in Civil and Political Rights*; 31 July 1981 (CCPR/C/DR (XIII)/R.6, 24); *Lavell v. Canada (Attorney General)*, [1974] S.C.R. 1349 at 1360, citing Rand J. in *St. Ann's Island Shooting and Fishing Club Limited v. The King*, [1950] S.C.R. 211 at 219.

[20] Royal Commission on Aboriginal Peoples (1995), Volume One: Looking Forward, Looking Back, Part Two: False Assumptions and a Failed Relationship; Chapter 10 – Residential Schools, p. 335.

> The essential quality that the representativeness requirement brings to the jury function is the possibility of different perspectives from a diverse group of persons. The representativeness requirement seeks to avoid the risk that persons with these different perspectives, and who are otherwise available, will be systematically excluded from the jury roll.[21]

26. The American jurisprudence on the Sixth Amendment[22] provides a useful lens through which to analyze whether the s. 11 guarantee to a representative jury has been violated. In *Duren v. Missouri*, the United States Supreme Court outlined the requirements for finding a *prima facie* violation of the Sixth Amendment:

> (1) that the group alleged to be excluded is a "distinctive" group in the the community [cognizable group prong]; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community [underrepresentation prong]; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process [systematic exclusion prong]. [23]

27. Where a *prima facie* violation is proven by the accused, the government is required to justify its practices to prove "that a significant state interest [is] manifestly and primarily advanced by those aspects of the jury-selection process…that result in the disproportionate exclusion of a distinctive group."[24]

28. With respect to the third prong of the test, the defendant must establish that underrepresentation was systematic: "that is, inherent in the particular jury-selection process utilized."[25] Similar to the s. 11 analysis, the Sixth Amendment analysis requires that "petit juries must be drawn from a source fairly representative of the community," and that the "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude

---

[21] *R. v. Church of Scientology of Toronto* (1997), 33 O.R. (3d) 65, 116 C.C.C. (3d) 1 at p. 119

[22] The Sixth Amendment reads as follows: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

[23] *Duren v. Missouri* 439 U.S. 357.

[24] *Ibid*. at pg. 367-68.

[25] *Ibid.*

distinctive groups in the community and thereby fail to be reasonably representative thereof."[26] Absent from this test is any analysis of the intentions of a state actor.

29. There is some debate in the American jurisprudence on whether the third prong of the test requires the defendant to demonstrate that systematic defects are responsible for the totality of the underrepresentation. Some cases have held that the accused must establish that there are no demographic reasons that have caused underrepresentation of the distinctive group. In other cases, courts have held that where official action or inaction has exacerbated underrepresentation, the defendant has made out a *prima facie* case.[27]

30. NAN respectfully submits that the accused need only establish that the system has been operated in a manner that excludes a distinct group of people and need not demonstrate that the system is solely responsible for the exclusion. Requiring an accused to prove that there are no demographic reasons that contribute to the underrepresentation sets the test too high and would render the accused's right to a representative jury meaningless.

31. NAN respectfully submits that this Honourable Court should adopt a results based analysis in determining whether a jury roll that systematically excludes First Nations Reserve members is compliant with sections 7 and 11 of the *Charter*. The fact that court personnel may have made genuine efforts does not absolve the province of its responsibility nor does it render the current jury rolls constitutional.

32. NAN's approach is consistent with Canadian jurisprudence that has rejected any notion that intention is determinative of whether a breach of a *Charter* right has occurred. This jurisprudence recognizes the reality that serious violations of *Charter* rights can occur in the

[26] 439 U.S. 357 at pg. 364; see also *Taylor v. Louisiana*, 419 U.S., at 526-531.
[27] *United States of America v. Green*, 389 F. Supp, 2d 29 (D.Mass.2005).

absence of intention. From its inception, the primacy of effects over purpose has been a foundational principle for the interpretation of rights guaranteed by the *Charter*.[28]

(b) The 2008 Kenora Jury roll

33. NAN respectfully submits that in applying the results based test detailed above, the 2008 Kenora Jury roll is not representative.

(i) First Nations Reserve communities are a "distinctive" group

34. The distinctive nature of First Nations Reserve communities was recognized by the Supreme Court of Canada in the *Corbiere* case wherein the Court held that on-reserve population is an analogous ground for the purpose of section 15 of the *Charter*.[29]

35. According to the 2006 census, the total population of the Kenora District is approximately 65,000.[30] The territory of Kenora District includes 70 separate parcels of land designated as reserves under the *Indian Act* of which 48 are considered populated.[31] The population of First Nations Reserve communities and other First Nations settlements in the Kenora District was at least 21,000 in 2006.[32] Estimates of the proportion of the population of the Kenora District that resides on-reserves range from 30.2% to 36.8%.[33] Importantly, the on-reserve population is also growing at a rate faster than the growth rate of the off-reserve population.[34]

---

[28] For example, see *R. v. Big M Drug Mart Ltd*., [1985] 1 S.C.R. 295 at para. 88; *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143 at para. 37; *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 at para. 16-17, 26; *R. v. Golden*, [2001] 3 S.C.R. 679 at para. 95; *R. v. Grant*, 2009 SCC 32 at paras. 68, 73 & 75; *R. v. Harrison*, 2009 SCC 34 at paras. 62, 71-74; *Vancouver (City) v. Ward*, 2010 SCC 27 at para. 42.
[29] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.
[30] Second Khan Affidavit, para. 25-26, Table 22a and Exhibit N.
[31] Second Khan Affidavit, para. 21-22, 59 Table 2 and associated exhibits.
[32] Second Khan Affidavit, para. 42-50 and 53, Tables 18-21 and associated exhibits.
[33] Second Khan Affidavit, para. 54-55, Table 24.
[34] Second Khan Affidavit, para. 56-57.

(ii) The representation of First Nations Reserve communities on the jury roll is not fair and reasonable in relation to the number of such persons in the community

36. In the fall of 2007, when the section 6(8) questionnaires for the 2008 roll were mailed, Ms. Loohuizen had current lists from 8 First Nations, 2006 lists from 2 First Nations, 2000 INAC lists for 32 First Nations and no lists for 4 First Nations.[35] For the purposes of the 2008 jury roll, 1,200 questionnaires were sent to the off-reserve population of Kenora District. 600 questionnaires were sent to the on-reserve population. PCJ data indicates that 60 on-reserve questionnaires were returned, yielding a response rate of 10%, 166 were returned to the post office (27.7%) and there was no response received from 374 persons (62.3%).[36] Of the returned on-reserve questionnaires, 34 persons were found to be eligible (5.7% response rate). By comparison, the off-reserve eligible response rate was 55.6%.[37]

37. The 2008 Kenora jury roll consisted of 699 potential jurors, of which 29 were on-reserve residents, yielding an on-reserve representation rate of 4.1%. [38]

38. NAN respectfully submits that the First Nations Reserve communities in the Kenora District were grossly underrepresented in the 2008 jury roll, a finding confirmed by this Honourable Court in *NAN* v. *Eden*.[39]

(iii) The underrepresentation of First Nations Reserve members is due to the systematic exclusion of the group in the jury-selection process

39. The *Nadhee* test focused on the efforts of local sheriffs in complying with section 6(8). The facts of *Nadhee* and its progeny demonstrate that the jury rolls at issue did not include a

[35] Loohuizen Affidavit, para. 97 and Exhibit 47.
[36] Loohuizen Affidavit, para. 8.
[36] Loohuizen Affidavit, para. 8.
[37] Loohuizen Affidavit, para. 103-104 and Exhibit 54.
[38] Loohuizen Affidavit, para. 120.
[39] *NAN* v. *Eden*, 2011 ONCA 187 at para. 68.

proportionate representation of First Nations Reserve members. However, the courts looked to the "due diligence" and "best efforts" of the local sheriff when upholding the manner in which the jury roll was prepared. This analysis puts the onus to produce lists on the First Nations Reserve communities rather than assigning responsibility where it belongs, namely; the province that has failed to devise a system that is inclusive of First Nations Reserve communities.

40. The *Nahdee* test arose in circumstances where the accused brought a s. 629 application. Donnelly J. held that a sheriff's failure to exercise due diligence in attempting to obtain lists from First Nations Reserve communities gave rise to an absence of impartiality. Similarly, in *Wareham*[40], Platana J. applied the *Nahdee* test in holding that the Thunder Bay sheriff had taken all reasonable steps necessary to obtain lists from First Nations Reserve communities. In fact, the evidence before the court in *Wareham* demonstrated that the First Nations Reserve population was underrepresented in the 2012 Thunder Bay jury roll.

41. NAN respectfully submits that the *Nahdee* test may be sufficient for deciding impartiality issues under s. 629. However, the *Nahdee* test should be abandoned when the issue is the representativeness of a jury roll in the context of an alleged violation of sections 7 and 11 of the *Charter*.

42. NAN concedes that Ms. Loohouizen acted with the best of intentions when attempting to obtain lists from Reserve communities in the fall of 2007. However, the end result was a failure to adequately include First Nations Reserve members. In that regard, NAN adopts the submissions of the Appellants with respect to the systemic errors that significantly contributed to

[40] *R* v. *Wareham*, [2012] O.J. No. 767.

the underrepresentation of First Nations Reserve members on the 2008 jury roll (as reflected in paras. 58-90 of the Appellants' factum).

43. NAN respectfully submits that in determining whether there were systemic problems that significantly contributed to the exclusion of First Nations Reserve members from the jury roll, this Honourable Court should scrutinize the provincial government's inaction. In particular, the provincial government failed to pursue alternative centralized data sources like OHIP records or the permanent register of electors prepared pursuant to s. 17 of the *Election Act*.[41] The provincial government ought not to be permitted to rely on the best efforts of local court staff when all provincial responses to the historically low response rate from First Nations Reserve communities did not commence until after September 2008, when it was publically revealed, for the first time, that INAC refused to provide lists for the purpose of jury roll preparation.[42]

44. The provincial government should not be able to abdicate its responsibility by looking to First Nations Reserve communities to act as "Crown agents" for the purpose of providing enumeration lists (band lists or otherwise).

45. Prior to INAC's decision not to release the lists, the on-reserve population return rate was 33%.[43] In comparison, in 2007, relying on out-dated INAC lists and a handful of lists from First Nations Reserve communities, the eligible return rate was nearly six times lower (i.e. 5.7%).

46. After 2001, when lists were no longer being provided by INAC, the province failed to take any steps to access a centralized government database that would have yielded a better

[41] Section 17.1 to 17.4 of the *Election Act*, R.S.O. 1990, c., requires the Chief Electoral Officer to establish and maintain a permanent register of electors for Ontario that must be updated yearly based on a variety of records.

[42] Cross-examination of Shiela Bristo, pg. 219.
[43] *R. v. A.F.*, [1994] 4 C.N.L.R. 99.

return rate. Despite knowing that reliance on INAC lists created significantly higher Reserve population return rates, the provincial government took no steps to execute a Memorandum of Understanding with INAC to use these lists.

47. Section 6(8) can be acted upon in a *Charter* compliant manner. Regrettably, the province has decided not to take active steps to ensure that First Nations Reserve communities are adequately represented on the jury rolls. Instead, the province has preferred a system where local court staff attempted to co-opt First Nations Reserve communities into assisting in satisfying the provincial government's obligation to create a representative jury roll.

48. NAN respectfully submits that the piecemeal practices for the inclusion of First Nations Reserve populations on jury rolls is not sufficient to satisfy the constitutional requirement of a representative jury. Responsibility in this regard rests with the provincial government's failure to take any remedial action prior to September 2008, despite knowing of the disproportionally low inclusion of First Nations Reserve community members on jury rolls.[44]

(iv) Section 1 of the Charter is not applicable

49. NAN respectfully submits that the acts and omissions of government actors are not prescribed by law. Accordingly, s. 1 of the *Charter* has no application. Furthermore, this Honourable Court has held that an unrepresentative jury roll cannot be cured by s. 44 of the *Juries Act* or s. 670 and s. 671 of the *Criminal Code*.[45] As held by Justice Laskin, these provisions "certainly cannot be used to cure a roll that reflects the systemic discrimination or exclusion of First Nations persons."[46]

---

[44] Cross-examination of Shiela Bristo, at pg. 215.
[45] *NAN* v. *Eden*, 2011 ONCA 187 at para. 51; *R. v. Barrow*, [1987] 2 S.C.R. 694.
[46] *NAN* v. *Eden*, 2011 ONCA 187 at para. 52.

(v) Remedy

50. Any analysis of good faith or due diligence is only relevant for the purpose of determining the appropriate remedy under the *Charter* and not for the purpose of determining whether there has been a breach of the *Charter*. However, in a case such as this, where the breach goes to trial fairness, there is no good faith justification available for saving the unfair trial.[47] As a result, the ordering of a new trial, with a jury selected from a *Charter* complaint jury roll, is the only remedy that is available.

(c) Conclusion

51. The *Nahdee* test is not a substitute for a representative jury roll. Good intentions cannot cure systemic failures that affect fundamental trial fairness. First Nations have no lesser entitlement to a representative jury roll than any other member of Canadian society. Respectfully, this Honourable Court should abandon the *Nahdee* test in favour of a results based analysis.

PART IV: RELIEF REQUESTED

52. NAN respectfully requests an order:

a. Granting the Appellant, Mr. Kokopenace's appeal, setting aside his conviction for manslaughter and ordering a new trial on that charge before a jury selected from a representative jury roll; and

b. such further and other relief as this Honourable Court may deem just.

[47] A fair trial includes the right to a representative jury, see *R. v. Williams*, [1998] 1 S.C.R. 1128 at para. 47; *NAN* v. *Eden*, 2011 ONCA 187 at para. 28; see also *R. v. Stillman* [1997] 1 S.C.R. 607 at para. 72.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2nd DAY OF APRIL, 2012

FALCONER CHARNEY LLP
Barristers-at-Law
8 Prince Arthur Avenue
Toronto, Ontario
M5R 1B2

Julian N. Falconer L.S.U.C. # 29465R
Sunil M. Mathai L.S.U.C. # 49616O
Elisabeth Widner L.S.U.C. # 30161R

Tel: (416) 964-3408
Fax: (416) 929-8179
Lawyers for NAN

SCHEDULE "A" – LIST OF AUTHORITIES

1. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203
2. *Duren v. Missouri* 439 U.S. 357
3. *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429
4. *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143
5. *Lavell v. Canada (Attorney General)*, [1974] S.C.R. 1349 at 1360
6. *NAN* v. *Eden*, 2011 ONCA 187
7. *R. v. A.F.*, [1994] 4 C.N.L.R. 99
8. *R. v. Big M Drug Mart Ltd*., [1985] 1 S.C.R. 295
9. *R. v. Church of Scientology of Toronto* (1997), 33 O.R. (3d) 65, 116 C.C.C. (3d) 1
10. *R. v. Grant*, 2009 SCC
11. *R. v. Golden*, [2001] 3 S.C.R. 679
12. *R. v. Harrison*, 2009 SCC 34
13. *R. v. Nahdee*, [1993] O.J. No. 2425 (Sup. Crt)
14. *R v. Nahdee*, (1994), 26 C.R. (4^{th}) 109
15. *R. v. Ransley*, [1993] O.J. No. 2828 (Sup.Crt)
16. *R. v. Sheratt*, [1991] 1 SCR 509
17. *R. v. Stillman* [1997] 1 S.C.R. 607
18. *R. v. Wareham* [2012] O.J. No. 767 (Sup. Crt),
19. *R. v. Williams*, [1998] 1 S.C.R. 1128
20. *St. Ann's Island Shooting and Fishing Club Limited v. The King*, [1950] S.C.R. 211
21. *Taylor v. Louisiana*, 419 U.S., at 526-531
22. *United States of America v. Green*, 389 F. Supp, 2d 29 (D.Mass.2005)
23. *Vancouver (City) v. Ward*, 2010 SCC 27

SCHEDULE "B" – STATUTES AND REGULATIONS

Juries Act
R.S.O. 1990, CHAPTER J.3

Jury service notices

6. (1) The Director of Assessment shall in each year on or before the 31st day of October cause a jury service notice, together with a return to the jury service notice in the form prescribed by the regulations and a prepaid return envelope addressed to the sheriff for the county, to be mailed by first class mail to the number of persons in each county specified in the sheriff's statement, and selected in the manner provided for in this section. R.S.O. 1990, c. J.3, s. 6 (1).

Selection of persons notified

(2) The persons to whom jury service notices are mailed under this section shall be selected by the Director of Assessment at random from persons who, from information obtained at the most recent enumeration of the inhabitants of the county under section 15 of the *Assessment Act*,

(a) at the time of the enumeration, resided in the county and were Canadian citizens; and

(b) in the year preceding the year for which the jury is selected, are of or will attain the age of eighteen years or more,

and the number of persons selected from each municipality in the county shall bear approximately the same proportion to the total number selected for the county as the total number of persons eligible for selection in the municipality bears to the total number eligible for selection in the county, as determined by the enumeration. R.S.O. 1990, c. J.3, s. 6 (2).

Application of subs. (2) to municipalities in districts

(3) In a territorial district for the purposes of subsection (2), all the municipalities in the district shall together be treated in the same manner as a county from which the number of jurors required is the number fixed under subsection 5(2) to be selected from municipalities. R.S.O. 1990, c. J.3, s. 6 (3).

Address for mailing

(4) The jury service notice to a person under this section shall be mailed to the person at the address shown in the most recent enumeration of the inhabitants of the county under section 15 of the *Assessment Act*. R.S.O. 1990, c. J.3, s. 6 (4).

Return to jury service notice

(5) Every person to whom a jury service notice is mailed in accordance with this section shall accurately and truthfully complete the return and shall mail it to the sheriff for the county within five days after receipt thereof. R.S.O. 1990, c. J.3, s. 6 (5).

When service deemed made

(6) For the purposes of subsection (5), the notice shall be deemed to have been received on the third day after the day of mailing unless the person to whom the notice is mailed establishes that he or she, acting in good faith, through absence, accident, illness or other cause beyond his or her control did not receive the notice or order, or did not receive the notice or order until a later date. R.S.O. 1990, c. J.3, s. 6 (6).

List of notices given

(7) The Director of Assessment shall furnish to the sheriff for the county a list of persons in the county arranged alphabetically to whom jury service notices were mailed under this section forthwith after such mailing and the list received by the sheriff purporting to be certified by the Director of Assessment is, without proof of the office or signature of the Director of Assessment, receivable in evidence in any proceeding as proof, in the absence of evidence to the contrary, of the mailing of jury service notices to the persons shown on the list. R.S.O. 1990, c. J.3, s. 6 (7).

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. R.S.O. 1990, c. J.3, s. 6 (8).

Court of Appeal File Nos : C49961 and C48160

ONTARIO
COURT OF APPEAL

BETWEEN:

Her Majesty the Queen

(Respondent)

-and-

Clifford Kokopenace

(Appellant)

AND BETWEEN:

Her Majesty the Queen

(Respondent)

-and-

Clare Spiers

(Appellant)

AFFIDAVIT OF GOYCE KAKEGAMIC

I, Goyce Kakegamic, of the City of Thunder Bay, in the Province of Ontario, **MAKE OATH AND SAY:**

1 I am the former Deputy Grand Chief of Nishnawbe Aski Nation ("NAN") who held responsibility for the justice portfolio and as such, have knowledge of the information contained herein.

Background on NAN and the Justice Portfolio

2. I am a member of Kee-way-win First Nation. I was first elected to the Executive Council in 1997 and spent three terms, totalling nine years of service with NAN as a Deputy Grand Chief. In my three terms as Deputy Grand Chief, my core portfolio responsibilities included education, governance negotiation, and justice.

3. Nishnawbe Aski Nation (formerly known as "Grand Council Treaty 9") was established in 1973 as the political territorial organization representing the political, social and economic interests of its member nations. NAN's mandate is to represent the socioeconomic and political interests of its First Nations communities to all levels of government on a nation-to-nation basis.

4. NAN represents 49 First Nations communities throughout the province of Ontario. These communities are grouped by Tribal Council according to region.

5. NAN territory encompasses James Bay Treaty 9 territory and Ontario's portion of Treaty 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 the coast of James and Hudson's Bays. The total approximate population of NAN First Nations members (on and off reserve) is 45,000.

6. The Chiefs of the 49 First Nations communities are the members of the NAN not-for-profit corporation. The Chiefs meet two to three times a year in assembly to mandate, by resolution, the direction and initiatives of NAN. NAN's Board of Directors is comprised of the Grand Chief and three Deputy Grand Chiefs.

7. As the Deputy Grand Chief with responsibility for the justice portfolio, I dealt with issues related to community justice initiatives, the provision of legal services and policing.

Communications with the Attorney General

8. I was provided with the following correspondence by Meaghan Daniel, co-counsel to NAN. The first is a letter from Laura Loohuizen, the Trial Coordinator in the Kenora Region, addressed to me, dated July 5, 2002. A true copy of the letter dated July 5, 2002 is attached to this my affidavit as **Exhibit A**. The second is a fax from Ms. Loohuizen addressed to me dated August 26, 2002. A true copy of the fax transmission dated August 26, 2002 is attached to this my affidavit as **Exhibit B**

9. I have been advised by Ms. Daniel and do verily believe that these were the only two written forms of communication contained in the affidavit of Ms. Loohuizen, served on behalf of the Attorney General, respondents in these companion appeals.

10. Upon careful review of this correspondence, I have a limited recollection of receiving these letters; however, to the best of my ability I do not recall providing a response.

11. In addition, I have been advised by Ms. Daniel and do verily believe that Ms. Loohuizen's affidavit makes no mention of oral communications being made. To the best of my ability, I have no recollection of receiving a telephone call or any other oral communication from any member of the Kenora Court Operations with respect to the issue of the letter of July 5, 2002, the fax of August 26, 2002 or generally on the issue of the preparation of the jury rolls.

12. I have been informed by Ms. Daniel, and do verily believe that a thorough search was made of the correspondence files related to the justice portfolio, and no written response was found.

13. I make this affidavit for the purposes of NAN's intervention on the companion criminal appeals and for no other or improper purpose.

AFFIRMED BEFORE ME this)
th day of December, 2011)
in the City of Thunder Bay)
in the Province of Ontario)
)
)
A Commissionner etc.)
ANTHONY B. CARFAGNINI
SOLICITOR NOTARY PUBLIC

Goyce Kakegamic

W \General\Doc\W\Wishnawbe Aski Nation Intervention on Kokopenace and Spiers 1314-11\Court\aff.kakegamic dec 16 11.final docx

Ministry of the Attorney General
Court Services Division
Court House
216 Water Street
Kenora ON P9N 1S4
Telephone: (807) 468-2882
(807) 468-2842
Fax: (807) 468-2749

Ministère du Procureur général
Services aux tribunaux
Palais de justice
216, rue Water
Kenora ON P9N 1S4
Téléphone : (807) 468-2882
(807) 468-2842
Télécopieur : (807) 468-2749

Ontario

This is Exhibit A referred to in the affidavit of Goyce Kakegamic sworn before me, this 22 day of December, 2011

A. Carfagnini
A commissioner for taking affidavits
ANTHONY B. CARFAGNINI
SOLICITOR NOTARY PUBLIC

July 5, 2002

Fax 1-807-623-7730

Nishnawbe-Aski Nation
ATTN: Goyce Kakegamic
Deputy Grand Chief, Justice Portfolio
Thunder Bay, ON

Dear Sir:

RE: Jury Selection

The court staff in each district must prepare a list of potential jurors each year according to the Ontario *Juries Act*.

It is our duty to ensure the people living in all First Nation Territories in the Kenora District are included in the jury selection process. It would be helpful for us to use current band lists of voters, who are over 18 years of age and Canadian citizens.

Would you be able to advise me whether you would be able to supply us with such a list? I assure you that the list is confidential information which will only be used for jury selection.

Please call me at (807) 468-2842, or fax me at (807) 468-2691, or email me at laura.loohuizen@jus.gov.on.ca.

Thank you for helping us to ensure First Nation representation on jury panels.

Yours truly,

LLoohuizen

Laura Loohuizen
Trial Coordinator – Kenora Region

Copy: Nishnawbe-Aski Legal Services, Fax 1-807-622-3024
ATTN: Mary Jean Robinson, Director

2

2

FACSIMILE COVER SHEET

DATE: Aug. 26/02

TO: Goyce Kakegamic

FROM:
LAURA L. LOOHUIZEN
Judge's Secretary/Trial Coordinator
Superior Court of Justice
Court House
216 Water Street
KENORA, ON P9N 1S4
Tel: (807) 468-2831
Fax: (807) 468-2691

This is Exhibit B referred to in the affidavit of Goyce Kakegamic sworn before me, this 22 day of December, 2011

A. Carfagnini
A commissioner for taking affidavits

ANTHONY B. CARFAGNINI
SOLICITOR NOTARY PUBLIC

RE: Jury Selection

TOTAL PAGES, INCLUDING COVER SHEET: 2

MESSAGE: Enclosed is my letter of July 5, 2002, for your earliest response. Thank you in advance for your time + attention to this matter.

Copy: Mary Jean Robinson

Ministry of the Attorney General
Court Services Division
Court House
216 Water Street
Kenora ON P9N 1S4
Telephone: (807) 468-2882
(807) 468-2842
Fax: (807) 468-2749

Ministère du Procureur général
Services aux tribunaux
Palais de justice
216, rue Water
Kenora ON P9N 1S4
Téléphone : (807) 468-2882
(807) 468-2842
Télécopieur : (807) 468-2749

Ontario

July 5, 2002

Nishnawbe-Aski Nation Fax 1-807-623-7730
ATTN: Goyce Kakegamic
Deputy Grand Chief, Justice Portfolio
Thunder Bay, ON

Dear Sir:

RE: Jury Selection

The court staff in each district must prepare a list of potential jurors each year according to the Ontario *Juries Act*.

It is our duty to ensure the people living in all First Nation Territories in the Kenora District are included in the jury selection process. It would be helpful for us to use current band lists of voters, who are over 18 years of age and Canadian citizens.

Would you be able to advise me whether you would be able to supply us with such a list? I assure you that the list is confidential information which will only be used for jury selection.

Please call me at (807) 468-2842, or fax me at (807) 468-2691, or email me at laura.loohuizen@jus.gov.on.ca.

Thank you for helping us to ensure First Nation representation on jury panels.

Yours truly,

Laura Loohuizen
Trial Coordinator – Kenora Region

Copy: Nishnawbe-Aski Legal Services, Fax 1-807-622-3024
ATTN: Mary Jean Robinson, Director

Clifford Kokopenace and Clare Spiers
Appellants

-and-

Her Majesty the Queen
Respondents

Court File No: C49961/M40566
C48160/M40567

COURT OF APPEAL FOR ONTARIO

Proceedings Commenced in Toronto

FACTUM OF THE INTERVENOR NISHNAWBE ASKI NATION

FALCONER CHARNEY LLP
Barristers-at-Law
8 Prince Arthur Avenue
Toronto, Ontario
M5R 1A9

Julian N. Falconer (L.S.U.C.#29465R)
Sunil S. Mathai (L.S.U.C. #49616O)

Tel: (416) 964-3408
Fax: (416) 929-8179

Lawyers for the Intervenor, NAN