Court file #C49961/C48160

COURT OF APPEAL FOR ONTARIO

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

-and-

CLIFFORD KOKOPENACE (C49961)

Applicant

-and-

CLARE SPIERS (C48160)

Applicant

-and-

NISHNAWBE ASKI NATION
BUSHIE FAMILY and PIERRE FAMILY
DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

Interveners

RESPONDENT'S FACTUM

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RESPONDENT'S FACTUM

PART I
RESPONDENT'S STATEMENT AS TO FACTS

1. As noted by Chief Justice McLachlin in *Find*, the jury is the "cornerstone of Canadian criminal law".[1] It acts as an "excellent fact finder", reflects the conscience of the community, stands as the "final bulkwark" against oppressive laws and their enforcement, and provides a vehicle through which the public can increase its knowledge of and trust in the justice system.[2] The jury does not belong to a party to the proceeding, but to the administration of justice.[3]

2. In these appeals, the Court is asked to determine the scope of the constitutional right to "representativeness" in the jury context and the state's corresponding obligation to ensure that right is respected. The appellants and interveners ask this Court to find various *Charter* breaches on the basis that Ontario failed in its obligation to ensure a representative jury roll in Simcoe County for the year 2007 and Kenora District for the year 2008. While they do not challenge the constitutional validity of ss. 6(2) or (8) of the *Juries Act*,[4] they say that government employees within the Court Services Division ("CSD") failed in fulfilling their responsibilities under the legislation and those failures resulted in unrepresentative rolls. In turn, they say these failures resulted in ss. 11(d), (f), and 15 *Charter* breaches.[5]

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[1] *R. v. Find,* [2001] S.C.J. No. 34 at para. 1; *R. v. R.M.G.,* [1996] S.C.J. No. 94 at para. 13, *per* Cory J., (for the majority); *R. v. Bain*, [1992] S.C.J. No. 3 at para. 70, *per* Gonthier J. (dissenting in the result).

[2] *R. v. Sherratt,* [1991] S.C.J. No. 21 at para. 30, *per* L'Heureux-Dubé J.; *R. v. Turpin,* [1989] S.C.J. No. 47 at paras. 11-14; *R. v. Church of Scientology of Toronto* ["*R. v. Scientology*"], [1997] O.J. No. 1548 (C.A.) at para. 141; *R. v. Bain, supra*, at para. 25, *per* Gonthier J. (dissenting in the result); Law Reform Commission of Canada, Working Paper 27, *The Jury in Criminal Trials*, 1980, pp. 1, 5-17.

[3] *R. v. Barrow,* [1987] S.C.J. No. 84 at para. 27; *R. v. Sherratt, supra*.

[4] *Juries Act*, R.S.O. 1990, c. J.3.

[5] The appellants further suggest that the sheriff's conduct constituted "partiality, fraud or other willful misconduct" under s.629(1) of the *Criminal Code*. It is the respondent's position that, on any reasonable view of the facts, the claim pertaining to s. 629 of the *Code* cannot withstand scrutiny.

3. The appellants and interveners provide three different tests for representativeness. They range from an American, to a modified American, to a results-oriented approach.[6] The fluctuating tests and thresholds embedded in the various positions of the parties and interveners underscore the unique question that this Court must face on these appeals. It is the respondent's position that any test that the Court arrives at must be appropriately sensitive to the Canadian jury experience and our unique constitutional fabric, including the important presumption of juror impartiality, qualified right to representativeness, and principle of randomness. Taking direction from the rich jurisprudence of this Court and the Supreme Court of Canada, Ontario says that constitutional compliance will be achieved where the sheriff has accessed and used, or made reasonable efforts to access and use, a broad based list of potential jurors from across the community for the purposes of preparing jury rolls. Where such lists are accessed and used - or where objectively reasonable efforts are made to access and use such lists - then, regardless of what results flow from that work, no ss. 11(d), (f) or 15 breach can result.

4. This is not to say that there is no cause for concern when results demonstrate a poor return rate, as they do in the case of Aboriginal on-reserve individuals. Indeed, in Kenora District, and elsewhere, this concern is palpable in respect to both on and off-reserve Aboriginal people. This concern has precipitated the Independent Review being conducted by the Honourable Frank Iacobucci who, pursuant to an Order in Council, is exploring the process for including people living within reserve communities on the jury roll. The Nishnawbe Aski Nation ("NAN") has resolved as a political territorial organization to work with the Ontario government and the Independent

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[6]The intervener on behalf of the Bushie and Pierre Families, at para. 29 of his factum, says that the sole question for constitutional compliance is whether jury rolls are representative.

Reviewer to enhance representation. The "Iacobucci Review" is well underway and the final report with recommendations is due to the Attorney General no later than August 31, 2012.[7]

5. While the Iacobucci Review is probing the important systemic issues surrounding low participation of Aboriginal people on juries, with great respect, these appeals should remain focussed on the task at hand: determining whether the individual appellants' *Charter* rights were breached. This approach accords with the individualized remedy of a new trial that they each seek. In each case, the sole question is whether the sheriff in Kenora District and Simcoe County fulfilled their responsibilities by accessing and using, or making reasonable efforts to access and use, a broad based list of potential jurors from across the community when preparing the jury rolls. When the facts of these appeals are properly understood, and placed against a correct understanding of the law and constitutional obligations that attach, it becomes clear that there has been no constitutional breach.

6. The respondent accepts most of the facts set out in the Appellants' Factum. To the extent that there are errors in those facts that are relevant to the disposition of the issues on appeal, and to the extent that additional facts are warranted, they are dealt with in Part II of the factum because they are inextricably linked to the legal analysis that follows.

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[7] *Order in Council*, OC 1388/2011.

PART II
RESPONSE TO APPELLANT'S ISSUES

A. SECTIONS 11(D) AND 11(F) OF THE *CHARTER*

(i) Overview

7. The appellants accept that Ontario's legislative scheme satisfies *Charter* requirements in relation to jury representativeness. The appellants also take no issue with the impartiality of any of the jurors in their trials.[8] The allegation on appeal is that government staff, in fulfilling the role of the "sheriff" under s. 6(8) of the *Juries Act*, failed to make adequate efforts to include Aboriginal on-reserve residents in the jury rolls that furnished the appellants' juries. They ask this Court to adopt and apply a three-pronged test that they have drawn, and modified, from American jurisprudence to the facts in these cases and conclude that alleged failures on the part of the "sheriff", at this first stage of the jury selection process, violated their rights under ss. 11(d) and (f) of the *Charter*. This proposed test is heavily anchored in the American presumption of juror partiality[9] and does not absorb easily into the Canadian constitutional matrix. While the respondent acknowledges that a right to representativeness is captured by ss. 11(d) and (f) of the *Charter,* it is an "inherently qualified"[10] right and one where its scope must be carefully defined by reference to the Canadian approach to juries and the specific purposes underlying these important *Charter* provisions.

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[8]Here, the respondent is specifically commenting on impartiality arising out of the representativeness issue, as opposed to the juror check issue raised in another of Mr. Spiers' grounds of appeal.

[9]*R. v. Find, supra,* at para. 26; *R. v. Williams*, [1998] S.C.J.No. 49 at paras. 12-13.

[10]*R. v. Scientology*, *supra,* at para. 147. See also: *R. v. Biddle, supra*, at para. 58, *per* McLachlin J. (as she then was).

(ii) The Canadian Approach to Jury Trials

a) The importance of the jury

8. The right to a trial by jury is constitutionally mandated under s.11(f) of the *Charter* where the accused is liable to a maximum sentence of five years or more. Trial by jury is a longstanding and fundamental part of the criminal justice system in Canada.[11] It is beyond dispute that jury trials offer multiple benefits that cannot be achieved by a single judge.[12] The right to be tried by jury has been described as the "most transcendent privilege" that a citizen can enjoy.[13]

9. In order to achieve the laudable goals of a jury trial, there must be an effort to collect jurors from a broad cross-section of the community at the initial stage of the jury process. This increases the likelihood of diversity in the jury roll (as well as in panels and petit juries drawn from the roll). Through diversity, fact-finding is enhanced. Varying experiences and beliefs, brought to the table by 12 people drawn from a broad population base, yields a stronger collective "common sense" to the fact finding process. This also contributes to public confidence in the system.[14] Moreover, the broader the reach, the greater the educational impact the jury process will have. When a broad based source is used at the first stage of the jury selection process, information about the system is likely to travel broadly throughout the community, if not to every corner.[15]

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[11] *R. v. R.M.G., supra*, at para. 13; *R. v. Sherratt, supra,* at paras. 27-33.

[12] See: para. 1, *supra; R. v. Bain*, *supra,* at paras. 25-26, *per* Gonthier J. (dissenting in the result); Watt, David, *Helping Jurors Understand*, (Toronto: Carswell, 2007), p. 2.

[13] Blackstone, Sir William, *Commentaries on the Laws of England,* vol. 3, 8th ed., 1778. See also: para. 1, *supra*; *R. v. Turpin*, *supra,* at paras. 11-12.

[14] *R. v. Turpin, supra*, at para. 12; *R. v. R.M.G., supra,* at para. 13; *R. v. Sherratt, supra*, at para. 30; *R. v. Scientology, supra,* at para. 141.

[15] *R. v. Sherratt, supra*, at para. 30; *R. v. Turpin, supra,* at para. 12.

b) The Presumption of Impartiality

10. Section 11(d) of the *Charter* guarantees the right to a fair and public hearing before an independent and impartial tribunal. The right to an impartial trier is an absolute one. Without an impartial trier, a trial cannot be fair or seen to be fair. As Chief Justice Dickson noted in *Barrow*, "the selection of an impartial jury is crucial to a fair trial".[16]

11. There is a strong presumption of juror impartiality in Canada.[17] So strong is the presumption that it can only be displaced where it is "clear and obvious" that the person is partial or where there exists a "realistic potential" for juror partiality.[18] Obvious partiality is dealt with at both the pre-trial and pre-screening stage,[19] while a realistic potential for partiality is dealt with pursuant to s. 638(1)(b) of the *Criminal Code* at the challenge for cause stage. As well, a trial judge retains the power to discharge a juror under s.644 of the *Code* where it is believed that the juror may not be impartial or may have a negative effect on the impartiality of the jury.[20]

12. In this important respect, our system is fundamentally at odds with the American approach that presumes juror partiality. As Chief Justice McLachlin held in *Find*:

> The Canadian system of selecting jurors may be contrasted with procedures prevalent in the United States. In both countries the aim is to select a jury that will decide the case impartially. The Canadian system, however, starts from the presumption that jurors are capable of setting aside their views and prejudices and acting impartially between the

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[16] *R. v. Barrow, supra,* at para. 27.

[17] *R. v .Find, supra,* at para. 26; *R. v. Williams, supra,* at para. 13; *R. v. Parks,* [1993] O.J. No. 2157 (C.A.), leave dismissed [1993] S.C.C.A. 481 at paras. 21-22, 32.

[18] *R. v. Find, supra,* at paras. 30-34; *R. v. Williams*, *supra*, at para. 57; *R. v. Hubbert,* [1995] O.J. No. 2595 (C.A.), aff'd [1977] S.C.J. No. 4, at paras. 18-45; *R. v. Gayle, supra,* at paras. 43-44; *R. v. A.B.* (1997), 115 C.C.C. (3d) 421 (Ont. C.A.) at pp. 448-49.

[19] See: s. 632 of the *Criminal Code.*

[20] *R. v. Tsoumas* (1973), 11 C.C.C. (2d) 344 (Ont. C.A.), at para. 6; *R. v. Holcomb*, (1973) 6 N.B.R. (2d) 485 (C.A.), aff'd (1973) 6 N.B.R. (2d) 858 (S.C.C.), at paras. 19-20.

> prosecution and the accused upon proper instruction by the trial judge on their duties. This presumption is displaced only where potential bias is either clear and obvious (addressed by judicial pre-screening), or where the accused or prosecution shows reason to suspect that members of the jury array may possess biases that cannot be set aside (addressed by the challenge for cause process). *The American system, by contrast, treats all members of the jury pool as presumptively suspect, and hence includes a preliminary voir dire process, whereby prospective jurors are frequently subjected to extensive questioning, often of a highly personal nature, to guide the respective parties in exercising their peremptory challenges and challenges for cause* [emphasis added].[21]

13. The presumption of impartiality, in great part defines our approach to juries in Canada and distinguishes us from the American model. While representativeness has been said to "enhance" impartiality, it cannot guarantee impartiality.[22]

c) Representativeness: An "inherently qualified right"[23]

14. Over the past number of years, this Court and the Supreme Court of Canada have commented on the rather elusive concept of "representativeness" in several cases arising out of varying factual scenarios. While the idea that representativeness is intertwined with ss. 11(d) and (f) appears settled,[24] there remains a lack of clarity and some inconsistency in relation to the exact parameters of the right to "representativeness" and its constitutional reach. What we do know is that jury representativeness is not an absolute right, nor is it a goal to be pursued through manipulation of the jury selection process.[25]

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[21] *R. v. Find, supra,* at para. 26

[22] *R. v. Biddle, supra*, at para. 57 *per* McLachlin J. (as she then was).

[23] *R. v. Scientology, supra,* at para. 147.

[24] Both *R. v. Sherratt, supra,* paras. 26-38 and *R. v. Scientology, supra,* at paras. 136-142, stand for the proposition that the right to a representative jury roll is anchored in both ss. 11(d) and (f) of the *Charter*.

[25] *R. v. Scientology, supra,* at para. 147; *R. v. Brown,* [2006] O.J. No. 5077 (C.A.) at paras. 22-26; *R. v. Laws,* [1998] O.J. No. 3623 (C.A.) at paras. 59-60; *R. v. Kent,* [1986] M.J. No. 239 at pp. 11-12, *per* Matas J.A.; *R.* v. *Bradley*, [1973] O.J. No. 1338 (H.C.J.) at para. 4.

15. Canadian courts have made it clear that an accused has no right to 12 similarly situated jurors or even one for that matter.[26] As Justice McLachlin (as she then was) articulated in *Biddle*, even largely homogeneous juries can stand in judgment of their fellow citizens without compromising the rights to an impartial trier and a fair trial - even where the accused does not share the characteristics that make the jury homogeneous.[27] Accordingly, while a "representative" jury may, to some extent, be desirable or, in the words of Justice McLachlin (as she then was), "generally a good thing", it is beyond debate that in law, and in logic, such a right cannot be "elevated to the status of an absolute right".[28]

d) The correlation between randomness and impartiality

16. The random selection of people who are sent jury questionnaires and invited into the jury process, is an important safeguard against partiality on the part of the sheriff by eliminating the exercise of discretion in the selection process. As Justice Rosenberg stated in *Scientology:*

> […] *the critical characteristic of impartiality in the petit jury is ensured, in part, by the fact that the roll and panel are produced through a random selection process. To require the sheriff to assemble a fully representative roll or panel would run counter to the random selection process.* The sheriff would need to add potential jurors to the roll or the panel based upon perceived characteristics required for representativeness. The selection process would become much more intrusive since the sheriff in order to carry out the task of selecting a representative roll would require information from potential jurors as to their race, religion, country of origin and other characteristics essential to achieve representativeness. *The point*

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[26] *R. v. Scientology, supra,* at paras. 146-148; *R. v. Biddle*, *supra,* at paras. 56-60, *per* McLachlin J. (as she then was); *R. v. Gayle, supra*, at para. 57*; R. v. Laws, supra,* at paras. 59-60*; R. v. Kent, supra*, at p. 12; *R. v. Lamarinde,* [2002] M.J. No. 133 (C.A.) at para. 153; *R. v. Teerhuis-Moar,* [2010] M.J. No. 342 (C.A.) at para. 143. This conclusion is in keeping with Supreme Court of Canada authorities that recognize that there is no entitlement to a "favourable" jury or an "ideal" or "perfect" trial: *R. v. Sherratt, supra,* at para. 58; *R. v. Harrer,* [1995] 3 S.C.R. 562 at para. 45 *per* McLachlin J. (as she then was); *R. v. O'Connor*, [1995] S.C.J. No. 98 at para. 193; *R. v. Find, supra*, at para. 28; *R. v. Cloutier*, [1979] S.C.J. No. 67 at p. 11 *per* Pratte J.

[27] *R. v. Biddle*, *supra,* at para. 60 *per* McLachlin J. (as she then was).

[28] *R. v. Biddle, supra,* at paras. 56-58 *per* McLachlin J. (as she then was); *R. v. Scientology, supra,* at para. 147.

> *of this is not to demonstrate that a jury panel or roll cannot or should not be representative but that the right to a representative panel or roll is an inherently qualified one* [emphasis added].[29]

17. Even if it were possible to create actually representative juries, the principle of representativeness should not be actively pursued through interference with the existing, random-based processes. To manipulate the jury selection process in this manner would undermine the very randomness that lies at the core of our jury selection process and is so intimately linked to trier impartiality and the public confidence therein. Such "engineering" of juries has been rejected in Canada.[30]

e) Eschewing the concept of proportionality as necessary to representativeness

18. Aside from the concern for partiality, a "calculated" or "engineered" approach to jury representativeness ought to be avoided because of the adverse impact it can have on the privacy of potential jurors.[31] Personal and private information, such as one's religious beliefs or sexual orientation may, through a manipulated process, become relevant to one's eligibility to serve as a juror. Perhaps more important, the rationale behind a scheme directed at "true" representativeness is rooted in stereotypical notions that all members of each distinctive subgroup within society will invariably think alike and that a particular group's mind-set and experiences can be captured by a single representative.

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[29] *R. v. Scientology, supra,* at para. 147.

[30] See: *R. v. Scientology, supra,* at 147. See also: *R. v. Brown* , *supra,* at paras. 22-26, where this Court disapproved of an approach to jury selection that required panels with more individuals resembling the accused's racial characteristics to be brought forward ahead of the others to increase the likelihood of those people getting on the jury. As noted by this Court, this type of approach undermines the important randomness requirement in jury selection; a requirement that supports the presumption of impartiality.

[31] This point was raised by Mr. Justice Rosenberg in *R. v. Scientology, supra,* at para. 147.

19. This notion has been rejected for good reason. In *Laws*, this Court held that manipulating the jury process so as to ensure the inclusion of one or more members of the same race of the accused would "reinforce the very type of racial stereotyping that the author [advocating such an approach] apparently abhors".[32] In support of this conclusion, this Court cited *R. v. Bradley*, a case that was decided in the context of a claim advanced under the *Canadian Bill of Rights*. As stated by Galligan J. (as he then was), "it would be as much discrimination to insist that a particular number of persons be of a particular race or colour as it would be to say that such persons cannot participate as jurors in the trial process". [33]

20. Although advocates of such an approach may have the best of intentions in terms of seeking diversity in the jury selection process, the reality is that "representativeness" is not about categorizing people based on stereotypical notions about what we expect they will bring to the table as a result of their sex, race, religion, sexual orientation, and so on. Rather "representativeness" in the jury context is about enhancing the rights under ss. 11(d) and 11(f) of the *Charter*. Clearly, not all First Nations community members would bring the same views and experiences to the task, just as members of other groups, such as women, gays and lesbians, Christians, Muslims, or Jews, do not necessarily share the same views.

21. To achieve these goals, it is not necessary to draw from an exact, or even approximately, proportionate cross-section of the community at the first stage of the jury selection process. The various jury acts in force across Canada do not target exactitude. Their approach, albeit implemented in different ways, to randomly target the community as a whole on the basis of a broad based source

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[32] *R. v. Laws, supra,* at para. 60.

[33] See: *R. v. Laws, supra,* at para. 63; *R. v. Bradley, supra*, at para. 4.

of potential jurors, has been approved of in *Sherratt*.[34] These legislative schemes are in keeping with the test proposed by the respondents. Importantly, proportionality among particular, or distinctive, subgroups of the population drawn from these lists cannot be achieved, or even monitored for that matter. It should be noted that the results of random selection from the MPAC list itself, in any given year, may well be disproportionate – even grossly so. Certain distinctive groups caught by Ontario's s. 6(2) process, be they of a certain religious order or otherwise, may be entirely missed by the random selection process and no *Charter* breach would result.[35]

22. Having regard to the practical realities of Canadian society, and the relevant legislative schemes that have been approved of by the Supreme Court of Canada, ss.11(d) and (f) cannot be interpreted as requiring proportionality in representation at the first stage of the jury selection process. Nor can they be interpreted as requiring specific inclusion of any one subgroup of Canadian society. As noted by Justice Rosenberg in *Scientology*: "The roll is selected from a discrete geographical district which itself may or may not be representative of broader Canadian society."[36]

23. Indeed, the "community" from which a given roll is created is effectively defined by arbitrary boundaries. Accordingly, the community from which an accused's jurors are drawn may not include members of his or her own community, depending on the location of the offence. It may also depend upon whether a change of venue is ordered. Many of the reserves within Kenora District might well have been included in Thunder Bay, Cochrane or another district had the province been so

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[34] *R. v. Sherratt, supra,* at para. 35.

[35] *R. v. Scientology, supra,* at paras. 146-148; *R. v. Biddle*, *supra,* at paras. 56-60, *per* McLachlin J. (as she then was); *R. v. Gayle, supra*, at para. 57; *R. v. Laws, supra,* at paras. 59-60*; R. v. Kent, supra,* at p. 12; *R. v. Lamarinde, supra,* at para. 153; *R. v. Teerhuis-Moar, supra,* at para. 143

[36] *R. v. Scientology, supra,* at para. 146.

subdivided. In fact, some reserve communities located in Kenora District have their Superior Court matters heard in Cochrane or Thunder Bay.[37]

24. When the concept of proportionality is properly understood, s. 6(8) of the *Juries Act* takes on new light. It effectively targets a distinctive group in Ontario and attempts to secure their specific involvement in the jury process (First Nations people, living on-reserve). They are the only ones who receive the benefits of this specifically targeted approach.

25. This is similar to a process known as "cluster sampling", that occurs when a population is subdivided based on certain characteristics and their proportionate size within the larger community is determined. Then, the random selection process is applied to each subgroup individually (with the number of names drawn, corresponding to that group's size within the community). The result of "cluster sampling" is that the number of questionnaires sent out to each subgroup is proportionate to its presence in the community.[38]

26. While not constitutionally required, s. 6(8) of the *Juries Act* is an illustration of "cluster sampling". In fact, by breaking down each reserve community separately, Ms. Loohuizen engages in "cluster sampling" within "cluster sampling". Through this practice, she guarantees that the random sampling process will lead to proportionate results (in terms of number of names drawn)

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[37] Affidavit of Laura Loohuizen at footnote 5. See: Cross-examination of Laura Loohuizen, December 5, 2011, pp. 124-133. Ms. Loohuizen's evidence was that she believes Lansdowne House and Marten Falls are serviced by Thunder Bay while Attawapiskat, Fort Hope, Peawanuk, and Kashechewan are serviced by Cochrane.

[38] The concept of "cluster sampling" is discussed in David Pomerant's Working Document entitled "Multiculturalism, Representation and the Jury Selection Process in Canadian Criminal Cases" (Canada, Research and Statistics Directorate, 1994), at p. 38.

across reserves and also as between the on and off-reserve populations in Kenora District.[39] If Aboriginal on-reserve individuals were accessed by a record source outside of this method, like the appellants suggest, while constitutionally acceptable, it would detract from the current worthy attempt at proportionality. It would also deprive the province and others of tracking return rates of questionnaires and specifically addressing the need to improve and increase Aboriginal on-reserve involvement in the jury process (as has been done in Ontario in recent years).

f) Conclusion

27. For these reasons, the respondent submits that any consideration of the scope of the right to a representative jury, or remedy for any breach thereof, must flow from these four initial principles firmly embedded in our jurisprudence: (1) all jurors are presumed impartial; (2) the right to representativeness in the jury context is an inherently qualified one; (3) random selection of jurors is critical to impartiality; and (4) proportionality is not a constitutional requirement.

28. It is against a full understanding of the operative principles that the test for assessing the constitutional obligations of state actors in the creation of the jury roll emerges. Bearing in mind these principles, the sheriff's obligation is to access and use, or make reasonable efforts to access and use, a broad based list of potential jurors from across the community for the purposes of preparing jury rolls. The question of reasonable efforts is one that is grounded in an objectively rational approach.[40] Where only a narrow population source is provided the opportunity to get onto

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[39]Note that she does combines the reserves with the smallest populations because their numbers are otherwise not substantial enough. Specifically, she combined Wabauskang, Peawanuk, and Slate Falls for the purpose of the random selection in 2007. See Affidavit of Laura Loohuizen, sworn July 18, 2011, Exhibit 50.

[40]Lower court decisions in this province may provide some assistance to this Court in respect of the reasonable efforts component of the respondent's test. *R. v. Nahdee*, [1994] 4 C.N.L.R. 158 (Ont. Gen. Div); *R. v. Monture*, [2011] ONSC 4254; *R. v. Wareham,* [2012] O.J. 767 (S.C.J.).

the jury roll, and no objectively reasonable effort is made to extend the opportunity to a broader base, then the sheriff will have failed in his/her responsibilities. The accused bears the onus.

(iii) The Approach to a Reasonable Apprehension of Bias

29. The appellants suggest that the conduct of the sheriff must be looked at through a three-pronged test (addressed below) "under the umbrella of the reasonable apprehension of bias standard".[41] The grounds required to support such a claim have been described as "substantial".[42] In *R.D.S.,* Justice Cory held that bias must be assessed through the eyes of a reasonable person, who is "an informed person, *with knowledge of all the relevant circumstances, including 'the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold'* [emphasis added]".[43] Provided the test as advanced by the respondent is met, that the sheriff has accessed and used, or made reasonable efforts to access and use, broad based lists of potential jurors from across the community to prepare the jury roll, then a reasonable apprehension of bias could not result. As such, there exists synchronicity between the respondent's constitutional test and the standard for a reasonable apprehension of bias.

30. Of course, bias could arise if the sheriff extended the opportunity to participate to a broad base of the population, but deliberately left out a small portion of the population for malicious or improper reasons.[44] As Justice Rosenberg held in *Scientology*: "exclusion of identifiable groups

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[41] See: Appellants' Factum, para. 96.

[42] *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at pp. 394-95, *per* Granpdré J., (dissenting, though not on this point).

[43] *R. v. R.D.S.,* [1997] 3 S.C.R. 484 at para. 111.

[44] *R. v. Butler,* [1984] B.C.J. No. 1775 (C.A.); *R. v. Lamarinde, supra,* para. 153.

from the jury panel *on the basis*, for example, of race or religion casts doubt on the integrity of the process and risks the creation of the appearance of bias, thereby possibly violating an accused's right under section 11(d) to trial by an independent and impartial tribunal [emphasis added]".[45]

31. The deliberate exclusion of First Nations reserve residents is not alleged here and for good reason. The fresh evidence, in particular in relation to the efforts of Ms. Loohuizen in 2007, overwhelming demonstrates quite the opposite. Ms. Loohuizen not only made impressive efforts to improve the representativeness of First Nations people, both on and off-reserve that year but, at all times, she pursued this goal in good faith, with genuine determination and personal resolve. A similar approach was taken in Simcoe County.

(iv) The Sheriff Met Its Obligation in Relation to the 2008 Kenora and 2007 Simcoe Jury Rolls

a) Overview

32. The appellants say that the efforts of CSD employees were "woefully inadequate". They note that on the basis of the "Peacock affidavit", this Court concluded in *Pierre*[46] that the Kenora jury roll was "manifestly unrepresentative" and that "court officials did very little to obtain other records". They say that "none of the additional evidence now available is sufficient to disturb this conclusion" and, in fact, that the "efforts undertaken by court officials in respect of the 2008 Kenora jury roll were fully summarized in the Peacock affidavit".[47]

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[45] *R. v. Scientology, supra*, at para. 138.

[46] *Pierre v. McRae*, 2011 ONCA 187 ("*Pierre*").

[47] Appellants' Factum, para. 99 and footnote 230.

33. With respect, this is a wholly inaccurate statement. The two-page affidavit of Rolanda Peacock,[48] with no appendices, bears no resemblance to the evidence on appeal or the work done in Kenora District (or elsewhere) for purposes of preparing the 2008 jury roll. While the record from below in the *Pierre* matter was not complete, the Attorney General is grateful for the opportunity to provide the Court with a complete and accurate factual record on this critically important issue to the administration of justice in these appeals.

34. On any objective view of the facts in this case, the sheriff made both reasonable efforts to and did access and use broad based lists, in both Kenora District and Simcoe County in the relevant years. One need look no further than the affidavit of Laura Loohuizen, sworn July 18, 2011, and the three-day cross-examination on that affidavit, to get a sense of the inherent complexities involved in her job.[49] If every civil servant's initiative, productivity, creativity, commitment to their jobs and justice were to be judged by the likes of Laura Loohuizen, it would be near impossible to measure up. While some mistakes may have been made along the way, these were a function of understandable human error that did not have any significant, if any, impact on the broad based lists accessed and used in efforts to obtain the involvement of individuals living on-reserve in the jury process.

b) The efforts of Laura Loohuizen in 2007 for the 2008 Kenora District jury roll

35. Since assuming responsibility for the Aboriginal jury process in Kenora in 2001, Laura Loohuizen made extensive efforts to obtain accurate and up-to-date lists of Aboriginal adults living

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[48] Affidavit of David Gibson, Exhibit "E", Appeal Book, Vol. IIIA.

[49] She swore another affidavit on October 4, 2011. The cross-examination on that affidavit, only bolsters the invariable conclusion that her job is a difficult, complex, and sensitive one. See: Cross-examination of Laura Loohuizen, dated December 5, 2011, Exhibit 18A.

on reserves and to increase their participation in the jury roll process. She also sought to improve off-reserve Aboriginal participation. Ms. Loohuizen's efforts in 2007 for the 2008 roll, the year pertinent to Mr. Kokopenace's appeal, are focussed on below.

- ***Learning about the First Nations communities in Kenora***

36. Contacting all of the Aboriginal reserve communities in Kenora is a complicated and dynamic process that must evolve to keep step with the evolution of Aboriginal communities. Laura Loohuizen inherited a list of First Nations reserves from her predecessor, but worked hard to update and maintain it as accurately as possible. The fresh evidence on appeal verifies that by 2007, Ms. Loohuizen had a complete list of the First Nations with populated reserves in Kenora. Indeed, her list was over expansive.

37. In 2007 she made detailed inquiries about the geographic boundaries of the district, and attempted to verify the number of First Nations with reserves.[50] Her inquiries led her to a number of conclusions, all of which underscore the complexities involved with the s. 6(8) exercise:

- The Aboriginal reserve communities of Kashechewan and Marten Falls are within Kenora District, although they are serviced by the Cochrane and Thunder Bay courts (for fly-ins and almost invariably for jury trials as well).[51] Up until this point, Ms. Loohuizen had considered them to be outside of the boundaries of Kenora District.

- It was also confirmed that the Neskantaga First Nation community of Lansdowne House was within Kenora District.[52]

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[50]Although Ms. Loohuizen does not recall with certainty what led her to make this inquiry, she believes it may have been prompted by questions in relation to the composition of jury rolls and the then upcoming Coroner's inquest into the deaths of two Aboriginal men in Kashechewan. See: Affidavit of Laura Loohuizen, sworn July 18, 2011, para. 96.

[51]See footnote 37, above.

[52]Neskantaga (Lansdowne House) was included on Ms. Loohuizen's original list of 43 First Nations communities, provided to her by her predecessor in 2001, but she had no list for Neskantaga (Lansdowne House). While she believes she may have asked for a list in 2002, she is not certain. In 2006 and again in 2007 (and since), she has asked Neskantaga (Lansdowne House) for a list but has never received one. See:

- A First Nations group identified to her as Koocheching (or East Sandy Lake) had broken off from the Sandy Lake First Nation.[53] On that basis, she began including Koocheching as a separate Kenora District First Nation, although Koocheching had not been officially recognized with a number from Indian and Northern Affairs Canada (hereinafter referred to as "INAC", although recently renamed Aboriginal Affairs and Northern Development Canada).[54]

38. As a result of this information in 2007, Ms. Loohuizen's list of First Nations within Kenora District grew to a total of 46.[55] As it turns out, Ms. Loohuizen's list was broader than the requirements of s. 6(8).[56] This is because she was including Koocheching (not recognized with an INAC number) and Saugeen (Savant Lake) which actually falls within Thunder Bay District (but which she has mistakenly included in her efforts up to the present).[57] Therefore, to the limited extent that Ms. Loohuizen can be criticized for being inaccurate in her list of First Nations to be captured under s.6(8), she was over-reaching, not under-reaching.

Affidavit of Laura Loohuizen, sworn July 18, 2011, paras. 98, 136, and footnote 19 at p. 17.

[53] Affidavit of Laura Loohuizen, sworn July 18, 2011, para. 98, footnote 32.

[54] Cross-examination of Laura Loohuizen, December 5, 2011, pp. 118-199. Up to the time of cross-examination, an INAC number still had not been assigned to Koocheching.

[55] Ms. Loohuizen had come to believe that McDowell Lake may no longer be operating as a reserve because the INAC population from 2000 was 5 people and she had been unsuccessful in reaching anyone associated to that First Nation. She kept the reserve community on her list but did not include them in the 2007 random selection process. See: Affidavit of Laura Loohuizen, sworn July 18, 2011, para. 98, footnotes 31-33.

[56] Ms. Loohuizen was cross-examined on her lack of knowledge about certain reserves, including her lack of knowledge of the fact that some reserves extended into Manitoba. However, those portions of reserves with which she was unfamiliar were shown to be unpopulated on re-examination. See: Cross-examination of Laura Loohuizen, December 5, 2011, pp. 216-220, and Re-examination of Laura Loohuizen, December 7, 2011, pp. 621-626. As well, and as is clear from the re-examination of Ms. Loohuizen, many of the reserve communities are known by two or more names. In each of these cases, Ms. Loohuizen had correctly identified which names belonged to the same community. See: Re-examination of Laura Loohuizen, December 7, 2011, pp. 613-620.

[57] In relation to Savant Lake, she likely included it on her list because she had received a 2000 INAC list for this community from her predecessor. Savant Lake's population from Laura Loohuizen's list is 65. See: Affidavit of Laura Loohuizen, sworn July 18, 2011, Exhibit 50. The AADNC population number for Saugeen in 2011 is 79. Cross-examination of Laura Loohuizen, December 7, 2011, 2011 at p. 624.

39. This is typical of the spirit with which she approached her work with a view to enhancing the involvement of Aboriginal people living on-reserve. Another example is in 2009 when Ms. Loohuizen finally obtained a list from Kashechewan, she was warned by the executive assistant to the Chief and Council that it was not the best list as it included residents of both Kashechewan and Albany. Ms. Loohuizen replied that she would still like to have the list as "it was better than no list at all".[58]

- ***Brainstorming with other members of the criminal justice system to come up with creative approaches and exceeding the section 6(8) formula***

40. In June 2004, Laura Loohuizen met with Justice Stach, Justice of the Peace Morrison (who is an elder), Rolanda Peacock (her superior at Kenora CSD), and Liz Boyce (from the provincial jury centre "PJC") in an effort to determine new and creative ways in which to improve upon the participation of reserve residents in the jury process.[59]

41. In 2007, when Kenora CSD learned of the dismal return rates from the on-reserve process, Justice Stach directed that the number of questionnaires to be sent to the on-reserve population was to be dramatically increased for the 2008 roll to 600 (up from 484).[60] The figure chosen by Justice Stach represented a 24% increase over the previous year. This number represented 33% of the total 1800 questionnaires being sent out across Kenora District (both on and off-reserve). To put this number in context, official population data suggests that the number of *adults* in Kenora District living on-reserve in 2006 may have been as low as 21.5% of the total *adult population* in the district

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[58] Affidavit of Laura Loohuizen, sworn July 18, 2011, para. 129.

[59] Affidavit of Laura Loohuizen, sworn July 18, 2011, para. 59.

[60] Justice Stach did not apply a fixed formula as was done province-wide in 2008, and has been done in years since (30% and 40%). Rather, on Ms. Loohuizen's evidence, he chose what she believed to be a random figure that represented a substantial increase over the previous year, which number had itself been increased to offset poor rates of return. Affidavit of Laura Loohuizen, sworn July 18, 2011, para.79.

or as high as 31.8%, as acknowledged by the appellants in their factum.[61] On the basis of the estimate of 21.5%, the increase directed by Justice Stach amounted to an adjustment upwards of more than 50% in the number of questionnaires (as compared to what would have been sent on the basis of true proportionality).

42. Although the appellants suggest in their factum that the number of questionnaires directed by Justice Stach fell well short of the number that should have been sent,[62] this suggestion is based upon Laura Loohuizen's population numbers, which included off-reserve residents. They concede, at footnote 278, however, that had the 1996 census population data been used for the on-reserve population (as was used for the off-reserve population in their example), the number of questionnaires to be sent would have been 334[63] (almost half of what Justice Stach directed be sent).

- ***Reaching out to the First Nations, individually and to NAN***

43. In 2002, 2006, 2007 and years since, Laura Loohuizen wrote to First Nations communities in Kenora, asking for up-to-date lists.[64] Her letters included the following language:

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[61]Appellants' Factum, para. 98; Affidavit of Amber Khan, sworn January 21, 2011, Appeal Book, Vol. IIIa, Tab 3, Table 24 at p. 72. See Appendix 1 to this factum for a copy of the chart.

[62]See: Appellants' Factum, p. 123, Appendix "6".

[63]The appellants provide a third number of 418, also in footnote 278 of their factum. This number is based on an approach to the population that entails subtracting all persons living in "unorganized" areas (a population of 7,604, based on 1996 census data). In the weeks leading up to the appeal, there were inquiries made of MPAC about whether individuals living in unorganized territory are reflected in the MPAC database. These inquiries resulted from assertions made in an affidavit of Elizabeth Smith, sworn February 28, 2012. See: Appeal Book, volume 12, tab 12 . In a letter to Mr. John Kromkamp dated April 11, 2012, the appellants asked that the paragraphs pertaining to the treatment of population within unorganized territory be struck from that affidavit. Specifically, those parts of the affidavit that suggest people living in unorganized territory are not caught in MPAC. *There is no evidence in the record that supports the claim that people living in unorganized territory are not included in the MPAC database*. The respondent disputes any such claim.

[64]In 2002, Laura Loohuizen received one response from a Chief who wanted to choose which of his band members would make suitable jurors. No new lists were obtained from these efforts. In 2006, Laura Loohuizen received 4 new lists. No responses came from the remaining 39 First Nations. The results of the

> It is very important that all members of First Nation communities be included in the jury selection process so that others can benefit from their wisdom and experience. An accused person is entitled to be tried by a jury of his or her peers, therefore good representation of all segments of the populations within Kenora district is important.
>
> To ensure our list of potential jurors is up-to-date, it would be most helpful to have your current *band electoral list.* Please be assured that the list will be treated as confidential information and will only be used for the purpose of jury selection.[65]

Whenever she received a response to one of her letters, she sent a letter expressing thanks and inviting any questions about the jury selection process.

44. While in 2007, Ms. Loohuizen did not reach out to NAN for assistance, she had previously written to NAN (representing all but 16 of the First Nations within Kenora District). Ms. Loohuizen wrote to the Deputy Grand Chief of NAN, Goyce Kakegamic, on July 5, 2002 requesting band lists. When she did not receive a response, she wrote again on August 26, 2002, but did not receive a response. On appeal, NAN has filed an affidavit from Deputy Grand Chief Kakegamic acknowledging having received the letters and stating that he has no recollection of responding.[66] Similarly, Ms. Loohuizen wrote to First Nations elder Justice of the Peace Morrison in 2004 seeking information about Treaty 3 and Treaty 9 contact people. No response was received.[67]

2007 efforts, that went far beyond sending letters to First Nations, are detailed later in this factum. Affidavit of Laura Loohuizen, sworn July 18, 2011, at paras. 48-49; 73-78.

[65] See sample letter: Affidavit of Laura Loohuizen, sworn July 18, 2011, Exhibit 35.

[66] Affidavit of Goyce Kakegamic, sworn December, 2011, para. 10.

[67] Affidavit of Laura Loohuizen, sworn July 18, 2011, para. 66.

- ***Visiting the communities, attempting to explain the jury process, and encouraging participation in the jury process***

45. In the summer of 2007 Ms. Loohuizen and Mr. Mandamin (a court interpreter and Native liaison for the North West Region) visited 15 remote reserves in person.[68] Ms. Loohuizen and Mr. Mandamin met with members of the band leadership and discussed issues relating to Aboriginal participation in the jury system. In these discussions they addressed: their concern about the lack of representation of Aboriginal people on the jury rolls; their desire to ensure fair representation of the population on jury rolls; the reality of the high Aboriginal populations in the district; and the high numbers of cases involving Aboriginal accused persons or complainants before the courts. Ms. Loohuizen emphasized that she would need updated band lists to assist in achieving better representativeness, ideally with addresses. As a result of the 15 meetings held in these remote communities, eight new band lists were received.[69] Much of Ms. Loohuizen's work in respect to these meetings and her correspondence flowing out of them, is located at Exhibit 45 to her affidavit sworn July 18, 2011. To be clear, these efforts (and more) were made in the year relevant to Mr. Kokopenace's appeal.

46. With respect to four reserves that are proximate to Kenora, Mr. Mandamin and Ms. Loohuizen attempted to meet with the Chief of each of these bands. They were successful in meeting with leaders of two of the reserves to discuss jury issues.[70] Notwithstanding these meetings

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[68]Bearskin Lake; Cat Lake; Kasabonika; Keewaywin; Kitchenuhmaykoosib Inninuwug (Big Trout Lake); Muskrat Dam; Wapekeka (Angling Lake); Webequie; Fort Severn; Poplar Hill; Sachigo Lake; Sandy Lake; Wunnumin; North Caribou Lake (Weagamow/Round Lake); Pikangikum.

[69]Bearskin Lake, Cat Lake, Kasabonika, Keewaywin (a list had also been provided in 2006), Kitchenuhmaykoosib Inninuwug (Big Trout Lake) (a list had also been provided in 2006), Muskrat Dam, Wapekeka (Angling Lake), and Webequie.

[70]Ochiichagwe'babigo'ining (Dalles) and Wauzhusk Onigum (Rat Portage).

and subsequent follow-up, Ms. Loohuizen never received lists from either of these communities.[71] No one showed up, on behalf of the bands, for meetings arranged with the other two reserves near Kenora.[72] Ms. Loohuizen and Mr. Mandamin also made efforts in relation to 10 other reserves to either arrange an in-person meeting or to discuss the jury issue over the telephone. No lists were obtained as a result of these efforts.[73]

- ***Attempts to better facilitate actual participation on a jury***

47. By 2005, at the latest, Ms. Loohuizen began taking proactive measures to assist First Nations people who had received a jury summons to attend court. This included calling prospective jurors to help with travel arrangements and ensure they understood that they did not have to pay to attend. In addition, Ms. Loohuizen observed, in her capacity as trial coordinator, that the travel days posed a substantial hardship for persons traveling from remote reserves. As a result, in 2006, CSD in Kenora began calling jury panels to appear on Tuesdays, rather than on Mondays, to dramatically shorten the travel time for those coming from remote reserves.[74] When a jury panel is summoned for a Monday, people sometimes have to leave their reserve communities by the Friday before in order to ensure a Monday arrival. By changing the date to a Tuesday for when panels had to arrive, people could travel on the Monday.

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[71]Ms. Loohuizen made five follow-up calls to the Ochiichagwe'babigo'ining (Dalles) reserve band manager after their meeting at her office on the reserve. Affidavit of Laura Loohuizen, sworn July 18, 2011, para.93.

[72]Whitefish Bay (Naotkamegwanning) and Washagamis Bay (Obashkaandagaang). See: Affidavit of Laura Loohuizen, sworn July 18, 2011, para.93.

[73]A detailed colour coded chart of contacts made with the various First Nations community in 2007 is found in the Affidavit of Laura Loohuizen, sworn July 18, 2011, Exhibit 47. Although the appellants suggest, at paragraph 36 of their factum, that no efforts were made with respect to the other 16 First Nations in 2007, this is incorrect. The other efforts are chronicled in the Affidavit of Laura Loohuizen, sworn July 18, 2011, Exhibit 1, Binder 3.

[74]Affidavit of Laura Loohuizen, sworn July 18, 2011, paras. 33-34.

48. In 2006 or earlier, Kenora CSD began including their toll free number on juror summons in order to encourage recipients to call if they had questions about the process. Also, since before Ms. Loohuizen took over responsibility for the s.6(8) duties, it was the practice of CSD in Kenora to send explanatory letters with the jury questionnaires, including translations into Ojibway native syllabics and Oji-Cree native syllabics. The opening paragraph of the simplified English letter reads as follows:

> We are trying to involve more First Nation members in jury duty so we can have the benefit of their wisdom. To help us, it is important that you fill out the paper we are sending you and return it to us as soon as possible. To help you we have enclosed a stamped envelope with our address on it.[75]

- ***Thinking beyond the boundaries of the reserves***

49. The appellants are critical, at paragraph 90 of their factum, of the fact that Ms. Loohuizen included people living off-reserve in her population counts and subsequent mail outs of questionnaires. This was not an accident. Ms. Loohuizen believed that the problem of under-representation of First Nations people on jury rolls was not unique to the reserve context.[76] In her view, including First Nations people in the s. 6(8) process, who may live off-reserve, simply improved their odds of being captured: "[I]f they're captured twice, it's only going to help their inclusion".[77] She also stated: "we haven't seen the urban Aboriginal population getting captured properly either", which is remarkable given that 15.5% of the off-reserve population of Kenora

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[75] See an example of this letter: Affidavit of Laura Loohuizen, sworn July 18, 2011, Exhibit 10.

[76] She testified in cross-examination that, in her view, neither MPAC, nor the band lists, were working properly to get First Nations members onto juries: Cross-examination of Laura Loohuizen, December 5, 2011, pp. 70-71.

[77] Cross-examination of Laura Loohuizen, December 5, 2011, p. 69.

District reported Aboriginal identity for purposes of the 2006 census.[78] Ms. Loohuizen further added that "I was concerned with everybody on the Band List, including all of them".[79]

50. Furthermore, Ms. Loohuizen was alive to the issue of mobility among First Nations reserve residents. As a result, she was not eager to remove people listed as living off-reserve, because she expected that some people may have moved back to the reserve. Further, based on her experiences and local knowledge, she believed that reserve residents who moved around would still remain within Kenora District. There was also a chance that mail sent to them General Delivery on-reserve would still reach them, even though they were living off-reserve. David Gibson's and Joan Mainville's evidence confirms Ms. Loohuizen's evidence in relation to the high rates of mobility, as does Statistics Canada data.[80]

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[78] Affidavit of Amber Khan,sworn January 21, 2011, Appeal Book, Vol. IIIa, Tab 3, at paras. 51-52, and Tables 17, 22A, and 22B.

[79] See Cross-examination of Laura Loohuizen, December 6, 2011, pp. 445-446.

[80] Cross-examination of David Gibson, January 9, 2012, pp. 35, 64; Cross-examination of Joan Mainville, January 26, 2012, pp. 14-15. Mobility rates among First Nations reserve residents, for some First Nations with in Kenora District, are reflected in the Statistics Canada "Community Profiles" included as exhibits to the Affidavit of Amber Khan, sworn January 21, 2011. Those statistics suggest that, with respect to some First Nations, their 5 year mobility rate is much higher than that which is seen in the province-wide context. For example, Fort Hope, Wabauskang 21 and Osnaburgh 63B numbers suggest that between 25-39% of the population (over 5) is at the same address as five years earlier while the province-wide numbers suggest that 57% of that population is at the same address as five years earlier (2001 data). See Appeal Book, Volumes VII-XI at tabs H7, H20 and H39.

c) The goal of cooperation: Responding to the appellants' suggestion that a different approach should have been taken

51. The appellants suggest that Ontario should have gone the way of other provinces and used a centralized list, containing the entire population, to identify those who should receive juror questionnaires.[81] For instance, the appellants suggest that Ontario should have used OHIP records.[82]

52. Undoubtedly, if one were to pick the easiest and most cost-effective system for constituting the jury roll, it would not be a ss. 6(2) and (8) model. If the state were to measure its obligations and responsibilities to First Nations communities by calculating the easy way, then there are admittedly easier ways to go about capturing Aboriginal on-reserve residents for purposes of the jury roll. This has not escaped Ontario's attention. But, it is open to a province to measure its obligations differently.

53. While there are other ways to obtain data for the creation of jury rolls, the Ontario approach seeks the cooperation of people living on reserves. Laura Loohuizen's extensive efforts in Kenora to meet and work with people living within these communities, to encourage their participation on juries, is very much in keeping with this approach. As Ms. Bristo, Acting Director, Corporate

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[81] Sheila Bristo, in her capacity as Acting Manager of the Operational Support Unit ("OSU") and later as Acting Director, Corporate Planning Branch, both in the CSD, attempted to explore the possibility of other data sources containing information about who lived on First Nations reserves, including using health card records, vehicle information, yellow pages, satellite images and "Google Earth". See: Affidavit of Sheila Bristo, sworn December 2, 2011, paras. 20-23.

[82] The appellants suggest that this would not require a legislative amendment. The respondent disagrees. Names and addresses are "personal health information" in the hands of the Ministry of Health and Long Term Care (MOHLTC), as they are identifying information relating to payment or eligibility, and thus subject to the *Personal Health Information Proctection Act (PHIPA),* 2004, s.o. 2004, C.3, Sched. A. Using these records for jury lists would not be a "consistent purpose" disclosure. Nor would it meet the law enforcement exception in *PHIPA*, as they do not relate to policing, inspection or investigation that could lead to a court or tribunal proceeding, or the conduct of a court or tribunal proceeding. See: *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F.31, s. 42.

Planning Branch, of the Court Services Division of the Ministry of the Attorney General, stated in her affidavit:

> In addition to the practical difficulties posed by using the MOHLTC and MTO data, I was concerned that data received indirectly would be negatively received by the First Nations communities. I had a concern that people living with First Nations communities may not appreciate the Ministry obtaining their information from these other sources without their input. I was aware that some First Nations communities were refusing to provide their lists on the basis of privacy concerns. I believe that a cooperative approach to the issue would be preferable.

In re-examination she said:

> [T]he First Nations have indicated that they have concerns with privacy, and my view is that going around in a back-door kind of way and getting information either from a health card or some other list like an electoral list or whatever list is out there may raise some concerns with the First Nations because it is getting information about them without their permission....
>
> It also doesn't address them feeling comfortable completing the questionnaire or attending court as summonsed or understanding the entire court process, if you send out a questionnaire because of a health card record....
>
> [Our approach] has been trying to engage with the First Nations in a very upfront way to develop the partnerships and trust and understanding so that we can learn about their issues, but then also they can understand the importance of the jury process and being on a jury and their participation on a jury.[83]

54. According to Ms. Loohuizen, "trust and respect are at the core of the relationship between Court Services Divsion and on-reserve communities".[84] She has "attempted to develop positive relationships with these communities [...] in an effort to strive toward the goal of representation for First Nations people on juries within Kenora District".[85]

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[83] Affidavit of Sheila Bristo, sworn December 2, 2011, para. 22. See also: Cross-examination of Sheila Bristo, January 25, 2012, pp. 229-30.

[84] Affidavit of Laura Loohuizen, sworn July 18, 2011, para. 36; Affidavit of Laura Loohuizen, sworn October 4, 2011.

[85] Affidavit of Laura Loohuizen, sworn July 18, 2011, para. 141; Affidavit of Laura Loohuizen, sworn October 4, 2011.

55. As suggested by Ms. Bristo, the Ontario approach provides for concrete steps to be taken in relation to Aboriginal people living on-reserve to facilitate and encourage their participation in the jury process, something that cannot be solved with a better database alone. In fact, numerous efforts have been undertaken to increase the return rates from reserve communities, including: significantly increasing the number of questionnaires sent to Aboriginal on-reserve residents; translated explanatory letters to questionnaires sent to reserve communities; attempting to meet with leadership from the First Nations reserves to discuss the issue of jury participation; and conducting information sessions to explain the jury and the importance of their participation in it.

56. Importantly, by virtue of the s. 6(8) approach, Ontario can track and respond to the trends in response rates. It can also increase the number of questionnaires going to First Nations communities. It can tailor mailouts. None of these things could be accomplished if the province moved to a centralized system like OHIP.[86]

d) Why the lists asked for and obtained were the best ones

57. INAC maintains an "Indian Register" ("IR") containing the names of people registered as "Indians" under the *Indian Act*. The IR also includes date of birth, registration and file number, sex, province code, registration category, and the band that the registered person is "affiliated" with as a matter of *ancestral heritage.* The IR may also include information about whether individuals live on or off-reserve. There is no statutory obligation to report moves on or off-reserve and the maintenance of the residence code is optional. Address or contact information is not retained or updated in the IR.[87] While at one time the on/off residence code was used to determine funding,

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[86] Affidavit of Sheila Bristo, sworn December 2, 2011, para. 36.

[87] Affidavit of Allan Tallman, sworn September 30, 2011, para.4; Cross-examination of Allan Tallman, December 12, 2011 and February 3, 2012, Exhibit 1, pp. 68, 98, 311-15.

after 2003 this was no longer the case.[88] Since that time, the "default" entry for this code in the IR has been off-reserve.

58. Mr. Tallman did not know how up-to-date or accurate any information contained under the residence code in the IR would be.[89] Mr. Tallman did not believe that a "register list" from INAC showing the registered individuals affiliated with a particular band would be better than a band membership list in capturing those who live on a particular reserve because the default for the residence code is "off-reserve". Mr. Tallman believes that the bands, and not INAC, are best placed to provide accurate information about who lives on a reserve.[90]

59. Ms. Mainville explained in her Affidavit that "electoral lists" or "voters lists" generally include "the name of the member, their status card/registry number, date of birth, *and their address* [emphasis added]".[91] This closely corresponds with Laura Loohuizen's "ideal" list for s.6(8) purposes,[92] and is similar to the lists provided annually to Simcoe CSD by the Mnjikaning First Nation.

60. There are good reasons why electoral or voters lists would include addresses, most importantly to enable bands to contact their members for election purposes. Elections are important

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[88] Cross-examination of Allan Tallman, December 12, 2011, pp. 68, 105-7; Cross-examination of Allan Tallman, February 3, 2012, 311-15.

[89] In other words, to the extent that information contained in the "Indian Register Population" tables are relied upon in the Amber Khan Affidavit, marked as exhibits 11 to 19 of the cross-examination of Allan Tallman, the accuracy of the residence code from the IR must be considered against this fact. See Cross-examination of Allan Tallman, February 3, 2012, pp. 317-19.

[90] Cross-examination of Allan Tallman, December 12, 2011, pp. 68, 105; Cross-examination of Allan Tallman, February 3, 2012, pp. 311-15, 318, 324-25.

[91] Affidavit of Joan Mainville, sworn September 21, 2011, para.14.

[92] Cross-examination of Laura Loohuizen, December 5, 2011, pp. 62-63.

events for the community, with potentially significant practical consequences. In order for an election to be perceived to be fair, and to respond in the event it is contested, the band, through its electoral officer, will attempt to ensure that everyone who is entitled to vote knows about the election.[93] After *Corbiere*,[94] in which the Supreme Court found that *all* band members, not just those who live on-reserve, must be permitted to vote in band elections, regulations were enacted to guide how this must be done. Band members living on-reserve are to be notified about the election by posting information in a conspicuous part of the reserve. Band members living off-reserve are to be notified in writing at their last known addresses.[95]

61. In addition, while it is obviously up to an individual whether to remain in contact with his or her band, and to provide the band with contact information, there are many reasons to do so. Registration under the *Indian Act* provides entitlement to certain benefits, such as certain non-insured health benefits, exemption from certain taxes, treaty payments, the possibility of post-secondary education assistance, to name some. Many of these entitlements are administered through the band. For example, per capita distributions of band assets are provided through the band. In addition, voting is required on issues such as a decision to surrender land and then have a per capita distribution of the proceeds.[96] Post-secondary education assistance is usually administered by the band, which decides who will receive it.[97]

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[93] Cross-examination of Joan Mainville, January 26, 2012, pp. 18-21.

[94] *Corbiere v. Canada (Minister of Indian and Northern Affairs),* [1999] 2 S.C.R. 203.

[95] *Indian Band Election Regulations*, Regs. 4.2, 4.1(1), and 4.1(3). See also the Cross-examination of Joan Mainville, January 26, 2012, pp. 24-27.

[96] *Indian Act*, R.S.C., 1985, c. I-5, s.39(1)(b).

[97] Cross-examination of Joan Mainville, January 26, 2012, pp. 27-34.

e) Due to privacy complaints and change in policy, INAC can no longer provide information in the IR for jury purposes

62. INAC stopped providing band list information to Ontario for jury purposes in 2001, as a result of privacy complaints by some of the First Nations bands.[98] Around the same time, attitudes and policies toward sharing private information were changing, both in general and at INAC. In 2002, the guidelines for sharing information in the IR became much more restrictive. Prior to this time, information in the IR could be used, among other things, "to compile lists of Indians who may be selected to serve as jurors in the courts or for the purpose of administering or enforcing any law or carrying out a lawful investigation".[99] Beginning in 2002, information would only be shared where two related conditions were met: where sharing was essential to confer a *benefit* flowing from *registration status*.[100] As Mr. Tallman put it, "the primary consistent use is for the benefit of an individual to verify they're entitled to receive certain benefits that accrue to a registered Indian".[101]

63. Not only were INAC lists not a better option, because they do not contain the most accurate and up-to-date data, but the respondent rejects the appellants' suggestion that they enjoy a "limited

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[98]Briefing note dated September 4, 2001, Cross-examination of Shaun Joy, January 19, 2012, Exhibit 27, pp. 123-25; Cross-examination of Allan Tallman, February 3, 2012, pp. 321-33.

[99]The 2001-2002 edition of Info Source. See: Cross-examination of Allan Tallman, December 12, 2011, Exhibit 34.

[100]The 2002-2003 edition of Info Source removed from it any reference to serving as a juror. "Consistent Use" was defined as:

> The information in this bank may be used in very limited circumstances by provincial governments for the purposes of administering or enforcing provincial laws, *the applicability of which depends upon whether or not individuals are registered as Indians* [emphasis added].

Cross-examination of Allan Tallman, December 12, 2011, Exhibits 20, 35, p. 171; Cross-examination of Allan Tallman, February 3, 2012, pp. 318-23.

[101]Cross-examination of Allan Tallman, December 12, 2011, Exhibit 20, pp. 171-188, 229; Cross-examination of Allan Tallman, February 3, 2012, pp. 318-23.

privacy interest" and the government should have simply applied for an order to compel their production.[102] In other words, where First Nations were saying, through silence or otherwise, "we don't want you to have our list", that the government should have gone ahead and obtained it from another source. To the extent that INAC lists look like or act as band lists,[103] they contain highly sensitive information.[104] Moreover, getting the lists is only the first step toward increasing First Nations participation in juries. This also requires, at a minimum, enabling participation and encouraging cooperation. It is difficult to see how compelled production of this extremely sensitive information would aid in these larger goals.

f) It is difficult to draw "educated guesses" from the postal data, let alone any firm conclusions[105]

64. Contrary to the appellants' suggestion at paragraph 87 of their factum, the data from which the PJC produces reserve-by-reserve breakdowns of return rates of jury questionnaires was available in 2008 in relation to that year's Kenora jury roll. Had that data been asked for, it could have been produced at that time.[106] The respondent has taken the reserves and what lists were relied upon for the 2007 process and included it at Appendix 2 to this factum. At Appendix 3 to this factum, the respondent has included a chart that demonstrates there is no correlation between the currency of the

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[102] See: Appellants' Factum, para. 64.

[103] A First Nations band can assume control of its membership pursuant to s.10 of the *Indian Act*. Once it does, it can set its own membership rules, and is responsible for maintaining its own membership list. Nineteen of the First Nations bands in Kenora are "section 10" bands. The balance are s. 11 bands for whom INAC maintains the band list. See: Affidavit of Allan Tallman, sworn September 30, 2011, paras.4,6-9,12; Appellants' Factum, Appendix 2.

[104] Affidavit of Laura Loohuizen, sworn October 4, 2011. See also: Cross-examination of Laura Loohuizen, October 26, 2011.

[105] The appellant speaks of "educated guesses" when it comes to Canada Post information: see Appellants' Factum, para. 87. The respondent asks the Court to be cautious about any such guessing.

[106] Cross-examination of Shaun Joy, January 19, 2012, pp. 209-212.

list being used and the rate at which questionnaires are being returned to the post-office ("RPO"), or to the PJC.

65. What we do know is that Canada Post makes best efforts to deliver mail in the north, using a process called "knowledge sort". Where an address is labelled "General Delivery", and this is the only mode of delivery, community members must pick up their mail from the postal outlet. Where this is not the only mode of delivery, or there is something incorrect about the address, the postal clerk will nonetheless endeavour to deliver the mail. Postal clerks often know everyone in a small community and are able to complete delivery based on this knowledge. Clerks who are new to the community may need to cross-reference the name with a list of people who have postal boxes, though Allison Forsyth noted that the employees in many offices had been working there for a long time.[107]

66. If the clerk is unable to establish the correct address or postal box for delivery with certainty, the mail is returned to the sender.[108] Allison Forsyth estimated that the risk of a wrong postal code alone preventing a letter from Kenora reaching its recipient in a more northern community as being so low that it was almost unmeasurable.[109] Knowledge sort can break down, such as in one isolated example pointed to by the appellants where both the name of the reserve and the postal code used

[107] Cross-examination of Allison Forsyth, January 26, 2012, p. 76.

[108] Affidavit of Allison Forsyth, sworn September 30, 2011, paras. 8-13; Cross-examination of Allison Forsyth, January 26, 2012, pp. 37-39, 58, 95-99.

[109] Cross-examination of Allison Forsyth, January 26, 2012, pp. 77-78.

by CSD referred to a different community than the reserve.[110] Importantly, even in that one situation, some of the questionnaires clearly got through.[111]

g) The "county test" works

67. The county test provides that the sheriff divide the total number of questionnaires to be sent out (for both on and off-reserve) and divide it by the total adult population in the district (both on and off-reserve). This yields a percentage. That same percentage is then applied to each subgroup to determine how many questionnaires will be sent to each. The same result is achieved by Laura Loohuizen's method of taking the number of questionnaires to be sent to the off-reserve population and dividing by the off-reserve adult population. This calculation yields the percentage of off-reserve adults to receive questionnaires. That same percentage can then be applied to the population of adults residing on-reserve.

68. There is nothing wrong with this *method*. Contrary to the appellants' assertion,[112] it does not yield varying results in terms of proportionality, depending on the demographics of the district. Rather, properly applied, the county test provides proportionality as between ss. 6(2) and 6(8) populations for every district, regardless of their demographic make up. The respondent illustrates this simple calculation in Appendix 4 to this factum. It turns out that the *application* of the county test in the years prior to 2007 was flawed because the PJC gave Ms. Loohuizen the wrong number

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[110]Appellants' Factum, para. 88. See also: Cross-examination of Allison Forsyth, January 26, 2012, pp. 35-40, 82-85, 91-95.

[111]In 2009, three questionnaires appear to have been delivered and not responded to. In 2011, one questionnaire was completed and resulted in the person being eligible for the jury roll: Cross-examination of Allison Forsyth, January 26, 2012, Exhibit 4.

[112]Appellants' Factum, paras. 82-84.

for the off-reserve adult population.[113] That error, to the limited extent that it impacted upon relevant calculations in other years, had no bearing on the 2007 process for the 2008 roll. As is described described above, Mr. Justice Stach increased the number of questionnaires to be sent to the on-reserve population in 2007, setting it at 600.[114]

h) The efforts in Simcoe County in 2006 for the 2007 jury roll

69. There are two First Nations communities in Simcoe County: the Chippewas of Rama (Mnjikaning) First Nation and the Beausoleil First Nation. These communities are located in Orillia and Christian Island respectively. In order to fulfill the obligations of the sheriff under section 6(8) of the *Juries Act*, CSD staff sent out letters each year to each of these First Nations, requesting a list of Aboriginal people who live on-reserve who are over 18 years of age.[115]

70. In response to these requests, the Barrie CSD has received lists from both First Nations every year since 2000. The Chippewas of Rama Mnjikaning First Nation provided lists including only people over 18 living on-reserve, while the Beausoleil First Nation usually provided lists prepared by INAC. In 2006, the CSD sent out 25 questionnaires to each First Nations community, based on these lists.[116] Sixteen thousand questionnaires were sent to the off-reserve population in 2006.[117] The number sent to the on-reserve population therefore represented 0.31% of the total questionnaires sent.

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[113]Staff at the PJC repeatedly told Ms. Loohuizen that the census numbers from 1996 did not include First Nations reserve residents. This was incorrect. See Cross-examination of Laura Loohuizen, December 6, 2011, p. 501.

[114]See para. 41, *supra*.

[115]Affidavit of Cheryl McCalmont, sworn July 20, 2011, para. 11.

[116]Affidavit of Cheryl McCalmont, sworn July 20, 2011, para. 23.

[117]Affidavit of Shaun Joy, sworn July 19, 2011, para. 13.

71. To the extent that the appellants suggest in their factum, at paragraphs 44 and 123, that too few questionnaires were sent to the First Nations communities in Simcoe County in 2006, the respondent disputes this suggestion.[118]

i) Conclusion

72. In the end, in both Kenora District and Simcoe County, the sheriff accessed and used, and made more than reasonable efforts to access and use, a broad based list of potential jurors from across the community for the purposes of preparing jury rolls. Specifically, in Kenora District, for the purposes of the random selection of names at the first stage of the jury selection, Ms. Loohuizen used the following lists in 2007: eight lists from 2007 received directly from First Nations; two lists from 2006 received directly from First Nations; and 31 INAC lists from 2000 (her 32nd list for McDowell Lake was not used because of her belief that the reserve had stopped operating). While she had no lists for the remaining 4 First Nations, it bears repeating here that three of these First Nations are associated to reserves that are, in practice, serviced by courts operating out of Cochrane and Thunder Bay (including for purposes of jury trials): Neskantaga (Lansdowne House); Kashechewan; and Marten Falls. See footnote 37, above. There were 14,351 names on these lists and six hundred names were randomly selected from them (*i.e.,* 4.18% of the names on her lists were selected and sent questionnaires). This base, combined with the MPAC population base, constituted a broad base. No breach of ss. 11(d) or (f) resulted.

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[118] See Appendix 6 to this factum.

(v) A Brief Word About Why the Tests Proposed by the Appellants and Interveners Must Be Rejected

73. The appellants advance a three-part test for considereing ss. 11(d) and (f) *Charter* issues.[119] The appellants say that the Court must determine whether: (1) there a distinctive group; (2) the representation of that group on the roll shown to be unfair compared to its representation in the community; and (3) if yes, whether the underrepresentation of the group is attributable to the jury selection process in that exclusion is either *due to* or *exacerbated by* factors or circumstances for which the system bears responsibility. There is a fundamental difference between the third prong of the appellants' proposed test and the third prong of the *Duren* test, which actually requires that the constitutional claimant establish that the "underrepresentation is due to systematic exclusion of the group in the jury-selection process". Since *Duren*, the United States Supreme Court and state courts appear to have further tightened it by effectively requiring that any disparity be produced by the system and not external factors.[120] The appellant provides no reason for why the test has been altered so dramatically.[121]

74. NAN also adopts the *Duren* model, but under the third prong, says that it 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".[122] In other words, state conduct need only be one reason for exclusion, but how significant of a reason is unclear on the NAN test. The intervener for the Bushie and Pierre Families provide two tests for considering the issue of representativeness. The first is an exclusively results-based approach: "[r]egardless of the efforts

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[119] *Duren* v. *Missouri* 439 U.S. 357 at p. 364.

[120] *Berghuis v. Smith*, 130 S.Ct. 1382 (2010) at pp. 1395-96.

[121] Appellants' Factum, paras. 95-6.

[122] Factum of NAN, paras. 26-30.

undertaken, if that effort is ultimately fruitless, then the jury roll remains unrepresentative and must be viewed as unrepresentative."[123] At another point in the factum it is suggested that as long as Ontario can establish that "it did all that it could to create a representative jury roll", that should suffice.[124]

75. While the respondent takes no issue with the fact that Aboriginal reserve communities are distinctive groups, the *Duren, Modified Duren,* and *results-based* tests do not have application in our constitutional framework.[125] For all of the reasons noted above, focusing on this three-prong test, or on a results-based approach to representativeness, would be antithetical to our s. 11(d) and (f) *Charter* jurisprudence to date. It would offend the presumption of impartiality, the principle of randomness, and embrace a concept of proportionality that is inconsistent with our approach to juries.

76. This is not to say that information about the rates of returns of questionnaires from First Nations communities is not of some value. Such information may, as in Ontario's recent experience, highlight the need for pro-active measures in order to improve low participation by First Nations reserve residents in the jury process. The Iacobucci Review is one such measure. Nonetheless, return rates cannot, in and of themselves, be a measure of the reasonableness or constitutionality of the work done by the CSD. A closer look at the return rates themselves provide a good illustration about why. Notwithstanding that Simcoe county was using up-to-date lists every year, which included addresses in the case of Mnjikaning, and had almost no problem with questionnaires being returned

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[123]Factum of the Bushie and Pierre Families, para. 29.

[124]Factum of the Bushie and Pierre Familes, paras. 9, 43.

[125]As noted in *Scientology,* at para. 150, "the exact definition of 'distinctive group' has proved elusive".

to the post office, the return rates for questionnaires sent to on-reserve populations in Kenora and Simcoe county are largely comparable: in both cases the *rate of no response* was over 50 percent.[126] While this suggests a significant problem, it also suggests that the problem is far more complicated than the appellants suggest.

77. Even if the American approach to the question of representativeness were to be absorbed into our constitutional fabric, it does not follow that the "results based" approach to that test should also be accepted. It is increasingly apparent that the American test requires that any under-representation be produced by the method or system used to select jurors and not external factors. In effect, even if a distinct group can get past the very substantial hurdle of establishing under-representation,[127] they must also show an improper exclusionary government practice.[128] Courts have accepted, for example, that using voters lists does not meet the test of systematic exclusion because any exclusion of distinct groups is due to a failure to enumerate and not the operation of the system.[129] The United States Supreme Court recently upheld a trial judgment finding no systematic exclusion where the "systematic" causes included, among other things, the reliance on mail notices, the failure to follow

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[126]See tables at Exhibit "C" to Affidavit of Shaun Joy, sworn July 19, 2011. For the 2007 jury roll in Simcoe, the rate of no response was 52%. For the 2008 jury roll in Kenora, the rate of no response was 62%. This return rate can be compared with the non-reserve population of Ontario, which in 2007 was 28% and in 2008 was 21.3%. See Appendix 6 to this factum for a chart summarizing relevant return rates.

[127]See for example the recent decision of the U.S. Supreme Court in *Berghuis v. Smith*, for an illustration of the complexity of the American test, including assessing whether or not the distinctive group is under-represented in the jury pool. Three statistical models have developed in relation to this deceptively-simple sounding middle step of the *Duren* test: the absolute disparity test, the comparative disparity test, and the standard deviation test. In *Berghuis v. Smith*, the Supreme Court declined to rule on which test is to be preferred, as the case turned on the third step of systemic exclusion.

[128]See, for example, Richard M. Re, *Re-Justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury* (2006-2007), 116 Yale L. J. 1568 at p. 1601, 1604.

[129]Andrew Lang, "Who Gets Counted? Jury List Representativeness for Hispanics in Areas With Growing Hispanic Populations under *Duren v. Missouri*" (2007), 1 B.Y.U.L.R. 201 at p. 254.; Re article, *ibid*., at p. 1604; *US v. Cecil* (4th Cir. 1988), 836 F.2d 1431.

up on non-responses, the use of residential addresses at least 15 months old, and the refusal to enforce court orders. Justice Ginsburg, writing for the majority, concluded:

> No 'clearly established' precedent of this Court supports Smith's claim that he can make out a prima facie case merely by pointing to a host of factors that, individually or in combination, *might* contribute to a group's underrepresentation....This Court, furthermore, has never 'clearly established' that jury-selection-process features of the kind on Smith's list can give rise to a fair-cross-section claim. [emphasis in original][130]

78. Some state cases also illustrate judicial caution with results-based reasoning in the context of the fair cross-section requirement. In *Rioux* the court held that "[t]he inability to serve juror questionnaires because they were returned as undeliverable is not due to the system itself, but to outside forces, such as demographic changes."[131]

B. SECTION 15

(i) Overview

79. Mr. Kokopenance accepts that ss. 6(2) and (8) of the *Juries Act* are valid, but argues that the government has not done enough to ensure representativeness, resulting in a personal breach of his s. 15 *Charter* rights. The respondent agrees that Mr. Kokopenace has standing to assert a personal s. 15 right, but disagrees that he can succeed on the record in this case.

80. The appellant also asserts public interest standing on behalf of prospective jurors who he says have been improperly excluded from the jury roll. Mr. Kokopenace and Mr. Spiers do not seek relief commensurate with a claim of public interest standing. This s. 15 claim should also be dismissed.

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[130] *Berghuis v. Smith, supra,* at 1395-96

[131] *US v. Rioux* (2nd Cir. 1996) 97 F.3d 648 at paras.11 and 12. See also: *U.S. v. Gometz*, 730 F.2d 475 at para. 10.

(ii) The Personal Section 15 Claim

81. The appellant has correctly set out the test for determining whether a legislative provision or government conduct violates s. 15(1) of the *Charter*: (1) does the law create a distinction based on an enumerated or analogous ground; and, if so (2) does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[132] A s.15 *Charter* claimant must establish that an impugned provision or state activity creates a distinction that withholds an advantage or benefit from, or imposes a disadvantage or burden, on the claimant based on an enumerated or analogous ground.[133]

82. The appellant suggests that CSD conduct excludes Aboriginal on-reserve residents and thereby gives rise to differential treatment between on and off-reserve individuals in the Kenora jury roll, which has a discriminatory impact on Aboriginal accused "exacerbating their existing disadvantage". He does not articulate the nature of that disadvantage. He also says that his s. 15 right is breached on the analogous ground of Aboriginal-residence[134] because he was forced to be tried in Kenora, when he in fact lives in Grassy Narrows (a 45-minute drive from Kenora),[135] creating a "distinction between persons in the circumstances of the appellant (resident in Grassy Narrows) and those resident in or near the City of Kenora". He says this distinction imposes a burden by

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[132] *R. v. Kapp,* [2008] 2 S.C.R. 483 at para. 17; *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396 at para. 30; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2002] 2 S.C.R. 1120 at paras. 110, 125.

[133] *Andrews v. Law Society of British Columbia,*[1989] 1 S.C.R. 143 at paras. 174-75; *Eaton v. Brant Country Board of Education,* [1997] 1 S.C.R. 241 at para. 62; *R. v. Kapp*, [2008] 2 S.C.R. 483 at para. 17; *Ermineskin Indian Band and Nation v. Canada*, [2009] 1 S.C.R. 222 at para. 188; *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181 at para. 109; *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 at para. 106.

[134] This is a recognized analogous ground: *Corbiere v. Canada (Minister of Indian and Northern Affairs),* [1999] 2 S.C.R. 203 at paras. 14, 62; *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham,* [2011] 2 S.C.R. 670 at paras. 56-58.

[135] Cross-examination of David Gibson, January 9, 2012, pp. 29-32.

"perpetuating disadvantage and stereotypes". He again does not articulate the nature of the deemed "disadvantage or stereotype".[136]

83. The second claim is readily answered. The argument is based on geographic location, which has been repeatedly held not to be an analogous ground for the purposes of s.15 of the *Charter*.[137] To the extent that the appellant is suggesting that he was entitled to a jury with people from Grassy Narrows, or even Aboriginal people, the jurisprudence is universally unsupportive.[138]

84. As it relates to the first claim, there is no challenge brought to ss. 6(2) and (8) of the *Juries Act*.[139] As such, the appellants have acknowledged the appropriateness of the statutory differential treatment of reserve communities for purposes of creating the jury roll. Indeed, it is the respondent's position that this differential statutory treatment is an important way in which equality can be achieved.

85. A s. 15 claim involves more than simply pointing to a statistical outcome in relation to an enumerated or analogous ground, which undoubtedly exists in this case, and then saying that statistical problem is proof that inequality arose from government conduct. This is precisely the

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[136]See: Appellants' Factum, paras. 111-13.

[137]*Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995; *Wong v. Canada*, [1997] 1 F.C. 193 (T.D.) at p.197 *per* Rothstein J., aff'd [1997] F.C.J. No. 1797, leave to appeal denied [1998] S.C.C.A. No.61.

[138]See the argument above as it relates to s. 11 of the *Charter*. *R. v. Gayle, supra,* at para. 57; *R. v. Fowler, supra,* at para. 85; *R. v. Laws, supra,* at paras.54-58; *R. v. A.F. supra,* at paras.92, 152-54; *R. v. Kent, supra,* at p. 421.

[139]At paragraph 35 of the David Asper Centre for Constitutional Rights factum there is a reference to a s.52(1) declaration for constitutional invalidity of s. 6(8) of the *Juries Act*. To be clear, the parties have *never* taken the position that s. 6(8) is constitutionally infirm. Indeed, they specifically accept its constitutionality. An intervener cannot introduce a new issue on appeal, nor can it ask for a remedy, particularly a remedy not requested by the appellant. As such, this paragraph within the intervener factum should be disregarded.

problem with the appellants' modification of the American test. Rather, the *Charter* claimant must demonstrate that the statistical outcome is caused by the failings of government actors, in this case, CSD employees. As noted by Justice Iacobucci in *Symes*:

> We must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances that exist independently of such a provision.[140]

86. The appellant has not demonstrated that the low return rates for questionnaires from reserve communities are causally connected to CSD conduct at a sufficient level to meet the first question under a s. 15 analysis: does the law or conduct create a distinction *based on* an enumerated or analogous ground? As above, and with great respect, this is a far more difficult, layered, and nuanced problem than the appellants acknowledge. There is no easy answer to why return rates are so low. One thing is for sure: the efforts of the Superior Court of Justice (Mr. Justice Stach) and the CSD in Kenora District in 2007 for the 2008 jury roll, were impressive and should be applauded. Yet, the return rate for the 2008 roll did not reflect these additional efforts in any meaningful way.[141] As discussed at paragraphs 47 and 50 above, and paragraphs 104-105 below, there are multiple, complex factors that may go some way to explaining why the return rates are so low.

87. The difficulties with return rates are the subject of review by the Honourable Frank Iacobucci. The fact remains, though, that the appellant has not drawn a sufficient nexus between the impugned conduct of CSD and the return rate.

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[140] *R. v. Symes,* [1993] 4 S.C.R. 695 at para. 134. Similarly, McIntyre J. in *Andrews v. Law Society of British Columbia, supra,* at para. 163 stated that s.15 "is not a general guarantee of equality".

[141] Affidavit of Shaun Joy, sworn July 19, 2011, Exhibit "C", "Kenora, On Reserve - First Nations Questionnaire Results". The 2007 jury roll year had a 12% return rate and the 2008, 2009, 2010 had return rates respectively of 10, 11, and 10%.

88. As it relates to the second step of the *Kapp* analysis, the question becomes whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping. The Supreme Court has provided contextual factors that guide the discussion on this question, including whether there exists a correspondence between the ground of discrimination and the circumstances of the claimant, and whether there exists an ameliorative purpose or effect to the impugned law or activity.[142]

89. In terms of correspondence, the significant additional efforts of CSD in the critical year demonstrate that the government appreciated that something needed to be done, and recognized the autonomy and unique needs of the First Nations communities.[143] The correspondence factor also demonstrates why CSD did not take the steps that the appellant suggests should have been taken, like continuing to obtain INAC lists through a legal challenge under federal privacy legislation or an MOU, obtaining a court order to get the lists, or using private information from MOHLTC OHIP databases.

90. Rightly or wrongly, but the respondent says rightly, there is much to be said about not having gone behind the backs of Aboriginal communities in respect to their private information. Indeed, doing so would not respect their autonomy, or foster shared commitment in the justice system. As noted by Ms. Bristo, the desire to build trust with Aboriginal communities, approach them in a respectful manner, and deal on a cooperative level, is the very genesis of the system in place. Has it worked perfectly? No. Has it been ideal? Maybe not. But it was a policy choice open to the

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[142] *Law v. Canada, supra,* at paras. 63-75, 88; *R. v. Kapp, supra,* at paras. 19, 23. See *Withler v. Canada, supra,* at para. 66, where there has been a recent recognition of the fact that each factor need not be addressed in every case.

[143] See *Erminskin, supra,* at paras.195-201; *Cunningham, supra,* at paras.83-87; *R. v. Kapp, supra,* at para. 6; *R.v. Sim* [2005] O.J. No.4432 at para. 29.

government to make and one that is grounded in solid and respectful reasons.[144] The Supreme Court of Canada has strongly encouraged dialogue with Aboriginal communities, as opposed to going to third parties.[145]

91. The fact that the Iacobucci Review is underway conforms with the significant body of jurisprudence that includes a "duty to consult" in matters relating to aboriginal communities. Shared outcomes are always better than unilaterally imposed obligations.[146] While there exists no constitutionally protected duty to consult in these circumstances, before the subject lists were sought by the province, the decision to do so, or to have a review done before changing the system, should not be conceptualized as a perpetuation of a stereotype or disadvantage.

92. The extensive efforts by Ms. Louhuizen, in particular, who NAN has properly acknowledged having diligently committed herself to the task of improving return rates, constitutes an ameliorative purpose under s. 15.[147] It adds to the contextual backdrop for why it is said that CSD worked toward a goal of inclusiveness.

(iii) The Public Interest Claim

93. Both Mr. Kokopenace and Mr. Spiers request s. 24(1) relief. As the wording of the section indicates, this is a personal remedy: "Anyone whose rights or freedoms ... have been infringed or

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[144] See: *R. v. Withler, supra,* at para. 67, in which Supreme Court notes that deference will be shown to the government's reasonable policy choices when considering the correspondence factor. See also: *Alberta v. Hutterian Brethren of Wilson Colony,* [2009] 2 S.C.R. 567 at para. 108.

[145] *Ermineskin Indian Band and Nation v. Canada*, *supra,* at paras. 195-201; *Withler v. Canada (Attorney General*, *supra,* at para. 67.

[146] *R. v. Kapp, supra,* at para. 6; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 at paras. 64-67.

[147] *Law v. Canada, supra,* at para. 77; *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703 at para. 67.

denied" may apply for such remedy as the court considers appropriate in the circumstances. The appellants have asked for new trials. As such, they cannot assert a public interest claim on behalf of prospective jurors.[148] A public interest claim is rooted in s. 52(1) and declaratory relief. As noted by Chief Justice McLachlin in *Ferguson*:

> ss. 52(1) and 24(1) serve different remedial purposes. Section 52(1) provides a remedy for laws that violate *Charter* rights either in purpose or in effect. Section 24(1), by contrast, provides a remedy for government acts that violate *Charter* rights. It provides a personal remedy against unconstitutional government action and so, unlike s. 52(1), can be invoked only by a party alleging a violation of that party's own constitutional rights. [149]

94. Justice Iacobucci describes the principle that a "party cannot generally rely upon the violation of a third party's rights" to obtain a personal remedy under s. 24(1) as "settled law".[150] Respectfully, the Court should not provide the appellants with public interest standing, primarily on the basis of the personal relief sought. In addition, though, public interest standing is typically provided where to fail to do so will prevent the immunization of legislation or public acts.[151] Here, there is clearly no immunization of government conduct because the issues are scrutinized under ss. 11(d), (f) and 15 of the *Charter*.

95. In addition, public interest standing is discretionary and granted where failure to do so will result in the immunization from judicial review of legislation or public acts. Here, there is clearly no immunization of government conduct. The public acts or government conduct complained of in

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[148] *Borowski v. Canada (Attorney General),* [1989] S.C.J. No. 14 at para. 54.

[149] *R. v. Ferguson,* [2008] S.C.J. No. 6 at para. 61.

[150] *Benner v. Canada (Secretary of State),* [1997] S.C.J. No. 26 at para. 78. See also: *R. v. Scientology of Toronto, supra,* at para. 114.

[151] *Canadian Council of Churches v. Canada (Minister of Employment and Immigration),* [1992] 1 S.C.R. 236 at para. 36.

this case are being brought before this Court for judicial review to be scrutinized under ss. 11(d), (f) of the *Charter* and through the Appellants' personal challenge under s. 15.

96. Finally, the appellants' request for public interest standing does not meet the third branch of the *Canadian Council of Churches* test[152] because there is clearly a more reasonable and effective way to bring the challenge before the Court. Indeed, even if judicial review of CSD's actions were not already brought before the Court by Mr. Kokopenace personally, there are other reasonable and effective ways for prospective jurors to bring the challenge by way of an application, an action seeking a declaration, or judicial review of administrative action. In this manner, the prospective juror could bring his or her own evidence to support the s. 15 challenge.

C. REMEDY

(i) Overview

97. Whether the issue of representativeness in these appeals is analyzed through the lens of the *Charter*, or as a miscarriage of justice, the test for whether a new trial should be ordered is effectively the same. A new trial should only be ordered where it is established that there is prejudice or partiality in the trial, a reasonable apprehension of partiality or bias, or the appearance of unfairness such that public confidence in the integrity of the justice system would be undermined. Whether any of these things is established must be carefully considered in light of all the circumstances of the case, including the constitutional value or values being protected, the seriousness of the violation, and the competing values at stake. It is the position of the respondent that neither appellant has established that a new trial is an appropriate remedy in the circumstances of these cases. Experienced defence counsel turned his mind to the composition of this jury,

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[152] *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, *supra*, at para. 36.

knowing it did not contain First Nations people in numbers reflecting their share of the population, and that this was not an aberration in his experience and yet he explicitly indicated that he was satisfied with the jury. His client was in custody and wanted to get on with his trial.

(ii) What Happened at Trial

a) The constitutional issue was not raised at trial and why this is important

98. Defence counsel in Kokopenace did not seek to challenge the composition of the jury until months after the conviction was entered, when he learned about the "Peacock Affidavit" filed in the Coroner's Inquest in Kasheshewan.[153]

99. When appellate counsel for Kokopenace confirmed that they were going to pursue the jury representativeness issue on appeal, the Crown sought a pre-appeal ruling on whether the issue could be raised, for the first time, on appeal (by way of "*Roach*" application).[154]

100. Less than two months before the *Roach* application was scheduled to be heard, this Court released its decision in *Pierre.* As above, the Court concluded that the 2008 Kenora District jury roll was "unrepresentative".[155] In light of this finding, the Crown concluded that it was no longer in the interests of justice to continue to pursue the *Roach* application. Notwithstanding this change of course, and the concession that it is in the interests of justice for this Court to consider the issue, the

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[153]He provided the Crown and the Court with draft application materials and discussed the possibility of such an application in chambers, but he did not pursue the application further. All parties agreed that the judge was functus.

[154]Referring to the case of *R. v. Roach* [2009] O.J. No.662 (C.A.) in which the Court of Appeal considered such an application based on written submissions prior to hearing the appeal.

[155]*Pierre v. McRae*, *supra*, at para. 16.

fact that it was not raised at trial remains significant to the legal analysis on appeal.[156] Indeed, it is the position of the respondent that the appellants are simply too late to raise this issue, or, at a minimum, their failure to do so at trial is a very strong indicator that it did not affect the fairness of the trial or public confidence in the integrity of the justice system.

b) The demographics and judicial organization of Kenora and the 1994 *A.F.* case

101. Prior to jury selection at his 1994 trial, A.F., through his defence counsel Daniel Brodsky, argued that the provisions of the *Juries Act* produced an unrepresentative array in the particular context of Kenora. He brought a pre-trial motion seeking to be tried by a jury of his peers randomly selected from Sandy Lake and environs (a fly-in reserve most times of the year approximately 400 kilometers from the City of Kenora), instead of following the *Juries Act.*[157] The application involved extensive evidence about the demographics of Kenora and the operation of the *Juries Act.* Ultimately the application was dismissed, which in turn was upheld by this Court.[158]

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[156]With *Palmer* type fresh evidence, the absence of due diligence can affect the operation of the test for the admission of fresh evidence. The greater the failure of due diligence, the more compelling the fresh evidence must be in order to be admitted. See: *R. v. Maciel* (2007), 219 C.C.C. (3d) 516 (Ont.C.A.) at paras.44-52. With *Joanisse* type evidence relating to the circumstances of the trial, or *Seo/Dixon* type evidence relating to *Charter* facts, which is the type of fresh evidence in these cases, the absence of due diligence can affect both the analysis of the *Charter* right and the remedy that may be appropriate. Finally, it is a well-recognized principle in the proviso case law that the failure to object at trial is an important consideration in assessing prejudice and whether the saving provision should apply. This principle applies equally to the subset of complaints made specifically about a jury. See: *R. v. Kakegamic* (2010), 265 C.C.C. (3d) 420 (Ont.C.A.) at para. 38; *R. v. Katoch* (2009), 246 C.C.C. (3d) 423 (Ont.C.A.) at paras. 42, 45.

[157]*R. v. A.F.,* [1997] O.J. 2521 (C.A.) at para. 4.

[158]*R. v. A.F., supra.*

c) By the spring of 2008 in Kenora, issues surrounding the composition of jury rolls could come as no surprise to any justice participant working in the Kenora District

102. Counsel has been practising almost exclusively criminal law in Kenora since 1993. The respondent acknowledges the extremely important and challenging work done by counsel in the last few decades. A large percentage of his clients are First Nations individuals (he estimates 70 to 85%), and he has developed particular expertise in aboriginal issues in the context of criminal law, and speaks and consults on these issues. He has represented many individuals who live on First Nations reserves, and has visited reserves many times (he estimates that he goes to a First Nations reserve about once a week).[159] Defence counsel was familiar with the *A.F.* case. He knew the defence counsel, and recalled that the case was a major topic of conversation and interest when he first began practising criminal law in the north.[160]

103. What was new to defence counsel when he read the Peacock Affidavit in September 2008 was the fact that Kenora CSD was no longer getting band lists from INAC.[161] Accepting this to be the case, there was ample basis for him to make inquiries about the composition of Clifford Kokopenace's jury array prior to jury selection.

104. The "extraordinary measures" described in *A.F.* for addressing low return rates required the trust and cooperation of people living on First Nations reserves in order to be effective. Just how effective they would prove to be was a question waiting to be asked post-*A.F.*, and there was reason to be concerned about the answer. Living conditions in many First Nations reserves alone do not make participation in the criminal justice system easy. Defence counsel in this case explained, for

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[159] Cross-examination of David Gibson, January 9, 2011, p. 36.

[160] Cross-examination of David Gibson, January 9, 2011, pp. 25-26.

[161] Cross-examination of David Gibson, January 9, 2011, pp.76-77.

example, that if you are the person responsible for chopping wood to keep your family warm in winter, or hunting for food, you could not easily leave your community. Defence counsel explained further that there could be mistrust of and discomfort with the criminal justice system. He had experienced difficulty in persuading and arranging for witnesses living on reserves to testify, explaining that witnesses could be reluctant to take sides in the context of small communities, or disenchanted with a system they viewed as ineffectual and thus reluctant to cooperate and participate in it, or have concerns about sovereignty.[162]

105. The population of Aboriginal people living on First Nations reserves has been growing at a faster rate than the population of non-Aboriginal people living off-reserve. This obviously has the potential to exacerbate an existing problem with representativeness. As above, by the time of the 2006 census, the number of Aboriginal people living on First Nations reserves constituted between 21.5 and 31.8% of the population.[163] This was a large increase compared to 1991, which, as noted in *A.F.*, was 17.7% . Defence counsel was aware of this phenomenon, and described a population "explosion" in some First Nations reserves, vividly explaining its effect on living conditions as follows:

> In a community like Pikangikum, for instance, I have visited clients in their homes and been inside bungalows occupied by a husband, a wife, a grown brother and his girlfriend and their newborn baby and seven children between the ages of 11 and 2, and they're hanging blankets, they hang clotheslines to create notional rooms and hang blankets over them to separate bedrooms....[164]

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[162] Cross-examination of David Gibson, January 9, 2011, pp. 40-44, 79. Some similar factors were raised in community jury forums directed at Treaty #3 communities in 2010. See report entitled, "First Nation Community Jury Forums", attached as Exhibit 92 to the Affdavit of Laura Loohuizen, sworn July 18, 2011.

[163] See Affidavit of Amber Khan, dated January 21, 2011, Appeal Book, Vol. IIIa, Tab 3, Table 24, attached at Appendix 1 to this factum.

[164] Cross-examination of David Gibson, January 9, 2011, pp. 41, 56-60.

It is a tragic but inescapable fact that Aboriginal people are over-represented in the Criminal Justice system in Canada. Defence counsel was well-aware of this and noted that the problem is "visceral" in Kenora.[165] Notwithstanding measures like those outlined by the Supreme Court in *R. v. Gladue*, it is well-established that this problem is getting is getting worse, not better.[166]

106. In 2005, Daniel Brodsky publically complained, including to the Criminal Lawyers Association and First Nations leadership, about the lack of First Nations representation in the jury hearing his client, James Kakegamic's, case.[167] Defence counsel in this case was a member of the Criminal Lawyers Association at the time this e-mail was sent, but did not recall seeing it. As of May 2008, while he had never had the experience of having no Aboriginal people in a jury array, he had experienced relatively few Aboriginal people in the array, certainly in much fewer numbers than their proportion of the population in the district of Kenora.[168]

107. Notwithstanding all of these circumstances, defence counsel did not make any disclosure requests about the constitution of the jury roll. While defence counsel noted that he would not take short-cuts, he explained that his client was in custody, was not a candidate for bail, had been waiting for his trial for a long time and was anxious to begin his trial.[169]

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[165] Cross-examination of David Gibson, January 9, 2011, p. 32.

[166] *R. v. Ipeelee* [2012], S.C.J. No.13.

[167] In the course of the trial, Mr. Brodsky complained about the lack of Aboriginal representation in the jury array. While he did not "make this an issue at trial", noting it was "late in the trial", he wrote to senior Crowns and officials in the Crown Law Office - Criminal and the Ministry of the Attorney General, the Criminal Lawyers Association, and others. See Exhibit 4 to the Cross-examination of David Gibson, January 9, 2012.

[168] Cross-examination of David Gibson, January 9, 2011, pp. 86-92.

[169] Cross-examination of David Gibson, January 9, 2011, pp. 83-84.

d) There is no suggestion that either of the juries that heard these cases was partial

108. Defence counsel in Kokopenace appears to have given considerable thought and care to jury selection. He challenged a number of prospective jurors, and explicitly commented on the fact that the members of the array appeared old (in cross-examination he described the array as "a sea of old men").[170] He was clear, however, that he was not making any challenge to the jury selected or anything to do with its selection. After the jury was selected, the trial judge asked counsel if they had any comments or observations about anything that had transpired so far in the trial. Defence counsel responded with the following comment:

> Your Honour, may I just say - this comment is *not directly relevant to the trial* but I will be raising the issue with the trial coordinator. It wasn't immediately apparent until the panel was arrayed here today, but of the 130 people who were actually present, who weren't deferred or excused previously, I counted 37 *women*. There were *no young people* on this panel whatsoever. It was, I'm sure, random. I have no, I cast no aspersions on it, but I don't know if it reflects the changing demographics of this region in an extreme way but I thought it was an unusual panel when you actually saw the people present.
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> ...
>
> *Just so we're clear, 'cause I'm not raising an objection to the panel and I'm not,* obviously Mr. Williams and I had an opportunity to participate in the private discussions where people were putting forward their reasons for not wanting to sit, but it certainly was apparent from looking at the panel as they were arrayed in the courtroom, that there were a lot of people who looked like Mr. Williams and myself, and Mr. Cummine.
>
> THE COURT: With the grey hair....[171] [emphasis added]

(iii) The Approach to Determining a Remedy Under Section 24(1) of the *Charter*

109. If the appellants discharge their burden of demonstrating a violation of their *Charter* right or rights, the analysis shifts to the question of remedy. At this stage, they must show, on a balance of probabilities, that the remedy that they have requested under s.24(1) of the *Charter* is "appropriate

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[170] Cross-examination of David Gibson, January 9, 2011, p. 56.

[171] First Supplementary Transcript, Jury Selection, May 27, 2008, pp. 60-63.

and just" in all of the circumstances of the case.[172] A purposive approach must be taken to fashioning a *Charter* remedy.[173] This requires a careful consideration of the entire context of the case, including the nature and purpose of the right or value being protected, how serious the violation is, and what other competing values are at stake.[174] While prejudice is generally not considered when analyzing whether there has been a *Charter* violation, it is central to the analysis on remedy.[175]

110. The flexibility inherent in this approach allows for, and may well result in, different remedial results for the breach of a given right, depending on the particular circumstances of the case.[176] In addition, different remedies may be appropriate at different stages of the proceedings. When a complaint about disclosure is made for the first time on appeal, it is not enough to show a violation of the right to disclosure. An appellant must also show an infringement of the higher right to make full answer and defence. If defence counsel ought to have asked for disclosure at trial, this is an important factor in assessing whether the failure to disclose affected the fairness of the trial or the trial process.[177]

111. The right to a representative jury, as explained above, is an inherently qualified one. Where a complaint about representativeness is raised at the outset of the trial, prior to jury selection, the trial

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[172] *R. v. Carosella*, [1997] 1 S.C.R. 80 at p. 100; *R. v. Dixon* (1998) 122 C.C.C. (3d) 1 (S.C.C.) at para. 23.

[173] *R. v. Gamble*, [1988] S.C.J. No. 87 at para. 66.

[174] *Edmonton Journal v. Alberta (Attorney General)*, [1989] S.C.J. No. 124 at para. 51.

[175] *R. v. Carosella, supra,* at paras. 26-30; *R. v. Dixon, supra*; *R. v. Tran* (1994), 92 C.C.C. (3d) 218 (S.C.C.) at paras. 96-101.

[176] *R. v. Tran, supra,* at paras. 96-101, where the unanimous court held that the flexible approach in fashioning a remedy under s. 24(1) will allow for different remedial results for a breach of the s.14 right to an interpreter, and a new trial will not always be required.

[177] *R. v. Dixon, supra,* at paras. 23, 38.

judge has a range of options, including ordering a new array, or delaying the trial to await a new roll, which could potentially fix the problem and preserve the trial. Where the complaint is raised for the first time after conviction, however, the range of remedial options narrows drastically. At the same time, the right becomes even more qualified and the competing considerations more complex and pressing.

112. There are a series of *Criminal Code* provisions that explicitly circumscribe when a complaint about the jury array can be made and the basis for a complaint. There is a broad saving provision in the event of a later complaint about the composition of the jury. Section 629 of the *Code* limits challenges to the jury panel to situations of "*partiality, fraud or wilful misconduct* on the part of the sheriff or other officer by whom the panel was returned [emphasis added]". Section 631 mandates that a challenge to the array must be brought at the outset of trial, prior to jury selection commencing. Section 671 also provides for a saving provision.

113. These provisions, together with the procedures that can limit representativeness, suggest that once the trial is reached the inherently qualified right to a representative jury is even more qualified, and secondary to higher, absolute values such as partiality, which are even more essential to attain the core values underlying representativeness.

(iv) The Test for a New Trial as a Result of a Breach of the Qualified Right to a Representative Jury

114. Where a complaint about representativeness is made for the first time on appeal, a new trial should only be ordered if one of the following circumstances is established on a balance of probabilities:

- actual partiality or prejudice in the trial; or

- a reasonable apprehension of partiality or bias; or
- the appearance of unfairness such that public confidence in the integrity of the justice system would be undermined.

115. Even if this Court were to conclude that what happened in these cases amounted to a serious *Charter* violation, and it is appropriate to infer prejudice, without requiring that it be demonstrated,[178] the circumstances of these trials, together with the fresh evidence, rebut any suggestion of prejudice, both to the appellants and to the broader administration of justice.

116. Not only did defence counsel in *Kokopenace* not object to the composition of the jury at trial, but defence counsel, aware that First Nations people were not represented in juries anywhere close to their share of the population, turned his mind to the composition of this jury and explicitly indicated that he was content with it. This Court has repeatedly held that a failure to object at the outset to an issue relating to the very validity of the body trying the case, can be fatal to the objection, or, at a minimum, suggest an absence of prejudice.[179] In the case of Mr. Kokopenace, this Court has already confirmed that his trial was fair and contained no reversible error.

117. Both appellants were convicted of very serious offences. Mr. Kokopenace was charged with murder and convicted of manslaughter. Mr. Spiers was charged and convicted of first degree murder and two counts of kidnapping. In the context of otherwise fair trials, the seriousness of the offences is a significant factor to be considered and weighed in assessing whether there has been the appearance of unfairness undermining the integrity of the justice system.

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[178] *R. v.Khan* (2001), 160 C.C.C (3d) 1 (S.C.C.) at para.16; see also the 11(b) caselaw.

[179] *R. v. R.R.* (1994), 91 C.C.C. (3d) 193 (Ont. C.A.) at p. 199; *R. v. Gayle*, *supra*, at paras. 54-72; *R. v. Brown, supra,* at para. 16; *R. v. Katoch*, *supra*, at paras. 42, 45; *R. v. Kakegamic* (2010), 265 C.C.C. (3d) 420 (Ont. C.A.) at para. 38.

118. In contrast with errors relating to the jury occurring during the trial,[180] errors occurring in the "pre-trial" stage of assembling a jury, including involving the application of provincial legislation to create a jury roll, have been "saved" on appeal.[181] The members of the CSD involved in assembling the jury rolls at issue in these appeals exercised diligence and good faith in discharging their duties.

(v) In the Alternative, the Appellants Have Not Established a Miscarriage of Justice

119. The appellants assert, presumably in the alternative, as a personal remedy for a *Charter* violation must be analyzed through the lens of s.24(1),[182] that the circumstances in these cases give rise to a miscarriage of justice. However they do not explain what the test for this would be in the context of these cases, or how it would be met. For a miscarriage of justice to occur, the conduct must either destroy the appearance of justice or give rise to meaningful prejudice.[183] For the reasons set out in the preceding section, the appellants have not demonstrated prejudice to themselves, or to the integrity of the judicial system.

120. Any error of law in this case arising from the representativeness issue, which does not amount to a *Charter* breach, and falls short of meeting the test for miscarriage of justice outlined above, can and should be saved on the basis that it resulted in no prejudice, recognizing that this

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[180] *R. v. Varga* (1985), 18 C.C.C. (3d) 281 (Ont.C.A.); *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont.C.A.)

[181] *In Reference Re Coffin* (1956), 114 C.C.C. 1 (S.C.C.) a majority of the Supreme Court had no trouble saving a failure to comply with the geographic restrictions in the provincial legislation for assembling an array. Along similar lines, provincial courts have cured a failure to prepare the roll from the most recent voters list, see eg. *R. v. Morrow* (1914) 24 C.C.C. 310 (Que.K.B.); *R. v. Arseneau* (1977) 36 C.C.C. (2d) 65 (N.B.C.A.), Supreme Court dismissed further appeal on unrelated grounds 45 C.C.C. (2d) 321.

[182] *R. v. Tran, supra,* at paras.96-101.

[183] *R. v. Snow* (2004) 190 C.C.C. (3d) 357 at paras.29-54; see also *R. v. Cameron* (1991), 64 C.C.C. (3d) 96 (Ont.C.A.)

encompasses both the specific and a general components repeatedly referred to above, and the verdict would have inevitably been the same. It should be noted that the relevant provision of the *Criminal Code* would be s.686(1)(b)(iii) and not s.686(1)(b)(iv). The latter provision relates to procedural irregularities, including ones that could result in a loss of jurisdiction,[184] which occur "*at trial*". The problems alleged in this case relating to representativeness all occurred well before the trial began, and exist entirely outside the trial process. In the case of Mr. Kokopenace, this Court has already held that his trial was error free.

PART III
ADDITIONAL ISSUES

121. The Respondent raises no additional issues.

PART IV
ORDER REQUESTED

122. The Respondent respectfully requests that the appeals against conviction be dismissed.

Date: April 17, 2012

Michal Fairburn
Of Counsel for the Respondent

for: Gillian Roberts
Of Counsel for the Respondent

Deborah Calderwood
Of Counsel for the Respondent

[184] *R. v.Khan, supra.*

SCHEDULE "A"
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R. v. Tran (1994), 92 C.C.C. (3d) 218 (S.C.C.)

R. v.Khan (2001), 160 C.C.C (3d) 1 (S.C.C.)

R. v. R.R. (1994), 91 C.C.C. (3d) 193 (Ont. C.A.)

R. v. Katoch (2009), 246 C.C.C. (3d) 423 (Ont. C.A.)

R. v. Kakegamic (2010), 265 C.C.C. (3d) 420 (Ont. C.A.)

R. v. Varga (1985), 18 C.C.C. (3d) 281 (Ont.C.A.)

R. v. Rowbotham (1988), 41 C.C.C. (3d) 1 (Ont.C.A.)

In Reference Re Coffin (1956), 114 C.C.C. 1 (S.C.C.)

R. v. Morrow (1914) 24 C.C.C. 310 (Que.K.B.)

R. v. Arseneau (1977) 36 C.C.C. (2d) 65 (N.B.C.A.); appeal to SCC dismissed on unrelated grounds 45 C.C.C. (2d) 321

R. v. Snow (2004) 190 C.C.C. (3d) 357

R. v. Cameron (1991), 64 C.C.C. (3d) 96 (Ont.C.A.)

SCHEDULE "B"
STATUTORY PROVISIONS

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

Indian Band Election Regulations, Regs. 4.2, 4.1(1), and 4.1(3)

Indian Act, R.S.C., 1985, c. I-5, s.39(1)(b)

Table 24: Estimates of the proportion of the population of the Kenora District resident on-reserve

Data source and methodology	Proportion of population that is resident on-reserve			
	2001		2006	
	Total pop.	Pop. 18 yrs and older	Total pop.	Pop. 18 yrs and older
Census, excludes incompletely enumerated reserves; for population aged 18 and older, also excludes reserves with suppressed age data	25.1% (15538/61802)	17.1% (7489/43734)	30.2% (19448/64419)	21.5% (9888/46083)
Census, with Indian Register data for IE reserves and estimate for Kashechewan; for population aged 18 and older, also includes estimates for reserves with suppressed age data	30.1% (19906/66170)	24.1% (11120/46219)	33.8% (22921/67887)	27.6% (13282/48090)
Indian Register, excludes Kashechewan and Mishkeegogamang, own reserve only	30.6% (20238/66170)	25.7% (11875/46219)	31.0% (20983/67887)	26.7% (12819/48090)
Indian Register, excludes Kashechewan and Mishkeegogamang, own reserve, other reserve and Crown land categories	33.3% (22038/66170)	27.9% (12886/46219)	33.6% (22834/67887)	29.1% (13980/48090)
Indian Register, with estimates for Kashechewan and Mishkeegogamang, own reserve only	33.8% (22359/66170)	28.4% (13120/46219)	34.0% (23104/67887)	29.4% (14127/48090)
Indian Register, with estimates for Kashechewan and Mishkeegogamang, own reserve, other reserve and Crown land categories	36.5% (24179/66170)	30.6% (14126/46219)	36.8% (24975/67887)	31.8% (15291/48090)

Lists used in Kenora in 2007 for the 2008 jury roll			
Loohuizen's number	Band Name	List used in 2007 for 2008 Roll	NAN FN
1	Attiwapiskat	INAC	NAN
2	Bearskin Lake	2007 list	NAN
3	Cat Lake	2007 list	NAN
4	Deer Lake	INAC	NAN
5	Eabametoong /Fort Hope	2006 list	NAN
6	Eagle Lake/ Migisi Sahgaigan	INAC	
7	Fort Severn	INAC	NAN
8	Grassy Narrows	INAC	
9	Kasbonika	2007 list	NAN
10	Kashechewan	No list	NAN
11	Kee-Way-Win	2007	NAN
12	Kingfisher Lake	INAC	NAN
13	Kitchenuhmaykoosib Inninnuwug / Big Trout Lake	2007	
14	Koochiching	No list	NAN
15	Lac Seul	INAC	NAN
16	Marten Falls/Ogoki Post	No list	NAN
17	MacDowell Lake	INAC	NAN
18	Muskrat Dam	2007 list	NAN
19	Neskantaga/Landsdown House	No list	NAN
20	Nibinamik	INAC	NAN
21	North Caribou	INAC	NAN
22	North Spirit Lake	INAC	NAN
23	Northwest Angle No.33	INAC	
24	Northwest Angle No.37 / Sioux Lookout	INAC	
25	Ochiichgwe'babigo'ining/ Dalles	INAC	
26	Onigaming / Sabaskong / Nestor Falls	INAC	
27	Mishkeegogamang / Osnaburgh / Pickle Lake	INAC	NAN
28	Pikangikum	INAC	NAN
29	Poplar Hill	INAC	NAN
30	Sachigo Lake	INAC	NAN
31	Sandy Lake	INAC	NAN
32	Saugeen / Savant Lake	INAC	
33	Shoal Lake No.39 / iskatewizaagegan	INAC	
34	Shoal Lake No. 40	INAC	

35	Slate Falls / Bamaji	INAC	NAN
36	Wabaseemong / Whitedog	INAC	
37	Wabauskang / Ear Falls	INAC	
38	Wabigoon Lake Wabigoniiw Saaga'iganiiul	2006 list	
39	Wapekeka	2007 list	NAN
40	Washagamis / Obashkaandagaang	INAC	
41	Wauzhushk Onigum / Rat Portage	INAC	
42	Wawakapewin / Long Dog	INAC	NAN
43	Webequie	2007 list	NAN
44	Weenusk / Peawanuk	INAC	NAN
45	Whitefish Bay / Naotkamegwanning / Pawitik	INAC	
46	Wunnumin Lake	INAC	NAN

10 up-to-date lists (2006 or 2007)
32 INAC lists
4 no lists

Kenora First Nation Reserves - Questionnaire Results for 2011 Jury Roll
Including what list was used for each reserve and the percentage of questionnaires returned to post office (RPO)

Court	First Nation Reserve	Total # of Questionnaires Mailed	Eligible	Ineligible	RPO	Deceased	No Response	Pop'n on list	As of 2010	Rate of RPO
Kenora	Attawapiskat	34	1	2	7		24	860	INAC	20.59%
Kenora	Bearskin Lake	24	1		5		18	592	2007	20.83%
Kenora	Cat Lake	16		2	3		11	407	2007	18.75%
Kenora	Deer Lake	18	1		1		16	455	INAC	5.56%
Kenora	Eabametoong (Fort Hope)	51	2	1	23		25	1,272	2006	45.10%
Kenora	Eagle Lake/ Migisi Sahgaigan	6	1		5		0	152	INAC	83.33%
Kenora	Fort Severn	9					9	233	INAC	0
Kenora	Grassy Narrows	16		2	7		7	398	INAC	45.75%
Kenora	Iskatewizaagegan-Shoal Lake #39 – Kejick	8	3				5	205	INAC	0
Kenora	Kasabonika Lake	26			5		21	636	2007	19.23%
Kenora	Kashechewan	37	5	1			31	917	2009	0
Kenora	Keewaywin	19			8		11	456	2007	42.11%
Kenora	Kingfisher	13	1	3	1		8	325	2008	7.69%
Kenora	Kitchenuhmaykoosib Inninuwug – Big Trout Lake	38	2	1	8		27	956	2009	21.05%
Kenora	Koocheching – East Sandy							No list		NA
Kenora	Lac Seul-Hudson (Kejick Bay-Frenchman's Head)	17	1	2	3		11	434	INAC	17.65%
Kenora	McDowell Lake-Red Lake	1			1		0	5	INAC	100%
Kenora	Miishkeegogamang-New Osnaburg-Pickle Lake	43			21		22	1071	2010	48.54%
Kenora	Muskrat Dam	10	1		5		4	244	2007	50.00%
Kenora	Neskantaga – Lansdowne House							No list		NA
Kenora	Nibinamik/Summer Beaver	9			2		7	316	2010	22.22%
Kenora	North Caribou-Weagamow-Round	17	3		1	3	10	435	INAC	5.88%

Court	First Nation Reserve	Total # of Questionnaires Mailed	Eligible	Ineligible	RPO	Deceased	No Response	Pop'n on list	As of 2010	Rate of RPO
	Lake									
Kenora	North Spirit Lake	9	2				7	222	INAC	0
Kenora	NW Angle #33 – Naotkamegwanning – Pawitik – Whitefish Bay	29	1	2	12		14	409	INAC	41.38%
Kenora	NW Angle #37 Sioux Narrows (Anishnaabeg of Naogashiing)	3		1	2		0	73	INAC	66.67%
Kenora	Obanshkaandagaang Bay/ Washagamis Bay	3	1		2		0	86	INAC	66.67%
Kenora	Ochiichagwe' Babigo' Ining/Dalles/ Kenora	4	2				2	98	INAC	0
Kenora	Ogoki Post/Martens Falls							No list		NA
Kenora	Pikagikum	34	2	1	2	1	28	849	INAC	5.88%
Kenora	Poplar Hill	7	2	1			4	176	INAC	0
Kenora	Sabaskong/Nestor Falls/Onegaming (Ojibways of Onigaming)	20	2		12		6	490	2010	60.00%
Kenora	Sachigo Lake	10					10	244	INAC	0
Kenora	Sandy Lake	41	5	1		3	32	1014	INAC	0
Kenora	Saugeen etc.	3					3	63	INAC	0
Kenora	Shoal Lake #40	15		1			14	381	2008	0
Kenora	Slate Falls/New Slate Falls	6					6	149	2008	0
Kenora	Wabaseemoong/Whitedog/Islington	22	1				21	559	INAC	0
Kenora	Wabauskang-Ear Falls	2					2	46	INAC	0
Kenora	Wabigoniiw Saaga'iganiiw Anishinaabeg-Wabigoon Lk-Dinorwic	15	1	1	12		1	374	2006	80.00%
Kenora	Wapekeka-Angling Lake	10	1				9	255	2007	0
Kenora	Wauzhusk Onigum-Rat Portage-Kenora	8					8	192	INAC	0
Kenora	Wawakapawin-Long Dog-Sioux	1					1	34	2008	0

Court	First Nation Reserve	Total # of Questionnaires Mailed	Eligible	Ineligible	RPO	Deceased	No Response	Pop'n on list	As of 2010	Rate of RPO
	Lookout –Wawapekewin									
Kenora	Webequie	18			3		15	457	2007	16.67%
Kenora	Weenusk-Peawanuk	1					1	16	INAC	0
Kenora	Wunnumin Lake	11	1				10	284	INAC	0
TOTAL		684	43	22	151	7	461			

Results as of December 13, 2010 from report prepared by Provincial Jury Centre 14-Jul-11

County Test: A Formula Designed to Achieve Proportionality

The "county test" set out in PDB#563 provides direction to sheriffs on how to calculate the number of questionnaires to be sent to on reserve residents. In this regard, the test is designed to achieve approximate proportionality as between the number of questionnaires sent to eligible on and off reserve populations as contemplated by sections 6(2) and 6(8) of the *Juries Act* (based on their relative population size in the community).

There are two ways in which to approach the "county test", both of which achieve proportionality between these two groups, regardless of their relative sizes. Those approaches are described below as (a) and (b). The appellants, in their factum, have described a third approach. This approach, however, is not what is suggested by the Ministry's "county test". Their approach is described in (c) below.

(a) Approach Based on Total Questionnaires to be Sent Out

This approach involves dividing the total number of questionnaires to be sent out in the county or district (for both on and off reserve) by the total adult population in the district (both on and off reserve). This division yields a percentage. That same percentage can then be applied to each of the two groups to determine how many questionnaires should be sent to each. The formula looks like this:

total # of questionnaires to be sent out in county or district
(on and off reserve residents)
÷
total adult population of county or district
(on and off reserve residents)
x
100
=
percentage of each group to be sent questionnaires
(on and off reserve residents)

Proportionality, as contemplated by sections 6(2) and 6(8) of the *Juries Act* is achieved by this approach (ie. the same percentage of each population is sent jury questionnaires).

(b) Approach Based on Questionnaires to be Sent to the Off Reserve Population Only

The same result is achieved by taking the number of questionnaires to be sent to the off reserve population and dividing by the off reserve adult population (ie. not including the on reserve population either above or below the line). This formula looks like this:

total # of questionnaires to be sent out in county or district
(off reserve residents only)
÷
total off reserve adult population of county or district
(off reserve residents only)
x
100
=
percentage of each group to be sent questionnaires
(on and off reserve residents)

As with the previous example, proportionality as contemplated by sections 6(2) and 6(8) of the *Juries Act* is achieved by this approach (ie. the same percentage of each population is sent jury questionnaires). This formula reflects Ms. Loohuizen's understanding of the test and her approach to it in the years that she applied it.

(c) The Appellants Approach: A Misunderstanding of the "County Test"

The appellants in their joint factum mischaracterize the "county test". They suggest that the Ministry's test contemplates the division of the total population (including on and off reserve residents) by the number of questionnaires to be sent to the off reserve population only. The formula they describe looks like this:

# of questionnaires to be sent out in county or district to off reserve residents
(off reserve residents only)
÷
total adult population of county or district
(both on and off reserve residents)
x
100
=
percentage to be applied to on reserve population to determine # of questionnaires
(yields a different percentage from the off reserve population)

The result of this approach is that different percentages of the on and off reserve populations will be sent questionnaires. The extent of the difference in percentage numbers will be impacted by how significant the on reserve population numbers are. However, this is not the approach set out by the Ministry in the "county test", nor is it the approach that Ms. Loohuizen intended to take. Rather, for the years preceding the 2007 process, Ms. Loohuizen took the number of questionnaires to be sent to the off-reserve population and divided it by what she believed to be the population of adults living off reserve (taken from 1996 Census data provided to her by the PJC). This approach reflected a proper understanding of the proportionality aspect of section 6(8) and was consistent with the Ministry's "county test" from PDB#563.

Although it has been recently determined that Ms. Loohuizen's population data for the adult off reserve population was incorrect in the years leading up to the 2007 process[1], this did not impact the number of questionnaires sent out in 2007 because Justice Stach made that determination without applying the "county test" or other mathematical formula. That error, to the limited extent that it impacted upon relevant calculations in other years, had no bearing on the 2007 process for the 2008 roll.

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[1] Staff at the Provincial Jury Centre told Ms. Loohuizen that these Census numbers from 1996 did not include First Nations reserve residents. This was incorrect. The numbers do include reserve residents. Transcript of Ms. Loohuizen's Cross-Examination on December 6, 2011 at p. 500-501.

Calculating the Number of Questionnaires for Simcoe County Reserves

To calculate the number of questionnaires that should have been sent to on-reserve residents in Simcoe County, the appellants have used population numbers, for each of the two reserves, that simply cannot be taken as accurate (490 for Rama and 505 for Beausoleil for a total of 995). While those numbers appear in the calculations in the CSD file dating back to 2000, there is no evidence to suggest that those numbers were used by CSD for the purposes of the 2006 process or that they are anywhere near accurate for 2006.[1]

Accurate numbers as to the actual on-reserve populations in Simcoe County in 2006 are before this Court. Those numbers are apparent on the face of the lists provided by the First Nations themselves (which clearly identify the over 18 people living on-reserve). When these numbers are used instead of the appellants numbers, it becomes apparent that CSD was actually sending, at the very least, an approximately proportionate number of questionnaires to the Simcoe County reserves as contemplated by section 6(8) of the *Juries Act* (if not a greater than proportionate number). The following calculations demonstrate this point.

Appellants' Calculations[2]

Questionnaires sent to the off-reserve residents	16,000
	÷
Base eligible population from 1996 Census	233,572[3]
	0.0685

This number is then converted to 6.85% (by multiplying by 100), rounded up to 7% and applied to the population numbers referenced in CSD notes from 2000 (the original source of which is unknown). This yield the number they say should be sent to the on-reserve population. That calculation looks like this:

Mnjikaning:	490 x 7% = 34.3	(which the appellants round up to 35)
Beausoleil:	505 x 7% = 35.4	(which the appellants round up to 36)

On this basis, the appellants suggest that a total of 71 questionnaires should have been sent to Simcoe County reserves. The respondent, however, demonstrates below why these numbers are misleading by using accurate population numbers for the on-reserve populations.

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[1] Affidavit of Cheryl McCalmont, sworn July 20, 2011, para. 16; and footnote 11 at p. 8.

[2] The appellants calculations are included in a document they prepared and filed as Exhibit 12 to the cross-examination of Cheryl McCalmont on January 18, 2012.

[3] It would appear that this number includes on-reserve residents when it should be limited to off-reserve residents to comply with the "county" test and proportionality. This appears to be the case based on the 2001 Census data sheet included at Exhibit 5 to the Affidavit of Cheryl McCalmont, sworn July 20, 2011. However, given the relatively large off-reserve population in Simcoe County (and the relatively small on-reserve population) there is effectively no difference between these two numbers (ie. If you subtract even 1000 people from that total population, bringing it to 232,572, you get 6.88%). Given the numbers are rounded up to 7%, there is no impact upon the final percentage applied.

Respondent's Calculations

Questionnaires sent to the off-reserve residents	16,000
	÷
Base eligible population from 1996 Census	233,572[4]
	0.0685

As the appellants suggest, this number can be converted to 6.85% (by multiplying by 100) and reasonably rounded up to 7%. On the respondent's approach, it should then be applied to the actual population numbers on the lists provided by the First Nations of adult, reserve residents. The respondent's calculation looks like this:

Mnjikaning: 419 x 7% = 29.3
Beausoleil: 356 x 7% = 24.9

On this approach, CSD would send out 54 questionnaires.

This number is approximately proportionate to the number sent to the off-reserve population (50 were sent out in 2006). If, on top of this, you were to use accurate off-reserve numbers (by factoring in the indisputable population growth that has occurred in the off-reserve Simcoe County population between 1996 and 2006) you would almost certainly find that the number sent to the on-reserve population in 2006 exceeded the number required on a strict proportionality analysis.[5] This is a rapidly growing part of Ontario.

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[4] See footnote above.

[5] The population number for used by the appellants, as noted above, was from the 1996 Census.

Province Wide Return Rates in 2007 and 2008[1]

Year	Off Reserve Mailings	Number Returned	Returned by Post Office	Deceased	"No response"[2]
2007	460,400	211,152 (eligible) + 92,804 (ineligible) = 303,956 **66% return rate**	27,409 6%	Not noted	 **28% "no response"**
2008	433,400	215,322 (eligible) + 96,382 (ineligible) = 311,704 **71.9% return rate**	24,259 5.6%	5114 1.2%	 **21.3 % "no response**

Simcoe County Return Rates in 2007

Year	On Reserve Mailings	Number Returned	Returned by Post Office	Deceased	"No response"
2007	50	13 (eligible) + 11 (ineligible) = 24 **48% return rate**	0	Not noted	26 **52% "no response"**

Kenora District Return Rates in 2008

Year	On Reserve Mailings	Number Returned	Returned by Post Office	Deceased	"No response"
2008	600	34 (eligible) + 26 (ineligible) = 60 **10% return rate**	166 27%	Not noted	374 **62% "no response"**

[1] The figures in these tables are drawn from data compiled by the Provincial Jury Centre, attached to the Affidavit of Shaun Joy at Exhibit "C".

[2] In relation to the province-wide (off reserve) data summaries, the Provincial Jury Centre did not make a specific column for "no response". The respondent has therefore calculated the percentages listed here by subtracting the other figures from the total number of questionnaires sent out to arrive at the number of "no responses".

Court File Nos. C49961/c48160

THE QUEEN
Respondent

- and -

KOKOPENACE and SPIERS
Appellants

COURT OF APPEAL FOR ONTARIO

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