Court File No. C49961/C48160

COURT OF APPEAL FOR ONTARIO

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

CLIFFORD KOKOPENACE (C49961)

Appellant

-and-

CLARE SPIERS (C48160)

Appellant

-and-

NISHNAWBE ASKI NATION (NAN)
-and-
BUSHIE and PIERRE FAMILIES
-and-
DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

Interveners

FACTUM OF THE INTERVENER, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

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PART I: OVERVIEW AND STATEMENT AS TO FACTS

Overview

1. The David Asper Centre for Constitutional Rights (Asper Centre) has intervened in these appeals to address the primary issue raised by the Appellants – the lack of representativeness of the juries chosen at the trial and the application of the *Charter* to this claim and to the remedy sought. The Asper Centre will focus its submissions on the application of s. 15(1) of the *Charter* to the claim of discrimination advanced by the Appellants, on behalf of the Appellant Kokopenace directly and on behalf of the potential jury members excluded by jury selection practices that resulted in the systemic exclusion of on-reserve Aboriginal persons from the jury rolls in both the Kenora District and Simcoe County. The Appellants' claims under s. 11(d) and (f) of the *Charter* to a fair trial by an impartial jury are also informed by the s. 15 analysis with its focus on the values of equality and dignity which are applicable to all of the rights under the *Charter*. Given the circumstances of the case and its context in a legacy of discriminatory treatment of Aboriginal persons in the criminal justice system, the order for new trials requested by the Appellants is an appropriate remedy under s. 24(1).

Facts

2. The Asper Centre accepts the facts as summarized by the Appellants in their Factum. Where the Appellants and Respondent disagree, the Asper Centre anticipates that it will take no position, but has not yet had the benefit of the Respondent's submissions.

PART II: INTERVENER'S RESPONSE TO THE APPELLANTS' ISSUES

3. The Asper Centre takes the following positions with respect to the issues raised by the Appellants in paragraph 46 of the Appellants' joint factum:

A. The Asper Centre adopts the Appellants' submissions in respect of the statutory and *Charter* standards in respect of representativeness and argues that the analysis of the claim of a breach of s. 11 of the *Charter* must incorporate the s. 15 values of human dignity and equality.
B. The Asper Centre agrees that the exclusion of Aboriginal persons resident on-reserve from the jury rolls constitutes a violation of s. 15 of the *Charter*. The Asper Centre also agrees that the exclusion is not prescribed by law, thus rendering s. 1 of the *Charter* inapplicable.
C. The Asper Centre agrees that a correct interpretation of ss. 670 and 671 of the *Criminal Code* (and s. 44 of the *Juries Act*) makes them inapplicable in the circumstances, but in the alternative, the provisions are unconstitutional.
D. The Asper Centre agrees that a new trial is an available and appropriate remedy under s. 24(1) of the *Charter*.

PART III: ISSUES AND LAW

Context of Aboriginal Discrimination in the Jury System

4. In 1982, the Law Reform Commission of Canada recognized the jury as a crucial safeguard against oppressive law and law enforcement and as a way of increasing the public's trust in the criminal justice system. The right to trial by jury is especially important in the context of Aboriginal communities, since the jury can be seen as a bridge between Aboriginal and Euro-Canadian systems of criminal justice providing Aboriginal communities a significant avenue for participation and control. Nonetheless, Aboriginal persons in Ontario have long experienced systemic exclusion from juries. It was not until 1972 that Aboriginal persons served on a jury, since they were mostly excluded from voting lists before 1969. Until 1988, jurors were disqualified on the basis of the inability to speak and understand English – a requirement that most significantly excluded elders in Aboriginal communities. Since the elimination of this requirement, the scarcity of properly trained interpreters has remained a

problem in northern communities. Further, a 1979 study for the Law Reform Commission highlighted jury selectors' improper use of discretion to disqualify or excuse prospective jurors, which—along with the qualification criteria—had a disproportionate effect on Aboriginal representation. Comments like those of the sheriff in *R v Butler* reflect the stereotyping underlying the direct and systemic discrimination against Aboriginals in the justice system:

> "...the reason that Indians do not appear on the jury panels is because we have found them to be unreliable – they may show up one day for trial and then not come the next because they've gone out and gotten drunk the night before."

Canada, Law Reform Commission, *Report on the Jury*, No 16 (Ottawa: Law Reform Commission of Canada, 1982) at 5
Christopher Gora, "Jury Trials in the Small Communities of the Northwest Territories" (1993) 13 Windsor YB of Access to Just 156 at 180, 161, 166
Wendy Moss, *History of Discriminatory Laws Affecting Aboriginal People* (Ottawa: Library of Parliament, 1987) at 8, 9
Mark Israel, "The Underrepresentation of Indigenous Peoples on Canadian Jury Panels" (2003) 25 Law & Policy 37 at 40, 42
Perry Schulman & Edward Myers, "Jury Selection," in Canada, Law Reform Commission, ed, *Studies on the Jury* (Ottawa: the Commission, 1979) at 429
R v Butler, [1984] 63 CCC (3d) 243 (BCCA) at para 9

5. Efforts during the 1990s to address Aboriginal underrepresentation on juries met with limited success. Pursuant to section 6 of the 1990 *Juries Act*, jury lists were compiled by random selection from municipal rolls, excluding the 18.5 percent of Aboriginal persons who lived on reserves. Consequently, section 6(8) of the 1990 *Juries Act* provided for the use of any records available for the selection of prospective jurors from reserves. First, county officials did not always obtain lists of reserve residents with addresses; in *R v Nahdee*, the General Division of the Ontario Court found no *Charter* breach in this practice but acknowledged that there should be more consultation between the Ontario government and First Nations on jury selection. In addition, some records that were relied upon perpetuated the systemic exclusion. In 1995, Ontario's Commission on Systemic Racism in the

Criminal Justice System observed that the use of property databases as jury rolls was contributing to the exclusion of Aboriginal persons.

> *Juries Act*, RSO 1990, c J.3, s 6
> Israel, *supra* para 4 at 46
> *R v Nahdee* (1994), 21 CRR (2d) 81 (Ont Gen Div) at para 32
> Eric Mills, ed, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Ottawa: Queen's Printer for Ontario, 1995) at 253

6. It is against this historical backdrop, that the failure of the government to address the inadequate means of compiling a representative jury list in the communities in question should be reviewed and deemed wanting in respect of the Constitutional rights and values at issue in these appeals.

Equality and the Right to an Impartial and Representative Jury

7. The Asper Centre argues that the equality analysis under s. 15(1) is inextricably linked to the claimed breach of the Appellant's right to a representative jury selection process and an impartial jury under sections 11(d) and (f) through the systematic exclusion of on-reserve residents. In *R v Big M Drug Mart Ltd,* Dickson J. (as he then was) stated at p. 344:

> "[T]he purpose of the right or freedom in question is to be sought by reference ... to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in [Hunter v Southam Inc., [1984] 2 SCR 145] emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection."
>
> *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 344, Dickson J

8. The interpretation of the Appellant's rights under sections 11 (d) and (f) must be informed by the values embodied by the *Charter* as a whole, including "liberty, human dignity, *equality*, autonomy, and the enhancement of democracy [emphasis added]." The *Charter* values of human dignity and

equality, in particular, will support an application of s. 15 which reflects a departure from the justice system's historic mistreatment of Aboriginal persons.

> *R v Advance Cutting & Coring Ltd*, [2001] 3 SCR 209 at para 8
> *Hutterian Brethren of Wilson County v Alberta*, [2009] 2 SCR 567 at para 37, McLachlin CJ
> *R v Big M Drug Mart Ltd*, *supra* para 7 at 344

9. The right to an impartial jury is protected by s. 15(1), and is promoted by jury representativeness. In *R v Laws*, the Ontario Court of Appeal cited the Supreme Court of Canada's decision in *R v Williams*, at paragraph 48:

> "The accused's right to be tried by an impartial jury under s. 11(d) of the *Charter* is a fair trial right. But it may also be seen as an anti-discrimination right. The application, intentional or unintentional, of racial stereotypes to the detriment of an accused person ranks among the most destructive forms of discrimination. The result of the discrimination may not be the loss of a benefit or a job or housing in the area of choice, but the loss of the accused's very liberty." [Emphasis added.]

> *R v Laws* (1998), 41 OR (3d) 499 (ONCA) at para 65
> *R v Williams*, [1998] 1 SCR 1128 at para 48, McLachlin J

10. The Ontario Court of Appeal has observed the important link between jury representativeness and jury impartiality. Citing McLachlin J. (as she then was) in *R v Biddle*, Justice Sharpe held in *R v Gayle*, that representativeness is a means to ensure the s. 15 right to jury impartiality.

> *R v Biddle*, [1995] 1 SCR 761 at 340
> *R v Gayle* (2001), 54 OR (3d) 36 (ONCA) at para 58

11. Since jury representativeness is an important safeguard of the s. 15 right to an impartial jury, the exclusion of on-reserve Aboriginal persons from the jury roll creates an unrepresentative jury, which increases the risk of a jury that is partial against on-reserve Aboriginal persons due to existing disadvantages and stereotypes. The differential treatment on the basis of Aboriginality-residence

removes a guarantee against partiality towards Aboriginal persons, in a way that perpetuates existing disadvantage and stereotypes.

R v Gayle, supra para 10 at para 56
Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 at para 88

12. Petersen was correct to state in 1992 that "the issue of representativeness on jury panels is quintessentially a question of equality and should be addressed as such." The Ontario Court of Appeal has recognized that the importance of particular perspectives underlies the s. 11(d) and (f) right to jury representativeness, where a group's members share a "common thread or basic similarity in attitude, ideas or experience" that they uniquely bring to the jury. In *R v Church of Scientology*, Rosenberg JA explained at paragraph 158:

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

Cynthia Petersen, "Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process" (1992-1993) 38 McGill LJ 147 at 165
R v Church of Scientology, 116 CCC (3d) 1 (ONCA) at paras 158, 159, Rosenberg JA

13. Moreover, representativeness is closely tied to public perceptions of a fair and criminal justice system. According to jury studies performed in the United Kingdom, "There was a strongly held belief that bringing people together from different social and economic backgrounds was the best way to generate a viable and equitable system." This is consistent with the purpose of s. 15, as stated by McIntyre J. in *Andrews,* to promote "a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."

Roger Hancock, Lynn Matthews & Daniel Briggs, "Jurors' Perceptions, Understandings, Confidence, and Satisfaction in the Jury System: a Study in Six Courts" *Home Office Online Report* 05/04 (United Kingdom Home Office, 2004) at 46-47
Andrews v Law Society of British Columbia, [1989] 1 SCR 143 at 171, McIntyre J

Nature of the Section 15 Breach

14. The Appellant Kokopenace claims that he has experienced a violation of his personal s. 15(1) rights on the basis of both race and the analogous ground of Aboriginality-residence through the systemic exclusion from jury rolls of Aboriginals who are residents of reserves. The systemic exclusion of on-reserve Aboriginals from the Kenora jury rolls deprived the Aboriginal accused of a representative jury, thereby systemically excluding from the selection process the particular perspective of Aboriginal persons. The deprivation of jury representativeness also removes a crucial safeguard of the s. 15(1) right to an impartial jury. Each deprivation perpetuates existing disadvantage and stereotypes.

Law v Canada, supra para 11 at para 80
R v Gayle, supra para 10 at para 57
R v Laws, supra para 9 at para 65

15. The two-step test for s. 15(1) claim requires that (1) the law or government action created a distinction based on an enumerated or analogous ground and (2) the distinction created a disadvantage by perpetuating prejudice or stereotyping. As argued by the Appellants, the analogous ground of Aboriginality-residence has been recognized by the Supreme Court in *Corbiere.*

McKinney v University of Guelph, [1990] 3 SCR 229 at para 279
Andrews v Law Society (British Columbia), supra para 13 at para 28
R v Kapp, [2008] 2SCR 483
Withler v Canada (Attorney General) [2011] 1 SCR 396 at para 30
Corbiere v Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203 at paras 13-15

16. In some instances, Canadian courts have required a s. 15 challenge to a jury array to demonstrate a lack of randomness in the selection process. While any suggestion that intentional discrimination is required is inconsistent with s. 15 jurisprudence since *Andrews, supra*, courts have shown an appropriate focus on the promotion of jury representativeness, and the protection of equal

rights to jury service. Since jury representativeness depends not merely upon a random mechanism of selection, but also upon an inclusive set of sources, it is consistent with previous emphasis on the randomness of jury selection to require that the gathering of jury source lists does not systemically exclude an important segment of the community.

R v Nepoose (No. 2) (1991), 85 Alta LR (2d) 18 (ABQB) at 25
R v Sherratt (1991), 63 CCC (3d) 193 (SCC) at para 35

17. The Asper Centre notes in this regard that jury representativeness depends not merely upon a random mechanism of selection, but also upon an inclusive set of sources. It is consistent, indeed complimentary, with previous emphasis on the randomness of jury selection, to require that the gathering of jury source lists does not systemically exclude an important segment of the community.

R v Sherratt, supra para 16 at para 35

Violation of the s. 15(1) Rights of Potential Jurors' Resident On-Reserve

18. The Appellant also claims that the exclusion of on-reserve residents from the jury rolls constitutes a violation of the s.15 rights of potential jurors resident on-reserve on the analogous ground. Section 2 of the *Juries Act* bestows juror eligibility and liability on every resident in Ontario who is a Canadian citizen over the age of 18 years. Certain disqualifications are set out in the Act relating to occupation, mental disability and criminal convictions. The systemic exclusion of a group who would otherwise be qualified on the basis of an analogous ground constitutes unequal treatment under the law and deprives this group of the equal benefit of the law, to participate in a fundamental legal process that has a profound impact on their community and the community as a whole. There is differential treatment of on-reserve Aboriginal persons in the specific exclusion from juries of that group's recognized perspective. The treatment perpetuates historical disadvantage and prejudice.

19. The essential role of the jury in our justice system has been described as an "excellent fact finder," "conscience of the community," a final bulwark against oppressive laws or their enforcement," and a "public institution which benefits society in its educative and legitimizing roles." Petersen noted that, "in evaluating jury selection procedure, it is critical to move beyond an examination of the rights of the accused and of the victim to a consideration of the rights of prospective jurors."

R v Sherratt, *supra* para 16 at para 30, L'Heureux-Dubé J
R v Turpin, [1989] 1 SCR 1296 at 1310, Wilson J
Petersen, *supra* para 12 at 165 (referring in particular to the equality rights of potential jurors as representatives of minority communities)

20. As noted in *R v Mills*, the assessment of the fairness of the trial process must also be made "from the point of view of fairness in the eyes of the community." As the Ontario Court of Appeal noted in *R v Hubbert*, the process "must be fair to prospective jurors as well as the accused." While there is no specific remedy requested on behalf of potential jurors, the fact that their equality rights have been breached through systemic exclusion from the jury rolls must inform the analysis of fairness in the trial process and the response by this Honourable Court in respect of the remedy claimed by the Appellants.

R v Mills, [1999] 3 SCR 668 at para 72, McLachlin and Iacobucci JJ
R v Hubbert, [1975] OJ No 2595 (ONCA) at para 31; aff'd [1977] 2 SCR 267

Discriminatory Intent Is Not Required to Establish a s. 15 Claim

21. The Supreme Court has long recognized that showing discrimination for the purposes of s. 15 does not require showing discriminatory intent.

Ontario Human Rights Commission and O'Malley v Simpsons-Sears Ltd, [1985] 2 SCR 536 at 551
Andrews v Law Society (British Columbia), *supra* para 13 at 34
Law v Canada, *supra* para 11 at para 80

22. The *Charter of Rights and Freedoms* protects not only intentional or direct discrimination, but also discriminatory effects. Thus, jury selection procedures can unintentionally lead to adverse impact discrimination, notwithstanding the good intentions of government administrators. In the context of other *Charter* rights, the Supreme Court has held that negligence can lead to *Charter* violations.

Petersen, *supra* para 12 at 167
R v La, [1997] 2 SCR 68 at para 20 (s. 7 claim)
R v *Dixon*, [1998] 1 SCR 244 at para 30 (s. 8 claim)

23. The Appellant Kokopenace claims that negligence in the Kenora District jury selection process has systemically excluded on-reserve Aboriginal persons from the jury roll. Regardless of whether the exclusion was negligent, the effect of government action as documented herein decreased the representativeness of the roll, since jury representativeness depends just as much upon the sources of the jury selection process as it does upon the randomness of the process. In *R v Sherratt*, L'Heureux-Dubé J. stated at paragraph 35 that jury representativeness is guaranteed by the random selection process, "coupled with the sources from which this selection is made." Failure to take due care when collecting source lists for jury rolls affects the remaining steps of the jury selection process, including the selection of names from the rolls, summoning those persons and selecting from those summoned to create the jury panel.

R v Sherratt, supra at para 35, L'Heureux-Dubé J
Schulman & Meyers, *supra* para 4 at 395

24. Canadian jurisprudence on jury representativeness has recognized no guarantee to a particular outcome of the random jury selection process, but Saskatchewan and BC courts have observed the potential problem of unintentional and systemic exclusion since 1984-85. In *R v Laforte*, the Manitoba Court of Appeal held that the right to be tried by one's peers does not guarantee an Aboriginal accused

the right to be tried by Aboriginal jurors. However, in *R v Bird*, the Saskatchewan Court of Appeal stated:

> "A process which systemically excludes, either by design or unwittingly, an identifiable group from serving on a jury may be a sufficient ground for vacating a conviction made by a jury selected by that process." [Emphasis added.]
>
> *R v Laforte* (1975), 62 DLR (3d) 86 (MBCA) at 88
> *R v Bird*, [1984] 1 CNLR 122 (SKCA) at 122, Bayda CJS

Section 1 Analysis

25. The Appellants and the Interveners, Bushie and Pierre Families argue that the *Charter*-infringing state conduct in the composition of the Kenora District jury rolls is not prescribed by law and thus not capable of justification under section 1 of the *Charter*. The Asper Centre agrees with the Appellants that if the efforts to ensure representation of on-reserve Aboriginal persons on the jury roll were inadequate, then sections 670 and 671 of the *Criminal Code,* or section 44 of the *Juries Act*, do not cure the error. Therefore, the remedy for the breach of Appellants' *Charter* rights must be found under s. 24(1). Alternatively, if the actions are saved under the *Juries Act* or the *Criminal Code*, the standard for justification under s. 1 is not met.

> *R v Oakes*, [1986] 1 SCR 103 at paras 69-71

26. While the Asper Centre is not in a position to respond to the Respondent's arguments that are anticipated to justify any breach, it is its position that any objectives of the curative provisions in either Act cannot be pressing and substantial if they simply serve administrative ends. The right to a trial by an impartial jury must be protected, even and especially when the creation of inclusive jury rolls depends upon increased administrative coordination.

27. In the alternative, if the objective of the curative provisions of the Acts is indeed to ensure a right to a trial by an impartial jury, there is no rational connection between the pressing and substantial objective and the means by which government action was taken. Though the connection between the infringement of rights and the benefit sought need not be "scientifically measurable", there must be a link based on reason or logic. There is no such connection between the government's prioritization of administrative efficiency and the furtherance of the administration of justice.

RJR-MacDonald v Canada (Attorney General), [1995] 3 SCR 199 at para 154, McLachlin J

28. Third, there are alternatives to achieving the government's objective without the infringement on the Appellant's rights. While Parliament is not required to choose the absolutely least intrusive means of fulfilling its objective, it must choose from within a range of reasonable means that impair the Appellants' rights as little as possible. Based on the evidence, there were a number of alternative methods aimed at creating inclusive source lists that were contemplated, discussed and presented to decision-makers, but were not implemented. These alternative means would have infringed the Appellant's rights to a lesser degree, and pass the minimal impairment test of being "clearly superior to the measures currently in use."

Harper v Canada (Attorney General), [2004] 1 SCR 827 at para 110
Lavigne v Ontario Public Service Employees Union, [1991] 2 SCR 211 at 296, Wilson J

29. Even if it is found that the legislation has minimally impaired the Appellant's *Charter* rights, the overall balance weighs in favour of striking down sections 670 and 671 of the *Criminal Code*. The deleterious effects of the Act to the Appellant outweighs the salutory benefits of the objective of administrative efficiency. The Appellant is effectively denied the right to being tried by a jury that is

impartial in its full sense. Thus, this limitation on the Appellant's rights is not reasonably and demonstrably justified in a free and democratic society.

Dagenais v Canadian Broadcasting Corporation, [1994] 3 SCR 835 at para 92
R v Sharpe, [2001] 1 SCC 45 at para 102

Remedy Sought by the Appellant

30. The Asper Centre argues that only a retrial vindicates the equality interests of the Appellant, and society's interest in the integrity of the administration of justice. This remedy addresses the particular circumstances of the *Charter* breach and its context in the historic disadvantage and discrimination faced by Aboriginal persons, particularly by those persons residing on reserves.

31. The "systemic underrepresentation" alleged in the case at bar has the potential to significantly impact the fairness of the criminal justice system in the Kenora area and across Ontario. As the *Criminal Code* only prescribes the remedy for the early stages of the trial process, a case-by-case approach should be taken in determining the proper remedy for a s. 629 breach that is discovered post-verdict. In deliberating upon the appropriate remedy, it should be noted that the values informing s. 629 are the same values as embodied in the *Charter*. Therefore, the remedial approach in this context should emphasize the same concerns as under s. 24 of the *Charter*: namely, effective and meaningful remedies that vindicate *Charter* values and deter *Charter* violations.

32. In finding a remedy that is "appropriate and just in the circumstances" according to s. 24(1) of the *Charter*, this Honourable Court must consider both the circumstances of the infringement and those of the accused. In *Doucet-Boudreau v Nova Scotia (Minister of Education)*, Iacobucci and Arbour JJ. stated,

> [An] appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights and freedoms of the claimants. Naturally, this will take account of the nature of the right that has been violated and the situation of the claimant. A meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied. [Emphasis added.]
>
> *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 55, Iacobucci and Arbour JJ

33. In light of the circumstances of the *Charter* breach and situation of the Appellant, it is appropriate for the court to order a new trial in order to remedy the discrimination experienced by the Appellant. The jury selection practices of the Kenora District Court Services Division in 2007 were seriously and systemically flawed and breached the s. 15(1) equality rights of the Appellant and of potential jurors through the systemic exclusion of on-reserve Aboriginal persons from the jury rolls. The relevant situation and experience of the Appellant include his status as an on-reserve Aboriginal person. The Appellant belongs to a group which has for years faced discriminatory overrepresentation in Canada's criminal justice system, while being underrepresented on Canadian juries. This Appeal results from discrimination against the member of a historically disenfranchised group, effected through the further disenfranchisement of other members of that group. The appropriate and just remedy is to order the process reissued in a non-discriminatory form.

34. In addition to remedying the discrimination against the Appellant, the order for a new trial would dissociate the court from the perpetuation of historical discrimination and affirm procedural standards for the administration of justice. The contemporary exclusion through negligence of a group historically subjected to intentional discrimination undermines the integrity and public perception of the justice system. Even if steps have been taken since 2008 to enhance jury selection practices in

Kenora District, the undermining effect is exacerbated if a court fails to address and condemn the exclusion's effect on Aboriginal accused.

35. In the event that s. 52(1) of the *Constitution Act 1982* is engaged with respect to a conflict between s. 6(8) of the *Juries Act* is found to be inconsistent with the *Charter*, this is not a proper case for a suspended declaration of invalidity. A purely prospective remedy is not an adequate response to a *Charter* breach which forms part of the criminal justice system's long legacy of discriminatory treatment of Aboriginal people. As Lamer J. (as he then was) stated in *Schachter v Canada*,

> A delayed declaration is a serious matter from the point of view of the enforcement of the *Charter*. A delayed declaration allows a state of affairs which has been found to violate standards embodied in the *Charter* to persist for a time despite the violation.

By contrast, an order for new trial under s. 24(1) of the *Charter* is a retroactive remedy tailored to the procedural *Charter* breach at issue in this Appeal,

> *Schachter v Canada*, [1992] 2 SCR 679 at para 82, Lamer J

PART IV: ORDER REQUESTED

36. As an intervener, the Asper Centre takes no position with respect to the outcome of the appeals. However, it does take the position that a s.15 breach has occurred based upon the evidence filed herein and that an order for a new trial is an available remedy under the circumstances.

All of which is respectfully submitted this 2nd day of April, 2012.

Kent Roach

Cheryl Milne

SCHEDULE A – AUTHORITIES CITED

CASES

1. *Andrews v Law Society of British Columbia,* [1989] 1 SCR 143
2. *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203
3. *Dagenais v Canadian Broadcasting Corporation,* [1994] 3 SCR 835
4. *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62
5. *Harper v Canada (Attorney General)*, [2004] 1 SCR 827
6. *Hutterian Brethren of Wilson County v Alberta*, 2009 SCC 37
7. *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211
8. *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497
9. *McKinney v University of Guelph*, [1990] 3 SCR 229
10. *Ontario Human Rights Commission and O'Malley v Simpsons-Sears Ltd*, [1985] 2 SCR 536
11. *RJR-MacDonald v Canada (Attorney General),* [1995] 3 SCR 199
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13. *R v Biddle*, [1995] 1 SCR 761
14. *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295
15. *R v Bird*, [1984] 1 CNLR 122 (SKCA)
16. *R v Butler*, [1984] 63 CCC (3d) 243 (BCCA)
17. *R v Church of Scientology*, 116 CCC (3d) 1 (ONCA)
18. *R* v *Dixon*, [1998] 1 SCR 244
19. *R v Gayle*, [2001] OJ No 1559 (ONCA)
20. *R v Hubbert*, [1975] OJ No 2595 (ONCA); aff'd [1977] 2 SCR 267
21. *R v Kapp*, [2008] 2SCR 483
22. *R v La,* [1997] 2 SCR 68
23. *R v Laforte* (1975) 62 DLR (3d) 86 (MBCA)
24. *R v Laws* (1998), 41 OR (3d) 499 (ONCA)
25. *R v Mills*, [1999] 3 SCR 668
26. *R v Nahdee* (1994), 21 CRR (2d) 81 (Ont Gen Div)

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SCHEDULE B – RELEVANT LEGISLATIVE PROVISIONS

Canadian Charter of Rights and Freedoms

GUARANTEE OF RIGHTS AND FREEDOMS

Rights and Freedoms in Canada
1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

LEGAL RIGHTS

Proceedings in criminal and penal matters
11. Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

EQUALITY RIGHTS

Equality before and under law and equal protection and benefit of law
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

ENFORCEMENT

Enforcement of guaranteed rights and freedoms
24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Constitution Act, 1982

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Juries Act, RSO 1990, c J.3

Eligible jurors
2. Subject to sections 3 and 4, every person who,

(a) resides in Ontario;
(b) is a Canadian citizen; and
(c) in the year preceding the year for which the jury is selected had attained the age of eighteen years or more,

is eligible and liable to serve as a juror on juries in the Superior Court of Justice in the county in which he or she resides. R.S.O. 1990, c. J.3, s. 2; 2006, c. 19, Sched. C, s. 1 (1).

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

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

(a) at the time of the enumeration, resided in the county and were Canadian citizens; and
(b) in the year preceding the year for which the jury is selected, are of or will attain the age of eighteen years or more,

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

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

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

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

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

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

Indian reserves
(8) In the selecting of persons for entry in the jury roll in a county or district in which an Indian reserve is situate, the sheriff shall select names of eligible persons inhabiting the reserve in the same manner as if the reserve were a municipality and, for the purpose, the sheriff may obtain the names of inhabitants of the reserve from any record available. R.S.O. 1990, c J.3, s 6 (8).

Omissions to observe this Act not to vitiate the verdict

44. (1) The omission to observe any of the provisions of this Act respecting the eligibility, selection, balloting and distribution of jurors, the preparation of the jury roll or the drafting of panels from the jury roll is not a ground for impeaching or quashing a verdict or judgment in any action. RSO 1990, c J.3, s 44 (1).

Panel deemed properly selected

(2) Subject to sections 32 and 34, a jury panel returned by the sheriff for the purposes of this Act shall be deemed to be properly selected for the purposes of the service of the jurors in any matter or proceeding. RSO 1990, c J.3, s 44(2).

Court File Nos. C49961 & C48160

HER MAJESTY THE QUEEN
Respondent

-and-

CLIFFORD KOKOPENACE and CLARE SPIERS
Appellants

COURT OF APPEAL FOR ONTARIO

FACTUM OF THE INTERVENER, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

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