Manslaughter conviction tossed over lack of aboriginals on Ontario juries

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The Ontario Court of Appeals in 2007. The court has overturned an earlier ruling and found a G20 officer committed battery during the 2010 summit in Toronto. Brent Foster/National Post /Files

Clifford Kokopenace: Conviction tossed over lack of aboriginals on juries

TORONTO — A convicted killer will get a new trial after Ontari ruled Friday the provincial government violated his rights by failing to ensure aboriginals were lls despite knowing about the long-standing problem.

In a split decision that quashed a manslau Kokopenace, the Ontario Court of Appeal chastised the province for its inaction.

"The integrity of the process was fundame ntion paid by the state to a known and worsening problem, year after year," the court ruled.

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What the state knew or ought to have known was considerable; what the state did in response was very little

A non-aboriginal jury in Kenora, Ont., convicted Kokopenace in 2008 of stabbing a friend to death on the Grassy Narrows reserve.

In 2011, the Appeal Court upheld the manslaughter conviction as reasonable. However, in an unusual twist, the court put the ruling on hold in light of the constitutional challenge sparked by the jury-representation issue.

Lawyer Julian Falconer, who speaks for the Nishnawbe Aski Nation which intervened in the appellate hearing, said the court has now laid out a standard of conduct for the Ontario government's dealings with First Nations in the context of the justice system.

"This case is of huge consequence because it leaves absolutely no doubt as to the extreme neglect on the part of the Ministry of the Attorney General as it relates to excluding First Nations from the jury rolls," Falconer said.

"This judgment is a complete answer to any suggestion that the blatant exclusion of First Nations from the process was somehow the fault of First Nations."

The years-long under-representation of aboriginals came to light at coroner's inquests in northern Ontario into the 2007 deaths of two aboriginals.

In 2008, the jury roll for Kenora comprised 699 potential jurors of whom only 29 or 4.1 per cent were on-reserve residents even though First Nation residents represented about 33 per cent of the district population.

The issue paralyzed jury proceedings — criminal, civil and inquest — in the region.

Writing for the majority, Justice Harry LaForme said the Kokopenace case had to be judged against the problems aboriginals face in dealing with the justice system.

"Canadian courts have not only commented on the stark reality of aboriginal overrepresentation in the criminal justice system, but they have also observed its roots in an attitude of discrimination that pervades the administration of justice," LaForme wrote.

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In agreeing with LaForme, Justice Stephen Goudge noted the relevance of the state's "special relationship" with aboriginal people.

For its part, the Ontario government argued that justice officials did their best to ensure representative juries, but was stymied by privacy legislation and lack of co-operation by First Nation leaders.

The Appeal Court would have none of that, saying the province should have done much more to remedy the situation.

"The quality of effort, especially given the nature and extent of the problem, was sorely lacking," it wrote.

"The ultimate question of whether, in all the circumstances, the state made reasonable efforts to compile source lists for the preparation of the 2008 jury roll in Kenora must be answered in the negative."

In a lengthy dissenting opinion, Justice Paul Rouleau said the government was struggling to understand the complex under-representation problem and did what was constitutionally required in its efforts to address the problem.

There was no immediate reaction from the government.

In February, former Supreme Court justice Frank Iacobucci said the province's First Nations faced a justice and jury system in a state of crisis that required urgent action.

One reason Iacobucci gave was a lack of representation of First Nations peoples on juries of "serious proportion."

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