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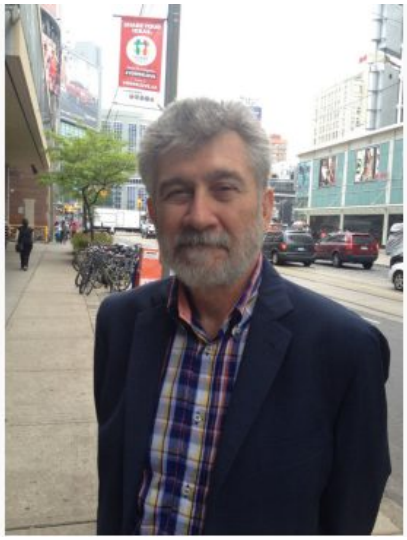
Lawyers and advocates hope case settles a long-standing problem of aboriginal underrepresentation in the nation's jury system



TORONTO STAR / DONOVAN VINCENT

Toronto lawyer Delmar Doucette has a case before the Supreme Court of Canada that claims Ontario is failing to ensure representative numbers of aboriginals on jury rolls.

By: Donovan Vincent News reporter, Published on Tue Jul 01 2014

Lawyers and advocates for aboriginal groups are hoping a looming Supreme Court of Canada case will once and for all settle the problem of native underrepresentation on jury rolls, particularly in cases where the accused is a First Nations person.

The case involves Clifford Kokopenace, who on June 17, 2008, in Kenora, was convicted by a jury of manslaughter in the death of a friend on the Grassy Narrows reserve. That jury had no aboriginal members.

The roll from which that jury was chosen consisted of 699 potential jurors, 29 of whom were on-reserve Indians — or 4.1 per cent of the roll.

But that's despite the fact that First Nations people were roughly one-third of the population that comprised the 65,000 who lived in the district at the time.

In a decision that set the stage for the Supreme Court case, the Ontario Court of Appeal quashed Kokopenace's conviction and ordered a second trial. One of the appeal court's key findings in its ruling in June of last year was that Ontario failed to provide aboriginal on-reserve residents with a "fair opportunity" to be included on the jury roll — a master list from which jury panels are drawn.

The quality of the effort to do so was poor, the appeal court said.

But in its recently released factum for the high court case set for the fall, Ontario argues

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the court of appeal ruling was too broad and has the potential to "drastically change" this nation's jury system.

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The appeal court ruling holds Ontario to account for a situation that is "beyond its control," the province argues. The factum goes on to say that the appeal court decision sets "no clear constitutional minimum standard" to meet regarding jury representativeness, and therefore leaves "considerable uncertainty" in the law.

The case would also likely impact juries sitting on inquests for deceased native persons in communities where there are sizeable native populations.

There has been a historical problem with low participation of First Nations persons getting on to the jury roll, and "that problem became much worse starting in the year 2000," says lawyer Delmar Doucette, who along with Jessica Orkin, another Toronto lawyer, is representing Kokopenace at the Supreme Court.

"The province allowed the problem to fester until it became public in 2008. In my view the problem has still not been corrected," Doucette says.

"Our argument will be that the Ontario Court of Appeal got it right. And that they made no error in saying it's incumbent on the province to make reasonable efforts to ensure that First Nations persons living on reserves are included on the jury roll," Doucette later added, outlining part of the argument he and Orkin plan to make at the Supreme Court.

They're set to file their factum by the end of June.

It's not the only time native representation on jury rolls has been an issue.

A trial for Shaldon Wabason on charges of second-degree murder and break and entering was set to start this past April in Thunder Bay, but was stayed until a year from now after a judge in the Superior Court of Justice in Thunder Bay ruled in April that Wabason's Charter rights were breached because the crown failed to make "reasonable efforts" to meet its obligations regarding First Nations representation on the jury list.

In ordering the stay, the Thunder Bay judge also ruled that the jury in next year's trial for Wabason be chosen from the 2015 roll.

Criminal trials in the Thunder Bay District have been and will continue to be scheduled in the normal course, according to Brendan Crawley, a spokesperson for Ontario's Ministry of the Attorney General.

"In the event a defendant chooses to challenge the jury roll, the Crown will respond in court to that motion," he added.

Both Kokopenace and Wabason remain in custody.

The issue of the lack of First Nations members on trial and inquest juries was also the subject of a major report by former Supreme Court Justice Frank Iacobucci, who spent over a year looking into the matter as part of a probe.

Iacobucci's investigation was launched in 2011 after inquests into the deaths of First Nations young people Reggie Bushie and Jacy Pierre revealed grave concerns about the representativeness of Thunder Bay juries as they relate to First Nations people.

And in 2008, a coroner's inquest into the deaths of Jamie Goodwin and Ricardo Wesley found that the Kenora judicial district jury roll had seriously underrepresented natives. Members of a local community — the Kashechewan First Nation — were left off the rolls.

The problem is complex, and includes a mixture of bureaucratic foul-ups, and, lawyers on both sides agree, the fact some members of native bands are distrustful of the justice system.

"If a community spends all of its time interacting with a justice system that jails its members in disproportionate numbers . . . is it any wonder at all that the community

would be reluctant to engage in a positive way with the justice system?" asks Toronto lawyer Julian Falconer, who represented the Nishnawbe Aski Nation at the Court of Appeal hearing for Kokopenance.

Nishnawbe Aski is a political organization representing 49 northern First Nations groups. The organization had standing at the Court of Appeal hearing.

Regarding the rolls in the Kokopenance and Wabason cases, the fundamental problems are the same, say lawyers for the accused.

Ontario's Juries Act is constructed in such a way that First Nations persons on reserve are selected for the jury roll in an entirely different manner than everyone else in the province.

People on reserves aren't captured by the Municipal Property Assessment Corporation (MPAC) system — the main approach used for everyone else — because they live on federal land not subject to municipal taxation. So the Juries Act calls for a separate system to invite on-reserve natives to be on the jury roll.

For this on-reserve population, attempts to find them locally and get them on rolls are made by local provincial bureaucrats.

The problem is that up to year 2000, Ottawa was willing to share its lists with the province, but that practice stopped, for privacy reasons.

The province argues membership lists kept by the bands themselves are the most accurate because the bands would know how to contact their members — both on and off reserve — for band election purposes.

But these lists can be old or outdated, or fail to specify who is and isn't on reserve.

Another sticking point pertains to questionnaires sent out to on-reserve members, in which they must give answers that determine eligibility to get on the jury list. A huge number of these questionnaires are coming back to the post office, undelivered.

"We suspect the questionnaires aren't getting to the people," Doucette says.

But even in jurisdictions with "perfect" band lists and no mail delivery problems, the non-response rates for First Nations on-reserve people was "disproportionately" high when compared with the non-response rate for the off-reserve population, the province notes in its factum to the high court.

Ontario argues that the focus should be on the efforts the system made to ensure a wide net was cast that avoided excluding any distinct group — not the results achieved by those efforts. The province says there was no constitutional violation in Kokopenace because the efforts to ensure First Nations representation on the rolls in this case were "reasonable."

Efforts to improve low response rates, for example, included education and community outreach, the province argues.

In the meantime, Crawley, the spokesperson for the Attorney General's ministry, says the province remains "deeply committed to the jury review process and to improving the representation of First Nations people on jury rolls."

As recommended in Iacobucci's report, the only approach that will produce enduring results is a collaborative process between the government and First Nations partners, and consistent with that advice, an 11-member jury review implementation committee has a substantial First Nations membership, Crawley adds.

Alvin Fiddler, deputy grand chief of the Nishnawbe Aski Nation, a committee co-chair, commenting in his role vis-à-vis the First Nations organization, said the fact Ontario is challenging the Court of Appeal ruling isn't helping to fix the jury roll problem.

"Even though we agreed last year to work together with (the province) to fix the problem, the fact they're contesting these issues . . . is contributing to the difficulty in fixing it," Fiddler said.

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