

Ext. 9

CR-09-0025

ONTARIO  
SUPERIOR COURT OF JUSTICE

5 B E T W E E N :

HER MAJESTY THE QUEEN

- and -

10 ANDRE THEODORE WAREHAM

15 \*\*\*\*\*

VOIR DIRE

BEFORE THE HONOURABLE MADAM JUSTICE H. M. PIERCE

on MONDAY, MARCH 14, 2011

at THUNDER BAY, ONTARIO

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APPEARANCES:

E. Burton

R. Kozak

Counsel for the Crown

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S. Hinkson

Counsel for the Defendant

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evidence Your Honour. Mr. Don Blaquiere, B-L-A-Q-U-I-E-R-E is the manager of Court Operations of Court Service Division northwest region and he is prepared, prepared to provide evidence to this court. As well to assist him, either together or independently Your Honour, is Yvette, Y-V-E-T-T-E Hinterbrandner, H-I-N-T-E-R-B-R-A-N-D-N-E-R. She is a client services representative of Court Services Division. The initial request of Mr. Blaquiere is whether or not Ms. Hinterbrandner could be present to provide assistance when he doesn't have answers and I indicated that would be a matter for Your Honour to decide whether the, you want to hear them independently or in conjunction. The Crown's perspective, we'd like to get to the information as soon as possible and we have no opposition to the two of them being allowed to provide the evidence simultaneously to the court or for her, Ms. Hinterbrandner to provide information to Mr. Blaquiere which he can testify to. You'll have to obviously hear from Mr. Hinkson as to his position with respect to that.

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THE COURT: Mr. Hinkson?

MR. HINKSON: Yes, and for the record Your Honour it's Hinkson, initial S on behalf of Mr. Wareham. Yeah, and I have no objection to that, and to Ms. Hinterbrandner being in the body of the court and assisting in terms of areas where Mr. Blaquiere is not familiar with. And if it gets to the heart of the matter, it would be greatly assistant.

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DON BLAQUIERE: SWORN

EXAMINATION IN CHIEF BY MR. KOZAK:

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Q. Thank you very much Your Honour. Mr. Blaquiere  
I understand you are the manager of Court Operations?

A. I am.

Q. Okay. And I understand that you have some  
10 familiarity either by your personal knowledge or by consultation  
purposes, of the process that's involved for the District of  
Thunder Bay with respect to the preparation of a jury panel list?

A. I do.

Q. Okay. Now, Mr. Blaquiere, I just want to share  
15 with you my understanding and that's based on the decision  
recently released by the Ontario Court of Appeal and from  
paragraph 24 of that decision the following statement is made and  
I'm just going to seek your assistance with respect to your own  
experience and the knowledge you have from other sources. Again,  
20 paragraph 24:

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Under the *Juries Act* the Sheriff in a county or  
district prepares a jury roll each year. The jury  
roll consists of randomly selected group of  
Canadian citizens resident in the province who have  
been sent and who have returned a jury service  
notice. The persons randomly selected to receive  
jury service notices are taken from municipal  
assessment lists.

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I'll carry on Mr. Blaquiere, the next paragraph  
deals with an issue that was live before the Court of Appeal and  
that's at paragraph 25:

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November of 2008. And that produces a raw figure, a total number. In the case of the 251 residents, that number was 7. Court Services then needs to determine a process by which those 7 people are contacted. So a notice goes out by letter in bulk to random members and those random members are taken from old band lists from the reserves and from a few, they are old lists from Indian and Northern Affairs. Each person on the list, each of the 251 people on the list, gets a number and those numbers are placed into a hat or a box and whatever the total is, in this case 7, 7 numbers are randomly drawn from that, from that hat or the box. The numbers are then matched up to the voters lists and those 7 people receive the documentation. The lists or lists, the population lists or the old electoral lists are listed on, by alpha so that it makes it fairly easy to do. Those people that were identified on the lists receive questionnaires and the questionnaires are, or forms, are official MAG or Ministry of the Attorney General forms and they go out with three letters. The first is a letter from the Attorney General outlining the process. The second is a letter from the Supervisor of Court Operations and it's Janette Sprovieri in this case, from Superior Court and the second letter is translated into Ojibway where it is relevant, so that compromise, or composes the third letter. The letters go out in bulk but each of the individual names are captured on the top, on the letterhead and they're sent to General Delivery in the specific community via Canada Post. The expectation is that the individuals will complete the questionnaires and return them to the, to the Jury Centre in the self-addressed stamped envelope provided and the Jury Centre is in London, Ontario. There's also a fairly comprehensive process that Court Services does to, to get the updated electoral lists, which are obviously important for determining the randomly selected people. CSD faxes out a letter to each chief and band,

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territories in the District of Thunder Bay provided their updated electoral lists as of 2010?

A. That is correct.

Q. And the 13 remaining did not provide current information and that information you've confirmed is dated...

A. That is...

Q. ...information?

A. ...correct.

Q. Okay. Do you have access to the, how old the remaining 13 jurisdictions, the electoral lists are, from those?

A. We could probably provide that information. I don't have it on hand.

Q. Okay. That's no problem, as long as that information is accessible. So just to understand the formula that is based, you've provided an example that in a community of 251 residents there was two factors that were multiplied. I'm wondering if you're able to explain the formula, what the 2 percent is all about and what the 30 percent is all about?

A. Those are policy directions we've from, from corporate office. I'm not, I'm not familiar with the rationale behind the 2 percent. At the time it was, it was suggested that that, the percentages would reflect the percentage of Aboriginal members in the overall population but I don't have that official...

Q. Oh, okay?

A. And the 30 percent was just a directive from Ms. Norris that came out in, in November of 2008. Again, I'm not sure of the rationale behind it but we were expected to comply with that formula and we have ever since.

Q. Okay. Now, following up on the information you've just provided to the Court, you've indicated that three letters would be sent to the individuals that were randomly

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A. I'm not aware of, of what, what Kenora is doing. I only know what, what we do here in Thunder Bay.

Q. Okay. So I'll just indicate to you, in this Court of Appeal decision it indicated in the year 2007, again this deals with Kenora, court officials traveled to 14 remote First Nation communities in the District of Kenora. This effort produced only 8 more band electoral lists. This was, just so you have the context, this was what had been done in the District of Kenora after there was the verbal request for band lists. So there was actually attendance in the community. Are you familiar if that has taken place in the District of Thunder Bay?

A. That has not taken place.

Q. Okay. Now, there was also a mention in the Court of Appeal decision that statistical analysis was conducted with respect to a particular jury roll and I'll share with you that information. It indicates and for the Court's benefit this is contained in paragraph 69 of the Court of Appeal decision.

Of a population of over 12,000 First Nation persons living on reserves in the District of Kenora, only 44 were listed on the 2007 jury roll.

Is there any statistical information available for the District of Thunder Bay as to, firstly how many First Nation persons are living on reserves and secondly how many would have been listed on the most current jury roll?

A. Given the questionnaires and responses go to the Jury Centre, I'm not privy to any statistical information in relation to that.

Q. Okay. Now just so the court record is clear Mr. Blaquiere, within the Court of Appeal decision at paragraph 71 there is some mention and I just want to make sure that the

from policies that came from corporate office so I'm not aware about the Jury Centre.

Q. Okay. So perhaps then trying to link the District of Thunder Bay information with the Jury Centre in London, if you can perhaps take us to the next step then, let's say for example your representative community of 251 residents, if all 7 individuals had provided positive responses to the questionnaires, what would happen with that information of those seven jury, potential jury members?

10 A. If it is a case that a jury is required for, for a case, notification is given to the Jury Centre and a list of 150 names are generated from the Centre to Court Services and notices go out from the Jury Centre to the individuals on that list of 150 and jury selection is made on that basis.

15 Q. Okay. Now how would the Jury Centre, if at all, become aware of the randomly drawn individuals who responded positively to the questionnaire?

A. I'm not sure if their inner workings. The responses to the questionnaires would have gone directly from the 20 First Nation residents to, to the Jury Centre so...

Q. Okay, so that's...

A. ...I'm not sure...

Q. ...information they would have received directly from, from those potential members?

25 A. That's correct. That's correct.

Q. And do you know if there is any statistical analysis shared between the District of Thunder Bay and the Jury Centre with respect to comparing the number of questionnaires sent out by Thunder Bay District and how many are received in the 30 Jury Centre London?

A. I'm not aware of any.

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electoral lists but in a few cases involved lists from Indian and Northern Affairs that dated back many years.

Q. Okay. Now, the next question might require some statistic or access to information. The third question the court was considering was how many jury questionnaires or notices were sent to First Nation on reserve residents? So do you have access to that information?

A. We, we could produce it. I don't have it in mind but there's a tracking system for each, the number of letters that were sent out to each of the 15 First Nations and that could be produced.

Q. That could be produced, thank you.

A. Yes, it can.

Q. And then the fourth question the court was asked to consider was how many First Nation individuals from Indian reserves are on the current jury roll? Is that information available from any source?

A. It's not available to us. That would have to come from the Jury Centre.

Q. And that's in London then?

A. That's in London, Ontario, correct.

Q. Now with respect to the last two answers, and perhaps if we could, it might be pressing you but the answer to how many jury questionnaires were sent to First Nation on reserve residents in the District of Thunder Bay, how long would it take for that answer to become available?

A. End of the day, easy.

Q. And the other one involves in answer from, from, not from your office but from the Jury Centre, if you have this information that's great. The answer, the question I'm asking is, how long would it take to obtain the answer to this

Q. Okay. And just if we want to conduct our own self analysis of the list, if you could share with us one by one the name of the 15 First Nation territories captured within the District of Thunder Bay please?

5 A. I could, I don't have that in mind but I can certainly provide it immediately after.

Q. Okay. So I believe the Court might be interested, we are certainly interested in that information.

A. The 15...

10 Q. The 15 First Nation territories?

A. Not a problem.

Q. Those are my questions. There will be some examination, cross-examination.

THE COURT: Mr. Hinkson?

15 MR. HINKSON: Thank you Your Honour.

CROSS-EXAMINATION BY MR. HINKSON:

Q. Mr. Blaquiere, if I understand you correctly, 20 you gave the example of two reserves which are part of the electoral selection utilized, is that right?

A. I gave the example, like my statistical example?

Q. That's right?

25 A. It was just one reserve.

Q. One reserve?

A. Yes.

Q. But in terms of responses received back when you sent out the letters, you received a response from two 30 reserves?

A. That's correct. We received updated electoral lists from two, that's correct.

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Q. Okay. So since you've been employed there,  
it's...

A. Yes.

Q. ...been, historically it's been like that?

5 A. It has, yes, that's correct.

Q. And obviously the Federal Government is aware  
of this problem?

A. I assume so.

Q. And up to this point in time, up to this date,  
10 the date that you come to court today, there has not been any  
effort to address that issue?

A. Not that I'm aware of. We simply follow the  
formula and the policy as dictated out of corporate office and,  
and deal with the results that we get.

15 Q. And corporate office, for example you have this  
formula, 2 percent and 30 percent. You have no idea where that  
percentage and that, where that comes from?

A. I'm sorry, I don't know.

20 Q. Okay. And nobody has really talked to you  
about this?

A. I've had informal discussions with my director  
and as I said, that's where I suggested it was likely the, a  
reflection of the, of the percentage of Aboriginal people in the  
larger population. But I have not seen that in any formal  
25 document.

Q. And when you say larger population, are you  
talking about...

A. The province.

Q. ...the province?

30 A. Yes.

Q. You're not talking the area of Thunder Bay?

A. No.

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Q. Okay. And again, this is historic in nature? Like it's not, it's not just this year, it's kind of, it's kind of a chronic situation?

A. Yes, the, when Indian and Northern Affairs used to provide the lists, they stopped in 2000 and since that time it's been incumbent upon us to obtain, obtain the lists ourselves.

Q. Okay. And now you talk about when they don't respond back to you rely, you relied on old lists?

A. Correct.

Q. And those old lists come to 2000?

A. Some, some of them, some of them do. Some of them are more contemporary.

Q. But when you say old, obviously they're not current?

A. They're, they're not this year's lists, that's correct.

Q. And obviously therefore the accuracy of the people on the list, the numbers, we don't know how accurate they really are?

A. That's, yeah, exactly. It's all we have but that's what we use.

Q. And I take it therefore that would mean that the population on the reserves could be higher than what, what you could guesstimate it to be?

A. I don't think the issue is the statistical population on the reserves. I think we get that from, from an independent source so that in terms of applying the formulas, those numbers, we don't rely on old band lists for those numbers. We just rely on the old band lists for selecting the names, for those that decline to send in updated lists.

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that process and making sure we were in compliance with the policy and so on.

Q. Even though when this whole issue was raised back in I'd say early 2009 about the, the composition of the jury array, that was never part of your discussion, discussion amongst management?

A. I have no memory of that, no, I don't.

Q. Okay?

A. As I say, our focus was on ensuring compliance with direction from corporate office.

Q. Okay. And when you compliance with corporate office, you're talking about the 2 percent number and 30 percent number?

A. That's correct.

Q. You weren't really concerned about the numbers of people who were responding back to the requests for...

A. We weren't aware of those numbers. They go to the, to the Jury Centre so I'm not aware of the response rate.

Q. So, so you didn't, were not aware that the bands were not responding back to the...

A. I, we had no knowledge of that. The, the only interaction we had with the bands was their declining for the most part to submit updated electoral lists. I have no idea the number of individuals that responded or did not respond to the Jury Centre.

Q. So, okay, but you just knew the number of bands who had not responded?

A. Who were not submitting an enhanced list, that's correct, yes.

Q. And so when this whole issue came up in the, 2009, no efforts were made to re-address or address this issue at all?

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A-N-I-S-H-I-N-A-A-B-E-K. That's number 1 Your Honour. Number 2 is Aroland, A-R-O-L-A-N-D. The third name Your Honour, again I'll just spell in the first two words, B-I-I-N-J-I-T-I-W-A-A-B-I-K.

THE COURT: I'm sorry, I-W...

MR. KOZAK: Sorry, I-W-A-A-B-I-K. Zaaging is the second word, Z-A-A-G-I-N-G and the third is Anishinaabek, A-N-I-S-H-I-N-A-A-B-E-K. That's number 3. Then carrying on to number 4, Fort William First Nation. Number 5 Your Honour is Ginoogaming, G-I-N-O-O-G-A-M-I-N-G. The next First Nation Your Honour is Gull Bay, just as it sounds, G-U-L-L B-A-Y. The next is Lac Des Mille Lacs, L-A-C D-E-S M-I-L-L-E L-A-C-S. The next is Long Lake Number 58. The next Your Honour is Martin Falls, M-A-R-T-I-N Falls. Next Your Honour is Ojibways of the Pic River, O-J-I-B-W-A-Y-S of the P-I-C River. Next Your Honour, Pays Plat, P-A-Y-S P-L-A-T. Next Your Honour, Pic Mobert. Next Red Rock. Second last Your Honour, Bingwi Neyaashi Anishinaabek, three words, B-I-N-G-W-I, second word N-E-Y-A-A-S-H-I...

THE COURT: N-E-Y...

MR. KOZAK: Yeah...

THE COURT: ...S-H-

MR. KOZAK: ...I'm sorry, N-E-Y-A-A-S-H-I.

THE COURT: A-A-S-H-I.

MR. KOZAK: S-H-I, yes.

THE COURT: Okay.

MR. KOZAK: And then Anishinaabek, A-N-I-S-H-I-N-A-A-B-E-K. And the last Your Honour is White Sand

THE COURT: Are counsel prepared to make submissions on the evidence before the court?

MR. HINKSON: I, I am Your Honour.

THE COURT: As to the Crown?

MR. KOZAK: Yes Your Honour, we, we are.

THE COURT: All right. I will hear submissions then.

SUBMISSIONS BY MR. KOZAK:

Your Honour the Court of Appeal is, provides clear direction to the courts. I, I'll be quite clear Your Honour. I don't want to advocate one position or another that there has been compliance with the direction. We've heard from Mr. Blaquiere what has taken place or at least the policies that have taken place. There are pieces of information that certainly would assist the court to coming to conclusions and that information perhaps Your Honour can glean are from questions that I had asked for which no answers were available and that deals with the issue of letters that hadn't been received by the addressee on General Delivery. There's no information available as to how many of those had been returned. There is no information with respect to statistical information before the court at this point in time as to how many responses they've received from those selected band, randomly drawn band members. The court has now received the 15 listed communities. You have before you a jury list and I did not see any of those First Nation communities in my perusal of the

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5 that jury panel so certainly the Crown's concern is  
if this case is going to proceed, it should proceed  
in a fashion that's unassailable by any higher  
Court and that we proceed with the direction we've  
received from the Ontario Court of Appeal. Yes,  
just to confirm on the record something that I did  
review and canvas with counsel Your Honour,  
formally this is not a challenge under the *Criminal*  
10 Code for the jury panel under 629. There are  
certain listed grounds for which a panel could be  
challenged. None of those are existent before the  
Court today so this is a matter of the Court's  
inherent jurisdiction dealing with an issue raised  
by the Ontario Court of Appeal. Subject to any  
15 questions Your Honour has, those are my  
submissions.

THE COURT: Thank you. Mr. Hinkson?

MR. HINKSON: Yes Your Honour, I concur with the  
20 comments made by my friend but also there is I  
think one that really jumps out at you when you  
heard the testimony of Mr. Blaquiere that out of 15  
bands only 2 really are brought into the mix of the  
whole scheme of things in terms of the jury array  
and if one considered that the composition of the  
25 jury should be representative of the whole  
community, if we're talking about 2 bands out of  
15, and we don't know what percentage that is of  
even of the whole population of the native  
30 population in the area. What compounds the  
situation even more so is that it's been going on  
for a lengthy period of time and the fact that we  
know that there have been problems in terms of

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MR. KOZAK: Your Honour, just, just to make sure and it's something I perhaps should have put on the court record, the facts that we're dealing with here Your Honour do not specifically deal with, the trial matter itself doesn't deal with First Nation issues but that shouldn't factor in Your Honour's decision but I just want to make it clear on the court record, we're dealing with a person, an accused person that's not an Aboriginal person. The deceased is not an Aboriginal person but nonetheless, the issue should be decided independently of whether the trial involves a First Nation person or, or not so it's the Crown's position the decision should be independent of that.

THE COURT: Thank you.

PIERCE, J.: ORALLY

[1] The issue raised on the voir dire in this case is whether the jury panel as currently formulated is representative of the community as a whole. The issue has come to the attention of counsel and the Court as a result of the Court of Appeal's decision in *Pierre v. McRae* released last week.

[2] The evidence on the voir dire establishes that since the year 2000 the Department of Indian Affairs has not forwarded current lists, band lists for the First Nations in the District of Thunder Bay. Since that time the Court Services Division has undertaken a process of requesting from each

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5 [6] Therefore of the jury panel as comprised,  
(which I might say offers no assistance as to  
whether there are any individuals resident on the  
reserves in the Thunder Bay District), I am drawn  
to the conclusion that the panel is not  
representative in the sense that is contemplated by  
the Court of Appeal in *Pierre v. McRae* and  
10 understanding that this voir dire is distinct from  
the challenge to the array contemplated in the  
*Criminal Code*.

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The Honourable Madam Justice Pierce