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SENT BY FAX AND MAIL

March 22, 2011

The Honourable Robert D. Nicholson
Minister of Justice and Attorney General of Canada
Department of Justice Canada
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Ottawa, ON K1A 0H8
Fax: (613) 954-0811

The Honourable John Duncan
Minister of Indian Affairs and Northern Development and
Federal Interlocutor for Métis and Non-Status Indians
Indian and Northern Affairs Canada
10 Wellington Street, 21st Floor
Ottawa, ON K1A 0H4
Fax: (819) 953-4941

Dear Ministers,

Re: NAN-ALST Coalition and the Legality of Jury Rolls in Ontario

I am counsel to Nishnawbe Aski Nation ("NAN"). On March 10, 2011 the Court of Appeal for the Province of Ontario issued a ruling in *Pierre v. McRae* in respect of First Nations and their exclusion from jury rolls in the Province of Ontario. NAN was a party to the proceedings. In upholding the claims of NAN and two First Nations Families (the families of Reggie Bushie and Jacy Pierre), the Court of Appeal concluded that it was following the decision of INAC in 2000 to cease circulating band lists that the exclusion of First Nations occurred:

“ . . . in the neighbouring District of Kenora the jury roll had excluded nearly all First Nations persons living on a reserve (par. 2) . . . Ms. Peacock’s affidavit [from Kashachewan Inquest, September 2008] shows that court officials did very little to obtain other records and, as a result, the District of Kenora jury roll was manifestly unrepresentative (par. 68) . . . There is no reason to think that the unrepresentativeness of the jury roll in the District of Kenora is unique. After 2000, the Provincial Jury Centre no longer received band electoral lists for the reserves in the District of Thunder Bay. (par. 71)”

You will recall that when it came to light at the Kashechewan Inquest in September 2008 (an Inquest that the Attorney General and INAC participated in) that First Nations were being systematically excluded from jury rolls, the issue received national media attention. By correspondence dated September 10, 2008, copied to both of your offices and your Ministries, NAN and their First Nations coalition partners sought the truth about the extent of exclusion of their communities. In our letter of September 10, 2008 we formally requested "early responses and cooperation" from both your Federal Ministries as follows:

"Since the allegation is that the federal authorities have declined to cooperate with provincial authorities in information-sharing in respect of the compilation of jury rolls, we are copying this correspondence to the appropriate federal Ministers and look forward to their early responses and cooperation.

On behalf of my clients, I can assure you that both the Nishnawbe Aski-Nation and Aboriginal Legal Services of Toronto will make every reasonable effort to cooperate in addressing what appears to be a serious injustice."

No answer (not even the courtesy of an acknowledgement) was ever received from either of your offices to our correspondence. Nor has any explanation been forthcoming from either of your Ministries as to the nature of the decision to withhold band lists. In the event that you have misplaced the above letter, we are enclosing a copy. As aptly put in the Court of Appeal judgment (in reference to your provincial counterparts), my clients' "reasonable" calls for information have thus far been met by "the run around" (par. 72).

The silence of both your Ministries was consistent right up to the day after the issuance of the Court of Appeal's judgment last week when an INAC spokeswoman, Genevieve Guibert, wrote the following in an email to a journalist last Thursday (as reproduced in an article this week):

"It was determined that it was more appropriate for First Nations themselves, not the federal government, to decide if their electoral lists would be shared with other levels of government," Guibert said. "This change in practice was in direct response to requests from First Nations."

Your decision to ignore my clients' correspondence for almost three years, but to issue public statements once "the jig was up" in the Court of Appeal is disrespectful of NAN specifically and First Nations leadership generally. It is reflective of the attitude attested to in the Court of Appeal's judgment when they speak of a system that is "not forthcoming" (par. 72).

If INAC is prepared to make public statements directed at deflecting responsibility to First Nations for INAC decisions regarding the provision of band lists, then presumably either the A.G. or INAC will answer the following specific questions by prompt return correspondence:

- 1) At any time, were First Nations apprised by INAC or the A.G. that the INAC decision not to provide band lists to the Ontario Government would have consequences for their communities' inclusions on jury rolls? If so, please advise as to the form of this notice. If not, why not?
- 2) Did INAC or the A.G. seek the consent of First Nations leadership for the distribution of band lists to the Ontario Government solely for the purposes of their inclusion on jury rolls (i.e. a consent to limited disclosure)? If so, please advise as to the form of this request for a consent to limited disclosure. If not, why not?

3) What communications did INAC or the AG have with representatives of the Ontario Government over the decision to cease providing band lists. Did your Ministries seek consents through the Ontario Government for the release of information for the purposes of the compilation of jury rolls? Please advise as to the nature of the communication and whether the compilation of jury rolls was discussed.

4) Did the Ontario Government apprise you at any time that your failure to provide band lists would result in the exclusion of First Nations from jury rolls?

5) What other provinces' jury rolls have been affected by the decision to cease providing First Nations band lists?

Given the Court of Appeal's express findings that INAC's decision to cease making band lists available was the triggering event for the exclusion of on-reserve First Nations from jury rolls in Kenora ("in the neighbouring District of Kenora the jury roll had excluded nearly all First Nations persons living on a reserve") - INAC bears serious responsibility to cease the "stonewalling" and be "forthcoming" about the First Nations' questions set out above.

While it has been almost three years since we sought "early responses and cooperation", now that an INAC spokesperson is willing to comment to the media, perhaps you will be good enough to acknowledge this correspondence and to provide answers to the questions set out in this letter.

Once again, NAN looks forward to your "early responses and cooperation".

Yours very truly,



Julian N. Falconer

JNF:od
Encl.

cc.
Deputy Grand Chief Terry Waboose, Nishnawbe Aski Nation
The Honourable Chris Bentley

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SENT BY FACSIMILE AND EMAIL

September 10, 2008

The Honourable Chris Bentley
Attorney General for Ontario
Ministry of the Attorney General
720 Bay Street, 11th Floor
Toronto, ON M5G 2K1
Fax: (416) 326-4007

COPY

Dear Minister Bentley:

Re: NAN-ALST Coalition and the Legality of Jury Rolls in Ontario

Our firm has been retained by a coalition of First Nations consisting of Nishnawbe Aski-Nation and Aboriginal Legal Services of Toronto. We are writing to request that immediate steps be taken to conduct a formal inquiry into the legality of the jury selection system that has been employed in the Territorial District of Kenora since 2000 and, more generally, across the Province of Ontario. The context for concern is that it would appear, at least for the entire judicial district of Kenora (if not elsewhere), that First Nations community members have been systematically excluded from Jury Rolls as a result of the failure of the responsible authorities to access lists of registered First Nations community members. At stake, of course, from the perspective of First Nations, is the right to a trial by a jury of one's peers along with the right of First Nations across this Province to participate in the justice system.

As you may know, Nishnawbe Aski-Nation ("NAN") is a political territorial organization that is responsible for 49 First Nations Communities in Northern Ontario with a total population of approximately 45,000 First Nations members. NAN territory in the North spans approximately two thirds of the Province of Ontario. Aboriginal Legal Services of Toronto ("ALST") is a multi-service legal agency providing services to First Nation communities across the province. Both Nishnawbe Aski-Nation and Aboriginal Legal Services of Toronto have a great deal of experience in addressing justice issues for Northern Aboriginal communities and have a sincere interest in ensuring that jury rolls prepared in Northern Ontario are prepared in a manner that ensures lawful and proper representation for First Nations people.

On September 8 and 9, 2008, pre-inquest motions were heard in Toronto before presiding Coroner, Dr. David Eden, in the Coroner's Inquest into the Deaths of Jamie Goodwin and Ricardo Wesley (the tragic Kashechewan fire deaths). Our office (along with A.L.S.T.) acts on behalf of the

Wesley family at the Coroners Inquest. During the motions, concerns were raised by the Wesley family with respect to the adequacy of the jury roll used in the Kenora District. In that regard, the affidavit of Ms. Rolanda Peacock, Acting Supervisor of Court Operations for the Territorial District of Kenora ("District"), was filed in the proceedings by Coroner's counsel. Attached for your convenience is a copy of Ms. Peacock's affidavit.

On its face, the affidavit confirms that, since 2000, the Kenora District's jury roll has been prepared in a manner that is in contravention of the *Juries Act*. In particular, steps taken by Kenora Court Services in compiling the current jury roll do not appear to comply with section 6(8) of the *Juries Act* which reads as follows:

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.

The affidavit reveals that no First Nations population lists were relied upon from 2000 to 2006. The explanation offered is that the Federal authorities, through the Department of Indian Affairs and Northern Development, ceased providing lists to provincial authorities in year 2000. In 2007, Court officials travelled to 14 of the 45 First Nation communities in the Kenora District. **As a result, most First Nations communities in the North are excluded from jury rolls. There are only 44 First Nations individuals (out of a total First Nations population of 12,111) on the Kenora District's current jury roll.**

It is noteworthy that in similar circumstances the Ontario Court of Justice declared a mistrial in a criminal trial when it was determined that the sheriff in Lambton County (Sarnia area) failed to comply with the statutory regime of the *Juries Act* by failing to ensure proper inclusion of First Nations people on the jury roll (*R. v. Nahdee*, [1993] O.J. No. 2425). The *Nahdee* decision also demonstrates that while the problem of exclusion from juries may be more acute in remote northern First Nation communities, it is unlikely that the problem is isolated to these communities.

Tom Fitzgerald, Director-Aboriginal Criminal Justice, is counsel for the presiding Coroner, Dr. Eden, and was present when submissions were made on the record on the legality of the Kenora District's jury roll. Mr. Fitzgerald can provide further information on Ms. Peacock's affidavit and concerns expressed at the pre-inquest motion of September 9, 2008.

As you are no doubt aware, the *Juries Act* is designed to ensure that a jury will be representative of the community in which a trial takes place and that the constitutional right to a trial by jury of one's peers will be upheld. Section 6(8) is specifically intended to ensure that representativeness of the jury extends to First Nations. Canadian law recognizes the importance of a representative jury. Securing a representative jury enhances impartiality and furthers important societal or community interests by instilling confidence in the criminal justice system (*R. v. Gayle*, [2001] O.J. No. 1559).

The process used in the Kenora District (and possibly elsewhere) appears to deny First Nations

their constitutional right to be tried by an impartial jury of their peers made up from a representative jury pool. Furthermore, First Nations in the North are being denied their rightful roles as equal participants in the justice system. The sad irony is that while First Nations are undoubtedly over-represented before our courts and in our jails – it is now apparent that they go unrepresented as triers in the justice system of the North.

In 2005, the Ontario government committed itself to a “New Approach to Aboriginal Affairs”. The new approach was to be guided by several foundational principles, including the recognition that Aboriginal communities have different circumstances and different needs, and that Aboriginal people must have greater participation in matters that directly affect their communities. Aboriginal people residing on Indian reserves have a right to be included on jury rolls and Aboriginal accused have the right to be tried by a jury of their peers. A formal Inquiry into Ontario’s jury roll practices may reveal that a new approach to including First Nation individuals in jury rolls is needed.

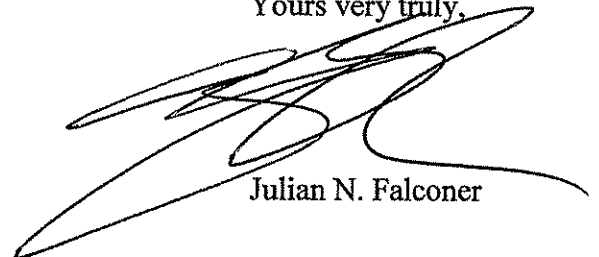
In light of the above, the Nishnawbe Aski-Nation and Aboriginal Legal Services of Toronto request that you, as the Attorney General of Ontario, conduct a formal inquiry and report back to the NAN – ALST coalition on the current legality of the jury rolls in Ontario generally and the Kenora District specifically. Such a report must include an explanation on what has transpired since year 2000.

Since the allegation is that the federal authorities have declined to cooperate with provincial authorities in information-sharing in respect of the compilation of jury rolls, we are copying this correspondence to the appropriate federal Ministers and look forward to their early responses and cooperation.

On behalf of my clients, I can assure you that both the Nishnawbe Aski-Nation and Aboriginal Legal Services of Toronto will make every reasonable effort to cooperate in addressing what appears to be a serious injustice.

Thank you for your consideration.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Julian N. Falconer', written over a horizontal line.

Julian N. Falconer

cc.

Deputy Grand Chief Alvin Fiddler
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AFFIDAVIT

IN THE MATTER OF CORONER'S INQUEST INTO THE DEATHS OF JAMIE GOODWIN AND RICARDO WESLEY

I, Rolanda Peacock, of (municipal address) in the City of Kenora, Ontario

Make oath and state:

1. I am the Acting Supervisor of Court Operations in the Court Services Division of the Ministry of the Attorney General for the territorial district of Kenora. I have held this position for three years. My duties include coordination, direction, scheduling, planning and supervising of the activities of court operations. I am the affiant herein and as such have direct knowledge of the facts hereinafter deposed.
2. The jurisdiction of the territorial district of Kenora encompasses 45 First Nation reserves, including the First Nation community of Kashechewan. For reasons to follow, no member of the First Nation community of Kashechewan is represented on the Kenora jury roll.
3. The provincial jury centre located in London, Ontario has responsibility of sending jury questionnaires to all Ontario residents living in municipal areas based on names received from the Municipal Property Assessment Corporation. Similar questionnaires are sent to First Nation residents living on-reserve within each court district.
4. The number of jury questionnaires sent to First Nations on-reserve residents is based on the percentage of Aboriginal people in the general population of Ontario, rounded up to the next percentage point (eg. 2.7% is increased to 3%), to assist in offsetting poor response rates.
5. The questionnaire is supplemented by an accompanying letter in simplified English language, which has been translated into Ojibway and Oji-Cree syllabics.
6. Until 2000, Indian Affairs provided the provincial jury centre with band electoral lists for most First Nation communities in Ontario. Band electoral lists for the First Nation community for Kashechewan have never been provided by Indian Affairs to the provincial jury centre. Since 2000, Indian Affairs has not provided any band electoral lists, making those band lists in the possession of the provincial jury centre out of date.
7. Court officials in the territorial district of Kenora, to manage the absence of First Nation electoral lists, now attempt to obtain band lists directly from First Nation reserves within the territorial district. In August 2006, letters from the Court

Services Division were faxed to the Chiefs of 42 First Nation communities in the District of Kenora requesting up to date band election lists. The First Nation community of Kashechewan was not a community that was mailed such a letter. Of the 42 letters sent, only four communities responded by sending new electoral band lists.

8. Court officials in the territorial district of Kenora, throughout 2007, traveled to 14 remote First Nation communities in the territorial district of Kenora to meet with First Nation community leaders. Eight current electoral band lists were received during or subsequent to these meetings. The First Nation community of Kashechewan was not a community visited during this initiative.
9. The municipal population in the District of Kenora is 42,702, according to the last numbers provided to the provincial jury office by Municipal Property Assessment Corporation. In addition, the population of the 42 First Nations communities in the Kenora district was 12,111, based on the year 2000 Indian Affairs band electoral lists.
10. The Kenora jury roll was based on 1,200 questionnaires sent to municipalities and 484 sent to First Nations. Over 72% of the questionnaires sent to people on First Nations were never returned. The rate of eligible returns from Aboriginal communities in 2006 was 10.72% and 7.83% in 2007. The provincial jury office reported that the rate of eligible returns from questionnaires sent to the municipal population was 66% in 2006, and 56% in 2007. Though no questionnaires were sent to Kashechewan First Nation, there is no reason to believe that response rates would differ from those of other First Nation communities that did respond.
11. There are 44 people from First Nations communities on Kenora's 2007 jury roll. None are from Kashechewan. Many are from fly-in Cree communities in Nishnawbe-Aski Nation territory policed by the Nishnawbe-Aski Police Service, including Attawapiskat, Bearskin Lake, Big Trout Lake, Deer Lake, Kasabonika, Keewaywin, Sachigo Lake, and Sandy Lake.

Signature of Affiant

R Peacock

Sworn before me at the City of Attawapiskat
in the province of Ontario, on this 8th
day of September, 2008

Commissioner of Oaths

Gent M. [Signature]
[Signature]