

CITATION: R. v. Kokopenace, 2011 ONCA 498

DATE: 20110706

DOCKET: M40198 and M40199 (C49961/C48160)

COURT OF APPEAL FOR ONTARIO

O'Connor A.C.J.O. (In Chambers)

BETWEEN:

Her Majesty the Queen

Respondent

and

Clifford Kokopenace

Appellant

AND BETWEEN:

Her Majesty the Queen

Respondent

and

Clare Spiers

Appellant

Julian N. Falconer and Sunil S. Mathai, for the proposed intervener Nishnawbe Aski Nation

Jonathan Rudin and Christina Big Canoe, for the proposed interveners, Rhoda & Berenson King (Bushie Family) and Elizabeth & Marlene Pierre (Pierre Family)

Michal Fairburn and Deborah Calderwood, for the respondent, Her Majesty the Queen

Anthony Moustacalis, for the appellant, Clare Spiers

Jessica Orkin, for the appellant, Clifford Kokopenace

Heard: June 29, 2011

ENDORSEMENT

[1] Nishnawbe Aski Nation (NAN) and Rhoda & Berenson King (Bushie Family) and Elizabeth & Marlene Pierre (Pierre Family) as represented by the Aboriginal Legal Services Toronto Inc. (ALST) seek to intervene in these appeals as parties. The rationale for seeking to be added as parties is that both sets of interveners propose to participate in these appeals by potentially cross-examining witnesses and tendering evidence.

[2] I am not prepared to add the applicants as parties to these appeals. These appeals are criminal in nature and factually unrelated as they arise from entirely separate incidents. In both cases the appellants are appealing their convictions for serious offenses, including murder and manslaughter, based on errors alleged to have been made at trial. The only link between the two appeals is that both appellants raise an issue with respect to the manner in which the jury panel was selected for their trials.

[3] The parties to these appeals are the appellants and the Crown. In most instances there is no room and to add "strangers" as parties to a criminal appeal. If simply added as parties, the interveners would, like any other party, have the right to seek to introduce new evidence, comment on the merits of the "substantive" grounds of appeal and would have rights of appeal. In my view, such participation is inappropriate and inconsistent with the Canadian system of criminal justice. Indeed, neither proposed intervener seeks an opportunity to litigate the substantive issues under appeal but both wish to participate only in relation to the issue arising out of the jury panel selection process.

[4] The proposed interveners concede that the reason they seek to be added as parties arises from this court's common practice of requiring interveners as friends of the court to accept the record as it exists and not seek to augment the record. They hope to be excused from that condition so that they might participate more fully in the development of the record in relation to jury panel issue.

[5] Intervention, whether as an added party or as a friend of the court, may be made subject to such conditions as the court deems appropriate. Even if added as a party, an intervener may be confined to the existing record and be subject to other restrictions imposed as conditions for the granting of intervener status. In contrast, an intervener added as a friend of the court may be permitted to augment the record in appropriate cases.

[6] I am satisfied that both NAN and the ALST have the experience and resources that will enable them to provide assistance to the court in dealing with the issue of the jury selection process that arises in these two appeals. Further, I am satisfied that the participation of both sets of proposed interveners should not be limited by the usual condition that they be bound by the record as developed by the parties.


[7] While this limiting condition will rarely be dispensed with, these proposed interveners have demonstrated a basis for permitting more wide-ranging involvement in this case. Both appellants supported intervention by the applicants on the basis that, amongst other things, they do not individually have the expertise, access to information or the resources

to fully develop the record. In contrast, the proposed interveners have access to information not generally available to individual litigants and have the resources to develop an appropriate record for use by the court. In my view, the participation of these interveners will be important in assisting the court to have a proper understanding of the nature and scope of the jury panel issue raised in these appeals.

[8] At this point I am prepared to allow the applications and order that applicants be granted intervener status as friends of the court and direct that their involvement will not be subject to the usual blanket limitation that they accept the record as it exists. This participation may well include being granted the opportunity to cross-examine any witnesses tendered by the Crown and developing and introducing other relevant evidence not tendered by the parties. However, I am not prepared, at this time, to authorize unfettered participation in the appeals by the interveners.

[9] The Crown has not yet produced the record that it proposes to rely upon in relation to the jury selection issue in each of these appeals. That record will be available by the end of July and will be provided to both the appellants and the interveners. At that time, both interveners will be at a better position to advise what, if any, witnesses they wish to cross-examine and articulate, with some specificity, the type, nature, scope and relevance of any evidence that they might wish to tender on the jury selection issue. At that point I may be approached with a view to determining what, if any, limitations will be placed on the scope of the interveners' participation in these appeals.

[10] As a result the applicants' motions to be added as parties to these appeals are dismissed. However both sets of applicants are granted intervener status as friends of the court. The motions are otherwise adjourned to a date to be fixed in order to consider any conditions in relation to the interventions, including the scope or limitations of the interveners' involvement in developing the record and any ancillary timing or filing issues. There will be no costs of this motion.

 A.C.J.O.