SUPREME COURT OF YUKON

Citation: *R. v. Cornell,* 2013 YKSC 96 Date: 20130911
Docket No.: S.C. No. 12-01510
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

CHRISTOPHER JONATHAN CORNELL

and

JESSICA RACHELL JOHNSON

Publication of information was prohibited by court order pursuant to s. 648(1) of the *Criminal Code*. This publication ban order has now expired.

Before: Mr. Justice Veale

Appearances:

Keith Parkkari	Counsel for the Crown
David C. Tarnow (by phone)	Counsel for Christopher Cornell
Bibhas D. Vaze (by phone)	Counsel for Jessica Johnson

REASONS FOR JUDGMENT

INTRODUCTION

[1] This application was brought jointly by both accused for an order that at least 25% of the jury panel returned for the purpose of their trial consist of Aboriginal individuals. Although the Crown and defence did not agree on the 25% figure, the intention is to ensure that the Aboriginal representation on the panel is representative of the Aboriginal

population in the community. The application was argued before me on July 29, 2013. I dismissed it with brief oral reasons, indicating that these written reasons would follow.

BACKGROUND AND FACTS

[2] Both Mr. Cornell and Ms. Johnson are citizens of Yukon First Nations. Mr. Cornell is a member of Kwanlin Dun, and Ms. Johnson is a member of the Kluane First Nation. They are jointly charged with a number of offences, the most serious of which are two counts alleging the attempted murder of one RCMP officer and one deputy Conservation Officer. Their jury trial is scheduled to commence on September 9, 2013, in Whitehorse.

[3] It is well-established that a significant portion of Yukon's population is First Nation. A number of federal and territorial statistical reports and surveys were filed on this application, indicating that Aboriginal individuals comprise 16 - 18% of the population in Whitehorse and around 25% of the population of the Yukon.

[4] It was not established in evidence to what extent the jury panels returned before a trial typically reflect this population breakdown. Indeed, part of Mr. Cornell's application was to seek this information in this case. My understanding from the evidence before me (and my own knowledge of criminal jury trials) is that jurors in the Yukon have never been formally identified on the basis of Aboriginal or First Nations background. The data accessed by the Sheriff for a jury panel assembly does not contain this information, and prospective jurors are not asked to self-identify.

[5] Yukon's Sheriff, Navhreet Nijhar, gave oral evidence on this application. She testified that the Sheriff's office assembles jury panels on the basis of Yukon Health Care records. Once the size of a panel is determined, her office has a program that randomly creates a jury list of that size with the names and addresses of individuals registered for

Yukon health care who are resident within the city or village the trial is to be held in. Summons go out on the basis of this information, along with a ‘Juror Certification Form’. While it seems that the health records flag individuals identified as “status” by Aboriginal Affairs and Northern Development Canada (“AANDC”), it is not clear what other background information is available. In any event, this information is not retrievable by the software used by the Sheriff’s office. All the Sheriff is able to see are names and addresses, however the program does filter by age to the extent that anyone under the age of 18 does not appear on the list.

[6] The process appears to operate as follows. Once the size of the panel is determined, the database is accessed on the basis of postal code. Each city and village has a distinct postal code and, for example, all postal codes in Whitehorse begin with ‘Y1A’. A typical panel consists of about 400 individuals. For this trial, the program will be asked to randomly create a jury list of 400 with the names and addresses of individuals over the age of 18 whose postal code begins with ‘Y1A’. The summons and certification form will then be sent out to these 400 individuals by registered mail, and the Sheriff will keep track of whether the documents are picked up. Although the Sheriff is therefore aware of who has not received delivery, there is typically no follow up with those individuals.

[7] As noted, the summons is accompanied by a Juror Certification Form. This is a one-page form. Although its return is not required by any legislation, the language used within it suggests that it is mandatory (“Complete and return this form within 5 days from receipt”). It contains three checkboxes that request the respondent to indicate i) whether they will attend for jury selection, ii) that they are not qualified, or iii) that they wish to be

excused. If an individual checks a box indicating that they are not qualified or that they wish to be excused, there are two lines for them to indicate the reasons for this. The Sheriff will then make a determination about whether to excuse them under the *Jury Act,* R.S.Y. 2002, c. 129 (as amended). The form also contains fields for name, signature, home and business telephone numbers and occupation. Ms. Nijhar testified that the certification form is returned by 75 - 80% of the prospective panel, and that 30 - 40% of these responses do not identify an occupation, despite the field for it. Regardless of whether or not a prospective juror returns the form, unless they are excused by the Sheriff or the Senior Judge pursuant to the *Jury Act*, they are expected to attend jury selection in accordance with the summons.

[8] In terms of the population captured by the Yukon Health Care records, an email from Sheri Blaker, A/Director of Court Services, attached to the affidavit of Jason Tarnow indicates that it includes “every eligible Yukon resident (a Canadian citizen or permanent resident) which includes First Nations persons and those of other aboriginal ancestry”. The affidavit of Kaitlin Melvin (filed July 26, 2013), referencing a conversation with Janet O’Connor, Assistant to the Director of the Yukon Government’s Insured Health and Hearing Services Office, similarly indicates that the only residents not included in the Yukon Health Care records are military personnel and people who have moved to the Yukon but have not yet been resident for three months.

[9] In addition to the 400 people on the randomly populated list, summons for this trial are also being sent to approximately 47 people who failed to attend in response to summons sent out prior to the previous jury trial (*R. v. Norman Larue*). This is pursuant to an order made by Brooker J., the presiding judge in that matter. The practice in the

Yukon is to add people who failed to attend jury selection to the next jury panel list rather than pursue the expensive and time-consuming procedure of having the Sheriff's office bring in every individual before the judge to determine whether a fine is appropriate.

POSITIONS OF THE PARTIES

Christopher Cornell

[10] Although Ms. Johnson was a party to this application, it was mainly argued by Mr. Tarnow on behalf of Mr. Cornell. Mr. Vaze indicated at the outset that he was supportive of the position of Mr. Tarnow and was content to rely on his submissions.

[11] The application was brought under the *Charter*. Mr. Tarnow's Notice of Application referenced both s. 11 and s. 15 and sought remedies under s. 24(1) and s. 52, however his oral submissions were on the basis of ss. 11(d) and 11(f) (right to trial by jury, right to a hearing by an impartial jury). The specific remedy requested was under s. 24(1), seeking an order granting a jury panel "comprised of at least 25% Aboriginal individuals". This was to be accomplished by a court direction requiring the Sheriff to include a question about Aboriginal heritage on the Juror Certification Form and a tally being made by prior to jury selection. If the returned panel did not have the requisite composition, further summons were to be sent out until the 25% threshold was reached.

[12] In support of his application, Mr. Tarnow relied on a recent Ontario Court of Appeal case, *R. v. Kokopenace*, 2013 ONCA 389 and on a report by retired Supreme Court of Canada Justice Frank Iacobucci (*First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci* (Toronto: February 2013)), (the "Iacobucci Report"). Citing the special relationship between the state and Aboriginal people, Mr. Tarnow argued that because the two accused are First

Nations, it would be grossly unfair to have them tried by an all-white jury, especially in an area such as Whitehorse where there is a significant First Nations population. While representativeness could be established at the time of jury selection, requesting the information earlier on the Juror Certification Form would potentially avoid the necessity of adjourning the trial to adjust the panel composition.

Crown

[13] Mr. Parkkari took the view that canvassing prospective jurors on the basis of race is neither contemplated by legislation nor made necessary through the *Charter*. He noted that the guarantee of a representative jury is met through a process that ensures a panel is randomly selected from a wide cross-section of the community and that the standard is not perfection (*R. v. McCarthy,* [2010] A.J. No. 16456 (Q.B.), *R. v. Fowler*, 2005 BCSC 1874). He is of the view that the use of the Yukon Health Care records to compile a panel is sufficiently inclusive and representative to satisfy this requirement. In addition, he submits that polling the panel would be potentially offensive, and that the corrective act of summonsing only people of a certain background to supplement the panel risks compromising the integrity of the jury system (*Fowler, R. v. Born With a Tooth* (1993), 10 Alta. L.R. (3d) 1 (Q.B.)). Mr. Parkkari pointed out that there is no evidence that First Nations people are either systematically excluded from or self-selecting out of the jury pool, and therefore there is no actual foundation for the assertion that they are not represented on the panel.

[14] While there was a statistical disagreement between Mr. Tarnow and the Crown on the percentage of the Yukon and Whitehorse population that is Aboriginal, and therefore

about what the representative requirement for a jury panel would be, I do not need to resolve this, given my decision to deny the application.

LAW AND ANALYSIS

[15] Sections 11(d) and (f) of the *Charter of Rights and Freedoms* guarantee:

> 11. Any person charged with an offence has the right
> …
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
> …
> (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.

[16] An unwritten but fundamental requirement of these two sections is that the jury be representative of the larger community. Representativeness ensures that different perspectives are reflected by the triers of fact. This has been made clear by earlier decisions of the Supreme Court of Canada in *R. v. Sherratt,* [1991] 1 S.C.R. 509 and the Ontario Court of Appeal in *R. v. Church of Scientology* (1997), 33 .O.R. (3d) 65. As LaForme J.A. in *Kokopenace* explains:

> [28] The *Charter* right to a representative jury roll serves several important objectives. First, it is a means of ensuring that any petit jury derived from that jury roll is an impartial decision maker. The representative character it brings to the jury composition process allows the jury to act "as the conscience of the community", as L'Heureux-Dubé J. said in *Sherratt* at 523. Second, it serves to build public knowledge of and trust in the criminal justice system. These objectives of impartiality and enhanced public confidence were described by Rosenberg J.A. in *Scientology*, at 119 this way:
>
> > The justification for the representative nature of the jury is not simply to assure that the case is

> tried by an impartial tribunal. The representative character of the jury also furthers important societal or community interests by instilling confidence in the criminal justice system and acting as a check against oppression. The accused and the community have an interest in maintaining the representative character of the jury system. In Sherratt, L'Heureux-Dubé J. made several other comments concerning the nature of the representative character of the jury. Thus, she stated at p. 524 S.C.R. that the modern jury was not meant to be a tool of either the Crown or the defence but rather "was envisioned as a representative cross-section of society, honestly and fairly chosen".

[17] This right is, however, not absolute, but inherently qualified (*Kokopenace*, para. 31). It is specifically not a right to a roll or panel representative of all of the many groups in Canadian society (*Scientology*, pp. 120-121). Although its review was limited to Ontario court decisions, the Iacobucci Report concluded at para. 130:

> Certain general principles emerge from these cases. The principle of representativeness requires that jurors be selected at random from a pool whose composition is representative of Canadian society as a whole. In order to be representative, no group of Canadians can be systematically excluded. However, as I have stated above, no one has the right to have individuals from a particular group on their jury panel, or to be tried exclusively by members of a group to which they belong. …

[18] In *Kokopenace,* the appellant was appealing his conviction on the basis that his s. 11(d) and (f) *Charter* rights had been infringed by the systematic exclusion of Aboriginal on-reserve residents from the jury roll in Kenora district, the jurisdiction in which his trial was held. The Court split, with comprehensive reasons provided by LaForme J.A., a concurring judgment by Goudge J.A., and a dissent by Rouleau J.A. The dissenting judge agreed that there was an obvious problem with the representativeness

of the jury rolls assembled in the Kenora district, however he differed on whether there was a *Charter* breach, given the state's efforts to address the issue. Unlike the case in the Yukon, the system used in Ontario to compile lists for jury panels relies on municipal voters lists supplemented by lists of on-reserve residents. A central body, the Provincial Jury Centre, determines how large the jury roll for a particular year should be, based, presumably, on the number of jury trials set in a judicial district, and the individual jury panels are drawn from this larger roll. Once the size of the roll is determined, questionnaires get mailed out to all prospective roll members, with the proportion of questionnaires sent to individuals on municipal lists versus individuals on-reserve determined on the basis of a formula. However, it is only once the completed questionnaire is returned that an individual actually gets included on the jury roll.

[19] In the past, up-to-date lists of individuals living on-reserve were provided by Indian and Northern Affairs Canada (the predecessor to AANDC), however, due to privacy concerns, this practice stopped in 2000 and courts were placed in the position of contacting reserve leadership directly so as to receive the relevant band membership list. Over the course of the next decade, responses to requests for membership lists in the Kenora judicial district were low (4 of 45 First Nations responded in 2006 and 8 of 45 responded in 2007). Questionnaires continued to be sent out to individuals on reserves, however the lists used were increasingly out-of-date. As well, by 2008 the rate of response to the questionnaires was 10% from reserves versus 60 - 70% for non-Aboriginal communities. While these figures may not have been known to the Ontario government outside of the Provincial Jury Centre or the public, courts in Kenora were raising concerns about the representativeness of the jury roll since at least 1994

(*Kokopenace*, at paras. 67 and 87, citing Stach J. in *R. v. F.A*., [1994] 4 C.N.L.R. 99 (Ont. S.C.)). Indeed, by 2008, only 29 people on the 699-person jury roll were on-reserve residents; in contrast, one-third of the Kenora district population of 65,000 lives on-reserve.

[20] It was the extreme nature of this situation that, once it came to light, prompted the Ontario government to convene the Independent Review in 2011. After extensive information-gathering and a thorough consideration of the issue, the Iacobucci Report was released in February 2013, roughly four months prior to the decision in *Kokopenace*. In addition to describing the situation in Ontario, the Iacobucci Report touched on existing practices and pitfalls in other provinces and territories. Yukon is omitted from his consideration, however, it is clear that several other jurisdictions rely on health care records for up-to-date population information. These jurisdictions seem to have adopted the approach from Manitoba, where a 1988 Public Inquiry determined that it was only after the province began to rely on health care records that jury lists began to properly capture Aboriginal people (*Report on Aboriginal Justice Inquiry of Manitoba,* Vol. 1 by A.C. Hamilton & C.M. Sinclair (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People, 1991)). The Law Reform Commission of Nova Scotia has similarly recommended that the medical insurance list be used for juror selection, as did the equivalent Commission in Saskatchewan. Other jurisdictions are able to use health records as one possible source for population information, as is the case in Yukon, but it is not entirely clear from the Report whether they actually do so[1]. Notably, in the Report's

[1] For the purpose of assembling jury lists, section 10 of Yukon's *Jury Act* grants the Sheriff access to "the voters lists and other public documents under the control of any officer of a municipality" and to "records in the custody or under the control of a department or public officer of the Government of the Yukon". The evidence from Ms. Nijhar is that they choose to use the latter source of information.

concluding Recommendations, Recommendation 8 is that that Ontario's Ministry of the Attorney General determine the feasibility of using OHIP records to generate a database of First Nations individuals living on reserve.

[21] This is not to say that use of a provincial health database is alone sufficient to remedy all the systemic issues that lead to underrepresentation of First Nations or Aboriginal people on jury rolls. For example, in Manitoba, a number of other barriers were identified in the Public Inquiry. These include lack of access to regular mail service, lack of telephone service, the accuracy of addresses in urban areas given the high prevalence of renting among urban Aboriginals, and language barriers. However, no such barriers were identified in Yukon or Whitehorse. There was no evidence before me to suggest that Aboriginal individuals are less likely to receive or respond to the summons sent out by the Sheriff's office, and nothing to indicate that they would otherwise be systemically underrepresented on assembled panels.

[22] As noted, the right to a representative jury is a qualified one. Contrary to Mr. Tarnow's submission, I do not think the law entitles his client to a jury panel whose Aboriginal composition exactly mirrors the composition of Whitehorse or Yukon. This was very succinctly stated by LaForme J. in *Kokopenace*:

> [43] … The right to a representative jury roll is an inherently qualified one. It does not require a jury roll in which each group is represented in numbers equivalent to its proportion of the population of the community as a whole. As Rosenberg J.A. said [in *Scientology*], there are practical barriers that render this impossible to achieve and the attempt to do so would require undesirably invasive inquiries of potential jurors. Moreover, a fully representative jury roll cannot be squared with the random selection process used to choose those who are to receive jury service notices.

> [44] In my view, therefore, in creating the jury roll, the test for the state's compliance with the representative right cannot simply look to the composition of the jury roll that results. …
>
> [45] Rather, the focus must be on the steps taken by the state to seek to prepare a jury roll that provides a platform for the selection of a competent and impartial petit jury that will ensure confidence in the jury's verdict and contribute to the community's support for the criminal justice system.

[23] The concerns here, as I see it, are therefore with the extent to which the Sheriff's process ensures a randomly assembled panel and whether there are systemic barriers that would result in the routine return of panels on which Aboriginal or First Nations individuals are under- or unrepresented.

[24] I say this recognizing that the state has a special relationship with Aboriginal people and that Aboriginal people have been fundamentally estranged from the justice system (*Kokopenace,* paras. 121-151), and I accept that sometimes further and different efforts may be required to ensure true equity in terms of jury participation. The problem for the defence here is that the system used to assemble a jury panel in the Yukon does not distinguish non-Aboriginals from Aboriginals or prefer either group and appears to ensure a randomly constituted panel from the entire community. There is no evidence of any particular impediment to the delivery of or response to summons. The onus is on the applicant in a *Charter* application. Unlike the case in Manitoba, there was no issue raised with respect to ineffective mail delivery, lack of telephone service or an inappropriate choice of language for the sent material. There is no evidence that Aboriginal people are self-selecting out of jury duty for other reasons. And, while I appreciate that it does not

appear to have been formally collected, there is no evidence to substantiate the position that the assembled panels do not already have adequate Aboriginal representation.

[25] In conclusion, the applicant has not met his onus on this *Charter* application. I am not satisfied, based on the evidence before me, that the methods employed by the Sheriff's office breach the right of Mr. Cornell and Ms. Johnson to a representative jury panel. The application is therefore dismissed.

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VEALE J.