
CANADA / JUDGMENT

R. v. Fowler

2005 BCSC 1874

COURT

Supreme Court of British Columbia

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2005 BCSC 1874 R. v. Fowler

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: R. v. Fowler

2005 BCSC 1874

Date: 20051012

Docket: 55236-2

Registry: Kelowna

Regina

v.

RONALD LEAL FOWLER

Before: The Honourable Madam Justice Neilson

Ban on Publication

Sections 648(1) and 645(5) C.C.C.

Reasons for Ruling on Challenge of Array

October 12, 2005

Counsel for the Crown:

P.L. Johnstone, Q.C.

N.E. Yates

Counsel for the Accused:

L.S. Wise

V.K. Goulding

Place of Trial:

Kelowna, B.C.

- [1] THE COURT: Mr. Fowler is a person of aboriginal heritage who is charged with the first degree murder of a Caucasian woman. The jury panel has been summoned for October 13, 2005. It is agreed there will be a challenge for cause during the jury selection based, in part, on Mr. Fowler's aboriginal heritage.
- [2] Mr. Fowler brings two applications. First, he challenges the constitutionality of ss. 2 and 8 of the Jury Act, R.S.B.C. 1996, c. 242, on the basis that they leave the selection of the panel to the sole discretion of the sheriff. He alleges that the sheriff, by using the voters' list as a means of returning the panel, exercised that discretion in a manner that produces systemic bias against aboriginal people serving on juries. He says that this, in turn, breaches his rights pursuant to ss. 7, 11(d) and (f) and 15 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, (the "Charter"), as he should be entitled to have his case heard by a jury that includes aboriginals.
- [3] The remedies sought in his notice are, first, that Band lists, along with voter lists, be used to ensure that some of those summoned are First Nations people. Second, and in the alternative, it be declared that a minimum number of First Nations jurors be set at two jurors. Third, and again alternatively, that the distance for summoning jurors for this trial be extended to include such reserves as the Merritt reserves.
- [4] Second, Mr. Fowler brings an application to challenge the jury panel pursuant to s. 629 of the Criminal Code, R.S.C. 1985, c. C-46, based on what he alleges is systemic bias and partiality arising from the manner in which the panel for this trial has been returned under the Jury Act. While he is not alleging deliberate misconduct by the sheriff, he says that the system employed to return the panel is reckless in terms of its exclusion of those of aboriginal heritage. That results in a violation of his rights under ss. 7 and 11 of the Charter.
- [5] Toward the end of the argument, I asked Mr. Fowler's counsel to describe the process he advocates on the day the panel is returned, if he is successful in these applications. Mr. Wise agreed that it is unlikely that all members of the panel who are of aboriginal heritage could be identified visually. He therefore proposed that, on their arrival, the sheriff ask each panel member to fill out a form that asks whether they see themselves as aboriginal. They would not be required to answer if they find the question offensive. Mr. Wise said that if this reveals that less than 10 percent of the panel has aboriginal heritage, the panel should be disbanded, the trial adjourned, and a new panel summoned using Band lists to ensure greater aboriginal representation. Alternatively, if it reveals that there are some aboriginals on the panel, he advocates that two of them should be assured a place on the jury without being subject to the challenge for cause process or the Crown's pre-emptory challenges.

- [6] In an effort to inconvenience the panel as little as possible, I directed that the evidence and the submissions on these applications take place before the date on which the panel is to assemble. I have now decided that I will also give my decision before the panel arrives for the same reason of public convenience. Viewing the array will not change the conclusions I have reached for reasons I will explain shortly, and I prefer not to keep the panel waiting while I read this decision tomorrow morning. I note the same procedure was followed in *R. v. Yooya* (1994), 126 Sask.R. 1 (Sask.Q.B.), and *R. v. Church of Scientology of Toronto* (1992), 74 C.C.C. (3d) 327 (Ont.Ct. (Gen.Div.)) at 330.
- [7] On these applications, the onus is on Mr. Fowler to establish on a balance of probabilities that his rights under the Charter have been breached. Essentially, his arguments rest on two propositions. First, he alleges that the system of assembling the jury panel in this case deliberately or recklessly excluded potential aboriginal jurors such that they are not represented on the panel in proportion to their presence in the community. Second, he says that due to the special status of people with aboriginal heritage, in cases where the accused is aboriginal, the jury system should go beyond ensuring proportionate representation on the panel, and should ensure that the jury includes aboriginal jurors.

The Evidence

- [8] The evidence on motions such as this may fall into two categories: adjudicative facts and legislative facts. Adjudicative facts concern facts that pertain to the immediate parties and must be proved by admissible evidence. Legislative facts are typically those that deal with the validity or purpose of the legislative scheme and that provides social, cultural and economic context. Requirements for proof of legislative facts are generally less stringent. Where they are notorious or uncontroversial, they are typically received through judicial notice. However, more stringent proof of legislative facts will be required where their contents are controversial and the material is presented to prove critical facts. Where that is the case, the party presenting the material cannot rely on it without providing a proper opportunity for its truth to be tested. Without that, the court will treat any factual assertions in the material as unproven: *Canada Post Corp. v. Smith* (1994), 118 D.L.R. (4th) 454 (Ont.Ct. (Gen.Div.)); *Public School Boards' Association of Alberta v. Alberta (Attorney General)* (2000), 182 D.L.R. (4th) 561 (S.C.C.); *R. v. Meadowbrook Management Ltd.* (2001), 309 A.R. 112 (Alta.P.C.).
- [9] Here, Sheriff Smith, who is in charge of returning jury panels in the Kelowna area and who returned this panel, testified, providing adjudicative facts. Sheriff Quigley, who has some limited knowledge of the Duck Lake Band, which is situated in the catchment area for Kelowna juries, also testified, but I found her evidence of little use.
- [10] Mr. Fowler filed two affidavits from people associated with his counsel's practice. These set out some of Mr. Fowler's background, and exhibited an earlier affidavit from Sheriff Smith. They also exhibited a number of publications and documents.

- [11] Mr. Fowler's background is briefly described in the affidavit of Ms. Smith-Gander. She notes that he is of aboriginal heritage but was adopted by a white family, the Fowlers, at a tender age. He lost all contact as a result with his birth family until he became an adult. He has evidently reconnected with his birth family, particularly his mother, brother and sister. His mother lives in the Northwest Territories. He has also reacquainted himself with Native ways and finds comfort in Native spiritualism. He has experienced racism in Canada growing up as an aboriginal, but has also experienced kindness.
- [12] Some of the material attached to these affidavits was comprised of statistics from Statistics Canada and maps. These are set out as Exhibits A, G and H of Ms. Smith-Gander's affidavit. The Crown takes no objection to them and I agree that they are admissible. Most of the exhibits are derived from the 2001 census, although some of the material dates back to the 1996 census.
- [13] The 2001 population statistics cover the City of Kelowna, as well as a separate set covering Kelowna and the surrounding area, including Westbank, Peachland and Winfield. It is not clear that the region covered by the latter exactly delineates the catchment area used by the sheriff to summon juries for Kelowna trials, but it is generally agreed that it approximates this area.
- [14] Population statistics in this broader area indicate that aboriginal people make up about 2.7 percent of the population. Other visible minorities residing in the same area comprise approximately 3.7 percent of the population. In the case of the aboriginal population, the numbers show approximately one-third are 19 years and under. Since the sheriff uses voters' lists as a basis for jury summons, this means the representation of aboriginal people of voting age in that area is probably closer to 2 percent. The statistics for the larger region also show that approximately 20 percent of the general population have moved in the last year, while approximately 30 percent of the aboriginal population had moved in that time.
- [15] The statistics provided for the Kelowna city area alone, which did not include any reserves, show that 2.1 percent of the city population is aboriginal, indicating that there is an urban population of aboriginal heritage, as well as a population on the Westbank reserves and the Duck Lake reserves which are included in the larger area.
- [16] The Crown objected to a number of other documents in the affidavits presented by the defence on the grounds of relevance and reliability. I have reviewed those documents in the context of the principles regarding admissibility of legislative facts based on the authorities cited above, and have reached the following conclusions.
- [17] The newspaper articles attached as Exhibit F of Ms. Smith-Gander's affidavit, and Exhibits C, D, F, G, I and J of Ms. Wise's affidavit are not admissible. They set out the untested opinions of individual writers whose expertise and reliability are unknown. Moreover, many of the topics covered in those articles are not relevant to the issues before me.

- [18] Exhibit A to Ms. Wise's affidavit is a First Nations historical timeline, which traces the history of First Nations in this province from the Royal Proclamation of 1763 to 1997. While the Crown takes no issue with the dates of the events, it objects to the extent that the descriptions of those events contain editorial comment which is untested and from an unknown source. I agree that those comments are not admissible.
- [19] I am, however, prepared to take judicial notice of the fact that the history of First Nations people in British Columbia has unfortunately included a number of discriminatory practices. I also take judicial notice that, more recently, there has been increasing political awareness and activity by First Nations people, as demonstrated by such events in the timeline as the court cases involving Delgamuukw, Calder and Gustafson Lake and the establishment of the Treaty Commission.
- [20] Exhibit B of Ms. Wise's affidavit is a report on Racial Discrimination in Canada compiled in 2002 by the National Anti-Racism Council of Canada, which I understand to be an affiliation of non-governmental organizations. It appears to be a response to the report of the Canadian government to the United Nations in compliance with its obligations under the International Convention on the Elimination of all Forms of Racial Discrimination.
- [21] The Crown objects to my accepting the assertions in this report as proof of the facts set out, as many of them are controversial and it appears to present a one-sided point of view. The report is highly critical of the government's performance in eliminating racism. I agree with the Crown that the report contains controversial facts and opinions which cannot be accepted as true in the absence of a means of testing them.
- [22] Nevertheless, I am again prepared to take judicial notice of some of the matters it sets out. These include the fact that the history between the Canadian state and the aboriginal population has been troubled at times; that aboriginals are over-represented in the justice system and correctional facilities; that the Indian residential school system removed many aboriginal children from their homes and culture; and that some aboriginal people continue to experience problems with poverty and alcohol abuse.
- [23] The report, however, does not relate these matters to the Bands in the Kelowna area. Nor does it deal specifically with the participation of aboriginals as jurors in the criminal justice system.
- [24] Exhibit E to the affidavit of Ms. Wise is unidentified printed material from the internet. It gives no information as to its source or reliability. I find it inadmissible.
- [25] More helpful material is found in Exhibit H to Ms. Wise's affidavit, the Report of the Aboriginal Justice Inquiry of Manitoba, and Exhibit E to the affidavit of Ms. Smith-Gander, which is the Final Report from the Commission on First Nations and Metis Peoples and Justice Reform in Saskatchewan. These appear to be the result of government-ordered commissions or inquiries, mandated to inquire specifically into issues concerning First Nations and the justice system in those provinces. Both deal directly with under-

representation by First Nations people on juries in Saskatchewan and Manitoba.

- [26] The Saskatchewan report, dated June 2004, states that despite an unbiased means of selecting juries from Saskatchewan health lists, people at community meetings with the inquiry advised that First Nations people were underrepresented on the juries. Suggestions were made that this may be due to a lack of childcare, lack of transportation, or a general feeling of alienation from the justice system.
- [27] The Manitoba report was published in 1991 and is more comprehensive. The inquiry undertook studies that led them to conclude that aboriginal people were underrepresented on juries despite the fact that they were proportionately represented on the Manitoba health services commission list used to develop the roll. The inquiry identified a number of possible interrelated explanations for this, including lack of follow up by the sheriff after summonses were sent, inadequate postal and telephone services on reserves, frequent changes of address among urban aboriginals, travel costs, language problems, and the fact the sheriff cut off responses once he had an adequate panel.
- [28] Exhibit D to Ms. Smith-Gander's affidavit is an article by Mark Israel titled "The Underrepresentation of Indigenous Peoples on Canadian Jury Panels" (2003) 25 Law & Policy 1 at 37. Mr. Israel is an Australian academic. He describes the jury selection process and the provincial inquiries I have mentioned, and deals with a number of decisions which I will come to later in these Reasons. He challenges the view that indigenous people are proportionately represented on jury panels and identifies three areas of concern: source lists, catchment areas and sheriff misconduct, which he discusses in the Canadian context.
- [29] I am prepared to admit the inquiry reports from Saskatchewan and Manitoba and Mr. Israel's academic article, but in deciding what weight to give them, I note the cautionary comments in *R. v. Redhead* (1995), 103 Man.R. (2d) 269 (Man.Q.B.) at paras. 62 to 64:

From a close reading of the evidence and in considering the submission of counsel for Mr. Redhead, it becomes patently obvious that this application has its genesis in the report of The Aboriginal Justice Inquiry ("The AJI").

During the course of the hearing, I indicated to counsel for the applicant that the positions he was taking and the submissions he was making were political in nature and ought properly to be made in a political forum rather than the court. I reminded counsel for Mr. Redhead that the recommendations made in the report of The AJI are not binding on this court.

Dealing with the report of The AJI, I agree with the observations of McFadyen, J. who said:

"The Manitoba Inquiry makes sweeping recommendations for changes in virtually every phase of the judicial system and this includes the holding of trials in or closer to native communities and recommends that juries be selected from a radius of some 40 km from the community where the trial is held. Whatever may be the merit of the Manitoba recommendations, nothing, in my view, in the criminal law or in the Charter now requires such a limited interpretation of the right to the benefit of a jury trial."

Those comments indicate that the recommendations of inquiries are not binding and that arguments based on them are more appropriately made in a political arena.

[30] In addition, I find the primary question on Mr. Fowler's applications is whether it has been established that the problems identified are present in British Columbia and, particularly, whether they interfered with the process of summoning a representative array for this trial. In determining those critical issues, it is appropriate to give adjudicative facts greater weight as long as they are credible.

[31] Such facts were provided by Sheriff Smith, the sheriff in charge of returning jury panels in Kelowna. Both parties led some hearsay evidence from him, but there were no objections taken to that. Sheriff Smith testified that he has been a sheriff for 24 years. He has been in charge of returning jury panels in Kelowna for the last five years.

[32] In doing so, he follows the Court Services Branch Sheriff's Policy Manual dated December 2002. Section 10.3 of that manual is relevant here:

10.3 Creating a Jury Panel

- a. The method of selection must be entirely random and unbiased.
- b. The Jury Automated System (JAS) has been programmed to select names on a pre-determined numerical interval system.
- c. Panelists are normally selected from persons who live within one-hour, one-way travelling distance by land via public transportation or private vehicle from the courthouse.
- d. The Sheriff shall seek direction from the trial Judge or the administrative Judge where it is deemed necessary to expand the one-hour radius.
- e. Persons summoned for jury duty and who serve as jurors will be exempt from jury service for a period of two years.
- f. Sheriffs' Offices are responsible for determining, through the office of the local government agent, if First Nations reserves within the one-hour radius have been enumerated.
- g. If it (sic) a reserve was not enumerated, the Sheriff's Office should ask the band, in writing, for a list of names and addresses to use for jury selection.
- h. If the request is refused, no further action is to be taken.

- i. If the request is accepted, the band's list of eligible jurors can be manually added to the panel list through the JAS program.
- [33] Sheriff Smith testified that the "JAS" referred to in that policy is a computerized system operated from Victoria, which contains the provincial voters' lists compiled from enumeration a month before each provincial election. He said that he typically receives a request to assemble a panel from the court registry, and estimates the number of prospective jurors required based on a number of factors.
- [34] In terms of the aboriginal population, the catchment area for Kelowna juries includes the Westbank reserve and the Duck Lake reserve. The Duck Lake reserve is small. There are both aboriginals and non-aboriginals living on the Westbank reserve. He said that he goes to the JAS and designates the Kelowna geographic area and feeds the required number of prospective jurors into the system. It then randomly selects that number of names from the voters' list in that geographical area and prints a list.
- [35] Sheriff Smith said that he has no means of influencing the selection process. Nor has he ever concerned himself with the personal characteristics of prospective panel members. He has no means to access such information.
- [36] His office then sends out the summonses to the people on the list. He identified the summons and the accompanying material which is sent to each person, all of which is in English.
- [37] He said he typically receives a 10 percent response rate from the mailing. He has the power to excuse people who let him know that they fall within the exceptions listed in s. 3 of the Jury Act. These are listed on the summons with directions to the panel members to let the sheriffs' office know if they apply.
- [38] If a prospective juror raises an issue such as inconvenience or language difficulties, he asks them to write a letter to him. He said he keeps a record of all responses to the summonses, but he has never analyzed the reasons why people are excused from the panel in advance.
- [39] He testified that this is the process he followed for this trial. He said that he sent out 1,250 summonses for this case, and at the time of his testimony on October 6th, he had received over 130 responses. He said that he has no reason to think the selection of the array for this case will be other than random. He said he would continue to receive responses until the panel is assembled.
- [40] Sheriff Smith testified that in the past he had not asked Bands on the reserves if their members had been enumerated as required by s. 10.3(f) of the policy. However, a problem arose in a criminal case in Kelowna a few years ago when it was discovered that one of the polling stations on the Westbank reserve had not been entered on the JAS system. The trial had to be adjourned and a new panel summoned after the error had been corrected. Sheriff Smith said that, as a result, he now checks by phone with both the Band administration and Elections B.C. to ensure that the reserves were enumerated for the last provincial election,

which I note was in the spring of this year.

- [41] He said that he did that for this case and that he was advised by both the Band and Elections B.C. that the reserves had been enumerated. As well, he said that he has noted that he has been getting returns from the Westbank area.
- [42] He agreed that there are other areas within the one-hour radius referred to in s. 10.3(c) of the policy, notably Vernon or Penticton. However, under a long-term agreement with those towns, Kelowna does not select juries from those areas.
- [43] Sheriff Smith agreed that the town of Merritt is beyond a one-hour drive from Kelowna. He was not asked about reserves in Penticton, Vernon or Merritt, or in any other area within a one-hour radius of Kelowna.
- [44] Sheriff Smith had little personal knowledge about the reserves in the catchment area. He agreed that the Duck Lake reserve is about half an hour away and said there is public transport to the airport which is nearby. He did not know details of reserve boundaries, the economic conditions, the literacy rates or the language on the reserves. Nor had he made any inquiries about the quality of phone service or mail service there.
- [45] Sheriff Smith agreed that enumeration means people are given the opportunity to register to vote, but what people do with that is up to them. He also agreed that about 90 percent of those notified for a panel typically do not respond. He said one reason is that many people move.
- [46] He said that he has never looked into the reasons people do not respond. Nor are there consequences for those people. Sheriff Smith said he has never been asked by the government to consider using other lists than the voters' list to assemble a panel.
- [47] He has heard of questions raised about getting more aboriginal people on juries, but he could not recall the details of these and has never done it himself. He acknowledged the instruction to use Band lists in s. 10.3(g) of the policy if a reserve is not enumerated, but he said that this has never been done to his knowledge in Kelowna.
- [48] Sheriff Smith testified that he has never had any prospective juror call and say that he or she could not come due to transportation difficulties. Nor could he recall ever excusing an aboriginal person from jury duty due to difficulties with language.

Analysis

- [49] The first question is whether the system used to return the panel in this case resulted in exclusion of potential jurors of aboriginal heritage.
- [50] Sections 2 and 8 of the Jury Act read:

Jury duty

2 A person has the right and duty to serve as a juror unless disqualified or exempted under this Act.

Selection procedure

8 Having regard for the principle in section 2, the sheriff may determine the procedures the sheriff considers appropriate for the selection of jurors.

The relevant sections of the Charter of Rights and Freedoms state:

Legal Rights

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

...

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;

...

Equality Rights

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[51] Mr. Fowler argues that ss. 2 and 8 of the Jury Act are unconstitutional because they leave the method of returning the panel entirely to the discretion of the sheriff. He says that the government has abdicated its responsibility to provide guidance to the sheriff to ensure that the panel will be representative and, in particular, that the aboriginal community will be properly represented in the array. Mr. Fowler does not allege wilful partiality or deliberate

exclusion of aboriginals on the part of the sheriff, but says that the practices and policies used lead to under-representation of aboriginal people on jury panels.

- [52] He argues first that the sheriffs choose to use the voters' list as a basis for selecting a panel, but many aboriginals may not register to vote. As well, he says that there are systemic factors that prevent aboriginal people from responding to jury summonses and participating as jurors, such as illiteracy, economic hardship, transportation difficulties, language problems, and alienation from a justice system that they mistrust. Mr. Fowler says that the government is obliged to acknowledge these factors and rectify them as part of the system of assembling a properly representative array.
- [53] Instead, the sheriffs take a "reckless approach" to aboriginal representation on the panel. They simply send out jury notices to people randomly chosen from the voters' list, and there is no follow-up to ensure an appropriate response by aboriginal people to those notices.
- [54] Mr. Fowler says that the result is a breach of his right to life, liberty and security of the person under s. 7 of the Charter, and his right to be tried fairly by an independent and impartial tribunal in the form of a properly representative jury under s. 11(d) and (f) of the Charter. While he also alleged a breach of his right to equality under s. 15 of the Charter, he did not put this forward forcibly, conceding that this was a weaker argument.
- [55] In *R. v. Church of Scientology of Toronto* (1997), 116 C.C.C. (3d) 1 (Ont.C.A.), the court considered similar applications to those brought by Mr. Fowler. For the reasons expressed by Mr. Justice Rosenberg at pp. 55 to 57, I find that the focus of Mr. Fowler's application must be a breach of his rights under s. 11 of the Charter through the deliberate or systemic exclusion of aboriginals on the panel. Section 7 offers no greater protection than the specific rights framed by s. 11, and he lacks standing to advance a breach of his rights under s. 15 as that argument is essentially one that stands on the rights of others to be jurors, rather than the rights of the accused himself.
- [56] The onus rests with Mr. Fowler to establish that his right to a fair trial before an independent and impartial jury under s. 11(d) and (f) has been breached because aboriginals have been excluded from the panel leading to an appearance of bias: *Church of Scientology of Toronto* (C.A.) at pp. 60 and 65; *R. v. Butler* (1984), 63 C.C.C. (3d) 243 (B.C.C.A.).
- [57] The first issue is how to determine if there is proportionate aboriginal representation on the panel that will be returned for this trial. As noted at the outset, Mr. Fowler wants the sheriff to solicit information from members of the panel as they arrive as to whether they view themselves as aboriginal. He says the secrecy of the process otherwise impedes assessment of whether there is adequate aboriginal representation in the array. While some of the panel may be offended by such a question, he says it is essential to prevent him, as an aboriginal accused, from feeling that the justice system has failed him through under-representation, and that his trial is thus unfair.

- [58] I am not prepared to direct the sheriff to follow such a procedure. I find it would be an intrusive and potentially offensive process, with little likelihood of providing reliable information as to aboriginal representation on the panel. It offers no uniform definition of aboriginal heritage, and leaves that to the decision of the individual panel member. As well, some panel members may choose not to answer the question, making it impossible to assess proportionate representation. I note that in *R. v. Lamirande* (2002), 164 C.C.C. (3d) 299 (Man.C.A.) the court stated that the polling of a panel on racial grounds was offensive and irrelevant in the absence of evidence that the Jury Act was not complied with, or that there had been something untoward interfering with random selection. I reach the same conclusion here.
- [59] Recognizing that it is unlikely aboriginal representatives on the panel can be reliably discerned visually, and having decided that the panel will not be polled as to their aboriginal ancestry, the adequacy of aboriginal representation on the panel can only be discerned by examining the legislation and the methodology that led to the return of the panel for this trial to determine if it excluded aboriginal people.
- [60] I find it useful to frame that examination in the form of the two issues delineated in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at paras. 20 and 21. First, are ss. 2 and 8 of the Jury Act unconstitutional on their face because they violate a Charter right? Second, if not, did the actions of the sheriff as the delegated decision-maker under those sections infringe Mr. Fowler's rights under s. 11?
- [61] I find there is nothing in s. 2 or s. 8 of the Jury Act that could be said to be in violation of Mr. Fowler's constitutional rights. The focus on the analysis must, therefore, be the system employed by Sheriff Smith in returning the panel.
- [62] It is true that s. 8 of the Jury Act gives sheriffs a wide discretion in deciding how to summon a panel. However, that discretion is not exercised in a vacuum. It must operate first within the legislative framework which forms the backdrop to these applications, the Charter and s. 629 of the Code, which permit challenge of the array on the basis of partiality, fraud or wilful misconduct on the part of the sheriff.
- [63] As well, it must comply with the requirements established by the common law in interpreting that legislation. For example, in *R. v. Sherratt*, [1991] 1 S.C.R. 509 at para. 35, the Supreme Court of Canada provided the seminal statement with respect to the significance of representativeness in the array:

The perceived importance of the jury and the Charter right to jury trial is meaningless without some guarantee that it will perform its duties impartially and represent, as far as is possible and appropriate in the circumstances, the larger community. Indeed, without the two characteristics of impartiality and representativeness, a jury would be unable to perform properly many of the functions that make its existence desirable in the first place. Provincial legislation guarantees representativeness, at least in the initial array. The random selection process, coupled with the sources from which this selection is made, ensures the representativeness of Canadian criminal

juries. (See the provincial Jury Acts.) Thus, little if any objection can be made regarding this crucial characteristic of juries.

- [64] The sheriff's discretion is also confined by the guidelines established by s. 10.3 of the policy manual of the Court Services Branch, which I have set out above. I note that in *R. v. Pena* (5 June 1996), New Westminster X043738 (B.C.S.C.) at para. 7, Josephson J. observed that a policy very similar to that in s. 10.3 was derived from the Access to Justice Committee in this province, chaired by Mr. Ted Hughes, due to an expressed concern that many aboriginal people living on reserves were not enumerated and were therefore underrepresented on jury panels.
- [65] In assessing the procedures followed here, I found Sheriff Smith to be a credible witness. I accept that he followed the process set out in s. 10.3 of the policy manual in returning the array for this trial. As well, I find that due to his earlier experience of losing a jury panel because a computer error led to under-representation of aboriginal people on that panel, Sheriff Smith is attentive to checking that the reserves in the Kelowna catchment area have been enumerated. I find that he checked that here satisfactorily.
- [66] As well, I note that the statistical evidence reveals that there are also potential aboriginal jurors off the reserves who reside in the City of Kelowna itself. In short, I find Sheriff Smith followed a process of random selection which was designed through the policy to include prospective jurors of aboriginal heritage.
- [67] Based on the statistical evidence, this random selection should result in summonses being sent to about 25 potential aboriginal jurors, which is about 2 percent of the 1,250, if all adult aboriginals have registered to vote.
- [68] Sheriff Smith supplied the somewhat surprising statistic, however, that generally 90 percent of those summoned do not respond. If aboriginal people are proportionately represented in that statistic, this means that only two or three members of the panel of more than 130 expected to arrive tomorrow would be aboriginal.
- [69] Mr. Fowler maintains that these figures are inflated, however, as many aboriginal people do not register to vote. As well, he says that aboriginal people will be over-represented in the 90 percent that chose not to respond, due to the systemic reasons set out in the reports of the Saskatchewan and Manitoba inquiries and the article authored by Mr. Israel, that is, such matters as transportation, poverty and alienation.
- [70] I have taken judicial notice of some aspects of the troubled history of aboriginal peoples in our society, and I have also considered the commission reports and the Israel article which identified those systemic factors that may interfere with proportionate representation of aboriginal people on jury panels. However, I find that those legislative facts are insufficient to establish that such factors played a role in the under-representation of aboriginal people on the panel returned in this case. Evidence demonstrating systemic discrimination against aboriginal people on this panel is clearly critical to the issues in this case, and should go

beyond reports from other provinces or academic articles that deal with the issues on a global and more abstract basis.

- [71] Mr. Fowler says such evidence is not available to him, and it is up to the government or the sheriffs to conduct studies and take steps to establish that such factors do not influence aboriginal representation on jury panels.
- [72] It may well be that further studies or other action could be taken to identify and alleviate factors that may prevent aboriginal participation in juries in British Columbia. However, in my view, that is a political matter and the failure to take such steps cannot be the foundation for a finding that the aboriginal population is underrepresented on this panel.
- [73] Mr. Fowler also argues that the jury legislation in other provinces provides more guidance and permits greater flexibility in the lists used to assemble the array. Saskatchewan and Manitoba, for example, use random selection from a list of those registered with the provincial health care plans. Section 6 of the Ontario Juries Act, R.S.O. 1990, c. J.3 stipulates random selection from an enumeration list related to the Assessment Act, R.S.O. 1990, c. A.31. Section 6(8) specifically provides for aboriginal representation. It states:

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 a 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.

- [74] While I agree that these Acts provide more legislative detail as to the methodology to be used, I am unable to find that they result in a higher proportion of potential aboriginal jurors on the panel than is the case in British Columbia. Problems of non-attendance due to such factors as poverty, language and alienation will arise in the selection process regardless of the nature of the list from which the panel is randomly drawn.
- [75] Moreover, given the high rate of prospective panellists who simply do not respond, it is evident that such factors are not the only reasons that citizens fail to respond for jury duty. Nor is non-response limited to the aboriginal population. Given that the aboriginal population represents only 2 percent of the population in the catchment area, and 90 percent of the panel do not respond, it is conceivable that the panel members that do appear tomorrow may have no aboriginal people in their midst due purely to statistical chance. The practical difficulties of obtaining a truly representative panel in this sense were discussed in *Church of Scientology of Toronto (C.A.)* at pp. 62 to 63.
- [76] In short, the Crown has led evidence from a credible witness that he returned the panel using a process of random selection from the voters' list, a source known to contain a broad representation of citizens. Care was taken to follow a policy designed to ensure that the reserves within the catchment area had been enumerated and, therefore, formed part of the pool from which the selection was made. I am unable to conclude that the process followed by Sheriff Smith in returning the panel for this case has resulted in the systemic exclusion of

potential jurors with aboriginal heritage. Accordingly, I conclude that Mr. Fowler's rights under s. 11(d) and (f) have not been violated.

- [77] The second question is whether Mr. Fowler is entitled to a panel and to a jury with disproportionately high aboriginal representation. Mr. Fowler seeks increased aboriginal representation on the jury panel, as well as assurance that there will be people of aboriginal heritage selected to serve on his jury. He says the failure to provide this would constitute a violation of his rights under ss. 7, 11 and 15 of the Charter.
- [78] He acknowledges that Sherratt and a number of other cases are clearly against this position. He argues, however, that these cases are older decisions, and ignored the special status of aboriginal people in Canadian society. He says that times have changed, and this should be reflected by departing from these earlier decisions.
- [79] Mr. Fowler argues that Sherratt was wrong in viewing representativeness from the point of view of a reasonable person. He says that in a case with an aboriginal accused, it should be examined from the point of view of a reasonable aboriginal person. He says that words like "random" and "representativeness" are meaningless for members of a minority. If justice is to be seen to be done, there must be representation of aboriginal people on the panel and on the jury in this case. Unless that occurs, an aboriginal accused will not perceive the trial as fair. As well, if there is no aboriginal juror, something significant to aboriginal background may be missed.
- [80] As I understand it, Mr. Fowler is essentially alleging a breach of his right to a fair hearing before an independent and impartial tribunal. He responds to the obvious floodgates argument by maintaining that aboriginals are different from other minorities, and have an elevated status compared to other minority groups. They are the First Nation. They are constitutionally protected by virtue of s. 25 of the Charter. Their special status and rights have recently been affirmed in cases such as *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. He says that they have become effectively a "quasi nation state" with the ability to make treaties with the government.
- [81] He says that to a large extent this special status derives from the increasing acknowledgement of the historical wrongs that aboriginal people have suffered at the hands of white governments. He points to such matters as the historical loss of aboriginal lands in British Columbia, their subjection to the Indian Act, R.S.C. 1985, c. I-5, the tragedy of the residential Indian school system, the overrepresentation of aboriginal people in the criminal justice system, and his own history of adoption and alienation from his culture.
- [82] He points out that aboriginal people are accorded a different status in sentencing proceedings under s. 718.2 of the Code, and says that they should also have special consideration in the composition of the jury panel and the jury in trials involving aboriginal accused.

[83] I am unable to find that the unique and tragic features of aboriginal history in this society which I have mentioned entitle Mr. Fowler to increased aboriginal representation on the panel or on the jury because of his aboriginal heritage.

[84] The importance of broad representativeness as a quality in the jury system is set out in the quotation from Sherratt, above. As well, in Sherratt, Madam Justice L'Heureux-Dubé stated at para. 31:

The modern jury was not meant to be a tool in the hands of either the Crown or the accused and indoctrinated as such through the challenge procedure, but rather was envisioned as a representative cross-section of society, honestly and fairly chosen. Any other vision may run counter to the very rationales underlying the existence of such a body.

[85] A multitude of decisions from Canadian courts have held that an accused is not entitled to demand that members of his race be included in the jury roll, the jury panel or the jury: *R. v. Kent, Sinclair and Gode* (1986), 27 C.C.C. (3d) 405 (Man.C.A.); *R. v. Born with a Tooth* (1993), 81 C.C.C. (3d) 393 (Alta.Q.B.); *R. v. A.F.*, [1994] O.J. No. 1392 (Ont.Ct. (Gen.Div.)); *Redhead; Church of Scientology of Toronto (C.A.)* at p. 60; *R. v. Laws* (1998), 128 C.C.C. (3d) 516 (Ont.C.A.) at para. 63; *R. v. Gayle* (2001), 154 C.C.C. (3d) 221 (Ont.C.A.); *Lamirande* at para. 153.

[86] The danger of abandoning broad representation in favour of selectivity based on racial or ethnic characteristics is discussed in many of those decisions. In *R. v. Kent, Sinclair and Gode*, for example, the Manitoba Court of Appeal considered a challenge to the array by an aboriginal person on the basis that the sheriff showed partiality in returning a panel without sufficient Amerinds to constitute at least six members of the jury. At page 421, Matas J.A. stated that to interpret the Charter as permitting an accused to demand members of his race to be included on the jury would run counter to Canada's multicultural and multiracial heritage and the right of every person to serve as a juror. It would mean the imposition of inequality. He went on at pp. 422 to 423 to state:

Section 25 of the Charter does not assist the appellant. That section provides that the guarantee in the Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada. The right of Indians to serve on a jury in any particular proportion is not a right encompassed under s. 25.

...Indians are treated the same as all other races. No other race, speaking a particular language, is guaranteed a special right to sit on a jury. As I pointed out above, if it were otherwise, considering the multi-racial character of Canada, the jury system would be subject to unreasonable constraints.

[87] Those comments have more recently been endorsed in *Laws* at para. 63 and in this province in *R. v. West*, [1992] B.C.J. No. 2958 (Q.L.) (S.C.). Similar sentiments were also expressed by O'Leary J. in *Born with a Tooth* at p. 397 where he stated:

An unarticulated premise of the argument supporting affirmative action in the jury selection process is that some otherwise qualified members of Canadian society are incapable of judging the conduct of other members of the same community in a fair and impartial manner in accordance with the solemn oath taken by jurors. There is no justification for such an assumption.

In my view, the condonation of a process other than random selection from a representative population will lead inevitably to the demise of the jury system. The selective inclusion of members of one group of citizens in a jury panel necessarily discriminates against others. It is a small step from the calculated inclusion of members of one distinct group to the express exclusion of those of other such groups.

He concluded that to depart from the principle of representation and random selection informing jury panels would reject a cardinal principle of the criminal jury system, and that such a fundamental change could only be made through legislation.

[88] Those sentiments are echoed in the other decisions I have cited. I am unable to agree with Mr. Fowler that these decisions are outdated, or that I am free to depart from them. The principle of broad community representation on a jury panel, randomly selected, remains a fundamental tenet of the criminal trial process. In *Laws* at para. 60, the Ontario Court of Appeal observed that if equality rights required that every jury must include one or more members of an accused's race, the entire jury selection process would have to be restructured. The principle of random selection would have to be abandoned. The end result would be the very type of racial stereotyping that the Charter is designed to prohibit.

[89] Mr. Fowler points out that in *Pena*, commonly known as the Gustafson Lake case, one of the accused challenged the panel as the sheriff had followed a policy to include more aboriginal people in the pool from which the panel had been selected. He had added 52 names of aboriginal people to a pool of 3,401 people because 14 of the 18 accused were Native persons, and he knew the region in which the trial was to take place had an under-representation of aboriginal people. The applicant took the position that this departed from the principle of random selection. There was no evidence as to how many of the 52 were actually summoned or responded to the summons.

[90] Mr. Justice Josephson concluded that in the circumstances of that case the sheriff's actions did not show partiality. He was following an established policy to ensure a representative number of aboriginal people in the pool. The panel had been chosen randomly from the pool. He concluded that complete randomness in the creation of the pool was not required as long as the effect of the non-random method chosen was not a deliberate or inadvertent exclusion of any particular group.

- [91] That case thus condoned a practice by the sheriff of deliberately increasing the number of aboriginal people in the jury pool to ensure appropriate representation of that group on the panel. I am unable to find, however, that it assists Mr. Fowler in demanding a disproportionate representation of aboriginals on the panel or on the jury at his trial.
- [92] Mr. Fowler says that the absence of aboriginal jurors will result in a breach of his right to a fair trial under s. 7 of the Charter. I find nothing in the evidence to support the premise that his trial will be more fair with aboriginal jurors than without them. His counsel agrees that there are no cultural factors in this case other than the fact that the victim was Caucasian and Mr. Fowler is a person of aboriginal heritage. He nevertheless argues that it is a matter of Mr. Fowler's perception and that justice must be seen to be done by having at least some aboriginal jurors sit on a trial where the accused is aboriginal.
- [93] Appearances alone do not create a fair trial. Fairness is derived from the impartiality and independence of the fact-finder. Jurors are to be neutral participants in the trial who take their instructions from the judge. Here, there is nothing to suggest that they would be more impartial or more independent solely because of their aboriginal background. There is no evidence that aboriginal jurors would bring any particular attitude towards the charge of murder or the evidence to be led.
- [94] There will be a challenge for cause during the selection of the jury which is directed, in part, to remove any jurors that may have a bias against aboriginal people. To permit aboriginal members of the panel to take a place on the jury without being subjected to the challenge for cause and to pre-emptory challenges, just for the sake of appearance, would fly in the face of the right of an accused to an impartial and independent fact-finder.
- [95] I conclude that there is no basis on which I could find that the failure to permit disproportionate aboriginal representation on the panel, or on the jury, is a violation of Mr. Fowler's rights under ss. 7, 11 or 15 of the Charter.
- [96] Accordingly, I conclude that there has been no violation of Mr. Fowler's Charter rights. He fails in his application to have the legislation or the method of returning the jury array in this case declared unconstitutional. As well, I dismiss the application to challenge the array on the basis of partiality.

"K. Neilson, J."

The Honourable Madam Justice K. Neilson

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