

Ruling  
Hearing of July 21, 22, and 28, 2011  
Inquest into death of Reggie Bushie

1. *Purpose of the Hearing*

The hearing was held in order to inquire into the representativeness of the 2011 jury roll of the Judicial District of Thunder Bay. Participants in the hearing were:

Mr. Derry Millar and Mr. Trevor Jukes, Coroner's Counsel

Mr. Jonathan Rudin, Counsel for King Family and Pierre Family<sup>1</sup>

Mr. Julian Falconer and Mr. Sunil Mathai, Counsel for Nishnawbe Aski Nation,  
Agent for Northern Nishnawbe Education Council

Mr. Dennis Brown, Mr. Darrell Kloeze, Ms. Chantelle Blom and Ms. Eunice Machado, Counsel for Ministry of the Attorney General- Court Services Division<sup>1</sup>

Ms. Agnieska Jaworska, Counsel for Aboriginal Affairs and Northern Development Canada (previously Indian and Northern Affairs Canada "INAC")

2. *Selection of jury rolls under the Juries Act*

In *Pierre v. McRae*, 2011 ONCA 187, the Ontario Court of Appeal summarised the jury roll process as follows:

**23** Every coroner's inquest has a jury of five people. The procedures for selecting a jury are found in the *Juries Act* and the *Coroners Act*, which incorporates by reference specific provisions of the *Juries Act*. In a nutshell, the coroner's jury is chosen from a list of jurors taken from a jury roll.

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

**25** The names of First Nations persons living on reserves, however, are not found on

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<sup>1</sup> The Pierre Family and the Ministry of the Attorney-General, Court Services Division were granted the right to participate in this hearing by my rulings dated June 17 and June 21, 2011, respectively.

municipal assessment lists. Thus, the *Juries Act* prescribes a separate procedure for ensuring that First Nations persons on reserves are included on a jury roll. Section 6(8) of the *Juries Act* 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 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**. [Emphasis added]

For First Nations persons, compliance with s. 6(8) is crucial if they are to be included in a jury roll and therefore eligible to serve on an inquest jury.

**3. Case law on representativeness of jury rolls**

Given that juries for criminal trials, civil litigation, and inquests are drawn from the same jury roll, it follows that criminal case law with respect to jury rolls is relevant.

**4. *R. v. Nahdee (No. 1)*, [1993] O.J. No. 2425 (S.C.J.) and *Pierre* represent the primary basis of this ruling with respect to representativeness of the jury roll under Section 6(8) of the *Juries Act* and the authority of the coroner to inquire into the matter and, if necessary, order a remedy.**

**5. The statutory process for jury roll selection of persons resident on First Nations reserves differs from the process employed in municipalities. In *Nahdee*, the defence challenged the jury roll, on the basis that First Nations persons resident on reserves had been excluded. The court upheld the challenge:**

13 Fourthly, in the case of an Indian reserve, the property being owned by the Band, there are no assessment or enumeration lists, the process involving the Director of Assessment is accordingly eliminated. The process is governed by s. 6(8) of the *Juries Act* which reads as follows:

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.

14 The reference to selection "in the same manner as if the reserve were a municipality" imports into the process of selection "from any record available" the element of randomness cast upon the Director of Assessment by s. 6(2).

[paragraphs 15-19 omitted]

20 From the reference in para. 12 to the request for membership lists being forwarded to the Band from the sheriff's office, I conclude that there was a single request made by mail with no further attempt by personal communication or otherwise to obtain lists from the Band or from another source such as the federal ministry having responsibility for Indian Affairs. This is neither a reasonable nor an adequate compliance with the obligation "to select names of eligible persons inhabiting the reserve". It seems the legislature may have contemplated the task thus facing the sheriff. In recognition of that task, the wide permissive provision is extended to the sheriff as follows: "the sheriff may obtain the names of the inhabitants of the reserve from any record available". The reference to the term "available" must contemplate something more than was done in this instance. The sheriff's statutory duty requires exercise of diligence, resourcefulness, ingenuity and perhaps persuasion extending beyond mailing a single request. This is particularly so against a backdrop of similar requests being chronically ignored. Simple acquiescence in the face of repeated failure to respond to the single mailed request is not sufficient compliance for the discharge of the statutory duty. If the sheriff goes further and thereby having done his statutory duty so far as he is able and the Band still chooses not to participate, either by providing lists or by individuals failing to appear as required for jury service, the responsibility then rests not with the sheriff.

6. The following principles from *Nahdee* and *Pierre* are relevant to the assessment of representativeness of the jury roll:
  - i. The court considers the sheriff's efforts with respect to First Nations reserves under Section 6(8).
  - ii. The sheriff's duty goes beyond the rote task of making requests, and requires exercise of diligence, resourcefulness, ingenuity, and perhaps persuasion.
  - iii. The sheriff can not passively acquiesce to non-response or chronically ignored requests.
  - iv. The sheriff's duty is to attempt, so far as he or she is able, to obtain a list of inhabitants of the reserve, and to send jury questionnaires to persons randomly selected from the list. The courts have established criteria for assessment of the sheriff's performance of his or her statutory duty, not a prescriptive map of the process to be followed by the sheriff. A single letter from the sheriff, without follow-up, failed the test in *Nahdee*; but this should not be taken to mean that dispatching a second letter would necessarily suffice. For instance, in *Pierre*, at paragraph 68, the Court of Appeal found that the Kenora jury roll was "manifestly unrepresentative", despite actions by the Kenora sheriff which exceeded those taken by the sheriff in *Nahdee*.
  - v. It is recognised in *Nahdee* that, where a sheriff has done his or her statutory duty so far as he or she is able, and a First Nation or its individual members choose not to participate, "the responsibility then rests not with the sheriff."

7. *Summary of Evidence*

Evidence included:

- i. Policies and procedures of the Court Services Division of the Ministry of the Attorney General, which has overall responsibility for the jury roll
- ii. Documentation regarding First Nations reserves in the judicial district of Thunder Bay, and records of contacts between Court Services staff and the Chiefs and Council of those reserves, and with federal authorities.
- iii. The types of lists of residents of First Nations reserves provided to Court Services, which included “band list” and “band electoral list”. For the purposes of this ruling, the generic term “membership list” includes band lists, band electoral lists, and other lists of residents of First Nations reserves.
- iv. Testimony from Court Services Division staff concerning their understanding of the law and policies, and the manner in which they perform their duties:

Janette Sprovieri: Supervisor of Court Operations, Northwest Region,  
Co-Designated Sheriff, Thunder Bay District  
MAG- Court Services Division

Don Blaquiere: Manager of Court Operations, Northwest Region,  
Co-Designated Sheriff, Thunder Bay District  
MAG- Court Services Division

Robert Gordon: Director of Court Operations, Northeast and  
Northwest Regions,  
MAG- Court Services Division

Shaun Joy: Manager of Business Support, West Region  
MAG- Court Services Division

Katie Mackenzie-Ferley: Acting Manager of Operational Support Unit  
(by video link) Corporate Planning Branch  
MAG- Court Services Division

8. The policies of Court Services Division relevant to this issue, dating back to 1996, were heard. On November 10, 2008, Court Services distributed a memorandum which further delineated the process for collection of membership lists. These policies included the steps for the sheriff to request membership lists, and for selection of names from those lists. Witnesses testified that the statutory duties and responsibilities of the “sheriff” under the *Juries Act* are divided among various staff members and offices of the Court Services Division of the Ministry of the Attorney-General. The term “sheriff” in this ruling is used in this broader sense.

- 9.** Until 2000, Court Services relied upon membership lists provided annually by INAC. INAC notified Court Services in 2001 that it would no longer provide membership lists, citing legislative and policy changes. INAC's position at this hearing was that it cannot provide membership lists directly to Court Services, but that a Chief or Council of a First Nation may choose to do so. There was evidence that, in the past, including during the preparation of the 2011 jury roll, INAC advised First Nations that they cannot lawfully share the membership list.
- 10.** Steps taken by Court Services to obtain membership lists for the 2011 jury roll included:
- i.* The tracking of requests for the lists, with repeated attempts where there had been no initial response.
  - ii.* Translation of certain correspondence into First Nations languages.
  - iii.* Correspondence explaining the importance of jury service by First Nations persons who live on reserves.
  - iv.* Participation in initiatives with First Nations leaders to enhance jury representation.
- 11.** According to information provided, there are 15 First Nation reserves in the judicial district of Thunder Bay, with a population of 7,526. The judicial district has a population of 149,063.
- 12.** Court Services annually requests the membership list for each reserve. In response to the Sheriff's request in preparation for the 2010 jury roll, membership lists were provided by 2 of the 15 First Nations.
- 13.** Evidence was heard that a membership list may include persons who are under the age of 18 years or who do not reside on the reserve, and are therefore not eligible for jury duty under Section 6(8). Witnesses from Court Services had not been aware of this issue prior to preparation for this hearing, and acknowledged that it was possible that a substantial proportion of jury questionnaires may have been mailed to persons who were ineligible for jury duty by virtue of age or place of residence.
- 14.** Where Court Services did not receive a membership list (13 of the 15 reserves), it proceeded using the most recent list in its possession. Of those lists, 4 dated to 2000, and almost half (7 of 15) were from 2005 or earlier. Because the lists were, in many cases, more than 10 years old, it was acknowledged that many young adults may never have had an opportunity to serve on a jury (i.e. those who turned

18 in or after 2001), whereas jury questionnaires may have been mailed to persons who had moved from the reserve or died since 2000.

- 15.** From each list, Court Services randomly selected a set of persons to whom jury questionnaires were mailed. The number of questionnaires was calculated by multiplying the population of the community by a proportionality factor called the “county test”. This result was then increased by 30%, an adjustment set by Court Services and intended to increase the number of First Nations persons on reserves who receive a jury questionnaire. This principle of upward adjustment has been endorsed in case law, but no evidence was provided to justify the specific increment of 30% used here.
- 16.** The “random” selection at the Thunder Bay office was performed by asking a staff member to call out arbitrary numbers, rather than using the methods directed in the policy (such as choosing counters from a basket). It was acknowledged that this process was not in compliance with Court Services policy, and may not satisfy the required standard of randomisation.
- 17.** Jury questionnaires were mailed to the selected persons, and Court Services staff classified the responses as eligible or ineligible for jury duty. If eligible, the person was added to the jury roll.
- 18.** The total population of the judicial district of Thunder Bay is 149,063. With respect to the 7,526 inhabitants of First Nation reserves, the outcome of this process was as follows for the 2011 jury roll (The comparable provincial rates regarding disposition of jury questionnaires have been provided as benchmarks. Percentages are rounded to the nearest digit):

  - i.* 196 questionnaires were mailed.
  - ii.* 77 questionnaires, 39% of those mailed out, were returned by the post office as undeliverable (“RPO”). This is approximately ten times the provincial rate.
  - iii.* 26 questionnaires, or 13%, resulted in responses, compared to the provincial rate of 76%
  - iv.* 17 were classified as eligible for jury duty, representing a little less than 9% of questionnaires mailed out. For the province, the comparable figure was 49%.
  - v.* Ultimately, residents of First Nations reserves represented 5% of the population, but accounted for only 1.3 % of the jury roll. In other words, if their participation was proportionate to their share of the population, it would be expected that the jury roll would contain 4 times as many reserve residents as it actually did. This is obviously a serious discrepancy.

- 19.** The rate of questionnaires returned by the post office as undeliverable (“RPO”) is noticeably high. Court Services staff testified that they had not systematically inquired into why almost ten times as many questionnaires were returned for residents of First Nations reserves than the provincial average.
- 20.** Ms. Mackenzie-Ferley testified as to some of the initiatives undertaken by the Operational Support Unit, Corporate Planning Branch, Court Services Division, with respect to First Nations’ participation in the jury process. Some of these initiatives occurred prior to her joining the unit in October 2010. She testified that the Court Services Division had undertaken a total of 12 jury forums with First Nations who were affiliated with Grand Council Treaty #3, between March and November of 2010. Ms. Mackenzie-Ferley testified that the forums included representatives of Grand Council Treaty #3 and the Court Services Division. She did not attend any of the forums. She testified that the purpose of the forums was to increase awareness and provide education on the jury process including the need for updated membership lists, encouraging participation by members of the First Nations and ensuring that there was a clear understanding of the difference between a jury questionnaire and a summons for jury duty. In the Thunder Bay Judicial District, only one First Nation is affiliated with Grand Council Treaty #3, Lac Des Mille Lacs First Nation, and she was not sure whether there had been a jury forum held with that First Nation.
- 21.** Ms. Mackenzie-Ferley also testified with respect to the steps undertaken by the Operational Support Unit with the Union of Ontario Indians between November 2009 and February 2010 to explore ways in which the Ontario jury system can be improved to increase the number of Anishinabek citizens serving as jurors. This initiative comprised three meetings held on November 19 and 20, 2009, and February 17, 2010. Of the 10 First Nations affiliated with the Union of Ontario Indians in the Thunder Bay Judicial District, 4 individuals from three of the 10 First Nations attended the meeting held in Sault Ste. Marie on February 17, 2010.
- 22.** While the initiatives summarised in the preceding 2 paragraphs are important and may lead to further initiatives on the part of the Court Services Division, they did not remedy the issues faced by the Court Services in preparing the 2011 jury roll in the Thunder Bay Judicial District.
- 23.** *Application of the representativeness test to the 2011 Thunder Bay jury roll*  
The tests for representativeness of the jury roll are summarised at paragraph 6 above.

24. Evidence regarding the process employed in the selection of the 2011 jury roll included the procedures used by Court Services for collecting lists of residents of First Nations reserves, set out in the 1996 Memorandum (Exhibit 1 at the hearing), and modified by subsequent policies, for example the 2008 Memorandum. Staff were directed to “attempt to obtain the Band electoral list, or any other accurate list of residents, by writing letters, telephoning, or visiting the reserves in your area.” The 1996 Memorandum also instructed staff to “seek help from native court workers, the Aboriginal Issues group at the Ministry ..., the Crown Attorney’s office, or any other resources available.” The 1996 Memorandum provided “the most recent list of Chiefs of Ontario and their addresses.” In assessing the actual steps taken by the staff in the Thunder Bay Judicial District in the preparation of the 2011 jury roll, against the steps provided for in the 1996 Memorandum, the following deficiencies are identified:

- i. In 2010, the names and addresses of the Chiefs of Ontario were not provided to Ms. Sprovieri or Ms. Hinterbrandner, the Court Services staff responsible for requesting membership lists. While Ms. Sprovieri testified that Ms. Hinterbrandner began to obtain the names of the Chiefs of each of the First Nations reserves in the Thunder Bay Judicial District, because of time constraints, it was decided that she should send the letters not to the actual Chief of the First Nations but addressed generically to “The Chief.” While this may have technically met the requirement of the 1996 Memorandum, it did not, in my view, meet its spirit, which clearly contemplated that the letters would be written to the actual Chief of each First Nation.
- ii. Unknown to Court Services, the membership lists upon which they relied may have contained a substantial number of persons who would not be eligible for inclusion on the jury roll because of age or residence.
- iii. In 2010, there was not a systematic and comprehensive effort to ensure, by personal visit or other official contact, that the Chief and Council of each reserve were informed of the importance of the membership list in ensuring that residents of First Nations reserves could participate in jury duty, and the value of providing age and address for each member of the list.
- iv. Telephone calls were made to First Nations to follow up on the generic letters to “The Chief”, but the contact was with the person who answered the telephone, typically an administrative assistant and not the Chief or a member of Council.
- v. The 1996 Memorandum instructed staff to “seek help from native court workers, the Aboriginal Issues group at the Ministry ..., the Crown

Attorney's office, or any other resources available." There was no evidence that, in 2010, anyone sought help from native court workers, the Crown Attorney's office, or any other potential resources. The letters were written to "The Chief", follow up calls were made to receptionists, and, in a few cases, the original letter was re-sent.

- vi. The calculations used to determine the number of questionnaires to be sent to each community were reviewed at the hearing, and, in many cases, found to be incorrect. For instance, the rounding-off procedure in the calculation in item B3 of the 1996 Memorandum was not followed. The 1996 Memorandum instructed staff always to round up to the next integer, but, in practice, the numbers were rounded up at .50 or greater and rounded down below .50. As a result of this error, Thunder Bay sent 196 questionnaire packages when it should have sent 213.
- vii. The methodology for random selection provided for in the 1996 Memorandum was not followed, as noted in paragraph 16 above.
- viii. There had been no systematic inquiry into the rate of jury questionnaires returned by the Post Office (RPO rate) of 39% in 2010, which was not markedly different from previous years, and was ten times the provincial average. This stands in distinction to the spirit of the court's direction in *Nahdee* that the sheriff should not display "simple acquiescence" to non-response.
- ix. The use, in many cases, of lists which are now more than a decade out-of-date would reasonably have resulted in the systematic exclusion of young adults who turned 18 in or after 2001.

## **25. Finding and Order**

For the above reasons, the tests set out in case law cited above are not met. In *Nahdee*, the court stated at paragraph 20:

The sheriff's statutory duty requires exercise of diligence, resourcefulness, ingenuity and perhaps persuasion extending beyond mailing a single request.

The first test, diligence, cannot be said to be satisfied when Court Services is not in compliance with its own policies, and is not aware of the nature of the contents of the membership lists upon which its mailing of jury questionnaires is based.

- 26.** It is therefore my finding that the 2011 jury roll for the Judicial District of Thunder Bay is not representative, and does not comply with Section 6(8) of the *Juries Act*. The inquest cannot proceed until the jury roll is representative.

- 27.** The Sheriff is directed to produce a list of jurors from a proper jury roll, that is, a roll which is representative and in compliance with Section 6(8) of the *Juries Act*. The Sheriff will advise Coroner's Counsel, at the earliest possible opportunity, of the date on which the new roll can be expected.
- 28.** A hearing will be held in order to inquire into the representativeness of the new jury roll.

For utmost clarity, while this ruling outlines evidence before me which led to my finding that the jury roll was unrepresentative, the list is not intended to be exhaustive or prescriptive. The assessment of the new jury roll will be in the context of the relevant case law, and remedying of the specific issues cited here will not necessarily yield a finding that the jury roll is representative. That being said, in the preparation of a future jury roll, the following should be demonstrated by the sheriff, insofar as is feasible:

- i.* Knowledge of the nature of the contents of each membership list, especially as to age and residence of persons on the list.
  - ii.* Rationale for the 30% increase in mailing of jury questionnaires to residents of First Nations reserves. While the legal basis for applying an increase is clear in case law, no specific justification was provided in evidence for the use of the 30% number, and it is not clear that the increment employed here is based upon a reasonable factual foundation and is adequate for the purposes for which it is employed.
- 29.** I thank all counsel for their very able submissions. The initiative and cooperation shown by counsel in this inquest and the inquest into the death of Jacy Pierre resulted in a more efficient and effective process, and deserves special recognition.
- 30.** Coroner's Counsel will be in touch with parties with standing as soon as we are able to proceed with the next stage of the inquest.

David S. Eden, M.D.  
Presiding Coroner  
September 9, 2011