CITATION: Pierre v. McRae, 2011 ONCA 187
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COURT OF APPEAL FOR ONTARIO

Weiler, Laskin and Sharpe JJ.A.

BETWEEN

Elizabeth Pierre and Marlene Pierre

Applicants (Appellants)

and

Dr. Shelagh McRae, Coroner

Respondent (Respondent)

AND BETWEEN

Nishnawbe Aski Nation, Rhoda King and Berenson King

Applicants (Appellants)

and

Dr. David Eden, Coroner

Respondent (Respondent)

Jonathan Rudin, for the appellants, Elizabeth Pierre, Marlene Pierre, Rhoda King and Berenson King

Julian N. Falconer and Julian K. Roy, for the appellant Nishnawbe Aski Nation

Kim Twohig and Michael E. Burke, for the respondents

Suzan E. Fraser, for the intervener Provincial Advocate for Children and Youth

Heard: September 21, 2010

On appeal from the orders of the Divisional Court (Wilson, Lederman and Swinton JJ.), dated July 22, 2009, with reasons by Swinton J. and reported at (2009), 259 O.A.C. 1.

Laskin J.A.:

A. INTRODUCTION

[1] In late October 2007, Jacy Pierre, a 27-year-old First Nations person, died of a drug overdose in the Thunder Bay District Jail. At about the same time, Reggie Bushie, a 15-year-old First Nations youth, drowned in the McIntyre River near Thunder Bay. Inquests into their deaths were ordered.

[2] Before each inquest began, the families of the deceased raised concerns about whether the jury roll from which coroners' juries are selected was representative. The families produced compelling affidavit evidence showing that in the neighbouring District of Kenora the jury roll had excluded nearly all First Nations persons living on a reserve. Each family – and on the Bushie inquest, Nishnawbe Aski Nation (NAN)[1] – asked the presiding coroner to issue a summons to the Director of Court Operations so

[1] NAN is a political organization representing 49 First Nations communities in Ontario, including the community where Reggie Bushie lived.

they could find out how the jury roll in the District of Thunder Bay was established. Both coroners refused to issue a summons.

[3] The Pierre family and NAN applied for judicial review of each coroner's decision and a stay of the inquests pending the hearing of their applications. Karakatsanis J. refused to stay the Pierre inquest but granted a stay of the Bushie inquest. The Pierre inquest was completed in February 2009; the Bushie inquest has yet to be held. In July 2009, the Divisional Court dismissed the applications for judicial review.

[4] In January 2010, leave to appeal was granted. The appeals raise three issues. The critical first issue is whether a coroner has jurisdiction to inquire into the representativeness of a jury roll. Assuming a coroner has this jurisdiction, the second issue is whether the families of the deceased and NAN have put forward sufficient evidence to warrant the issuance of a summons to the Director of Court Operations. Assuming a summons is warranted, the final issue is whether this court should order a second inquest into the death of Jacy Pierre.

B. BACKGROUND

(a) The inquest into the death of Jacy Pierre

[5] Jacy Pierre was a member of the Fort William First Nation. In late October 2007, he was being held on remand at the Thunder Bay District Jail. He died there after obtaining and ingesting powdered methadone.

[6] The coroner ordered an inquest into Jacy Pierre's death under s. 10(4) of the *Coroners Act*, R.S.O. 1990, c. C 37, which directs a coroner to hold an inquest whenever a person dies while an inmate at a correctional institution. Elizabeth and Marlene Pierre (the Pierre family) are the mother and grandmother of Jacy Pierre. They were granted standing at the inquest under s. 41(1) of the *Coroners Act*.

[7] Weeks before the inquest started, the Pierre family told the presiding coroner Dr. Shelagh McRae that they had concerns and questions about the jury roll in the District of Thunder Bay. They asked for information confirming that First Nations individuals living on reserves were included on the jury roll. The coroner's counsel told them to get this information from the Attorney General's office.

[8] The Pierre family then wrote to a representative of the Attorney General's office, Robert Gordon, the Director of Court Operations for the North West Region. The family asked Mr. Gordon four questions about the jury roll in Thunder Bay:

> i. What efforts were made by the Sheriff to select names of eligible persons for the jury roll that reside on Indian reserves in the Thunder Bay district?
>
> ii. What records were used by the Sheriff to obtain the names of the residents of the Indian reserves that exist in the Thunder Bay district?
>
> iii. How many jury questionnaires/notices were sent to First Nation on-reserve residents?
>
> iv. How many First Nation individuals from Indian reserves are on the current jury roll?

Instead of answering these questions, Mr. Gordon told the Pierre family to "raise any questions or concerns about the Coroner's jury with the Coroner or [her] counsel."

[9] Faced with the unwillingness of either the office of the coroner or the Attorney General to answer their concerns, the Pierre family asked Dr. McRae to issue a summons to Mr. Gordon to attend the inquest before the jury was sworn and speak to the validity of the jury roll. Dr. McRae refused to issue a summons. She said that Mr. Gordon's evidence was not "vital to the purpose of the inquest."

[10] The Pierre family sought to judicially review Dr. McRae's refusal to issue a summons and a stay of the inquest until their judicial review application was decided. Although the motion judge found that the application raised a serious issue, she nonetheless dismissed the motion for a stay because the inquest had already begun by the time the motion was argued.

[11] After their stay was denied, the Pierre family withdrew from the inquest and did not participate further. They cited as a reason for their withdrawal the failure of the coroner to ensure that Aboriginal persons would be represented on the jury. The inquest began on February 23, 2009 and was completed on February 25, 2009.

(b) The inquest into the death of Reggie Bushie

[12] Reggie Bushie was from the remote fly-in community of Poplar Hill. He went to Thunder Bay for high school because his own community did not have a high school. While in Thunder Bay, he lived with a family.

[13] On October 26, 2007, Reggie Bushie went missing. On November 1, 2007, his body was found in the McIntyre River, where he had apparently drowned. The coroner ordered an inquest into Reggie Bushie's death under s. 20 of the *Coroners Act*, which authorizes the holding of an inquest where doing so "would serve the public interest." The inquest will examine the circumstances surrounding Reggie Bushie's death and how First Nations youths are affected when going to school far away from their home communities.

[14] Rhoda and Berenson King (the King family) are the mother and step-father of Reggie Bushie. In December 2008, they wrote to the coroner's counsel and questioned whether the *Juries Act*, R.S.O. 1990, c. J.3 had been complied with. The coroner's counsel replied, expressing her belief that the practices in the District of Thunder Bay complied with the *Juries Act*, and her confidence that the inquest jury would be representative and impartial.

[15] In early January 2009, the King family asked the coroner's counsel to clarify the basis of her belief. The response was that the coroner's counsel had obtained information about the jury roll from Mr. Gordon. The King family was told to contact Mr. Gordon directly for any further information about "compliance issues." They did so, but Mr. Gordon refused to provide any further information without a summons.

[16] The King family, supported by NAN, then brought a motion asking the coroner, Dr. David Eden, to issue a summons for Mr. Gordon. They wanted Mr. Gordon to testify

about the preparation of the jury roll. In support of their motion, they filed an affidavit from a supervisor of court operations for the Ministry of the Attorney General in the district of Kenora. The affidavit showed that the 2008 district of Kenora jury roll was unrepresentative because it had almost wholly excluded First Nations persons living on reserves.

[17] Despite this evidence, Dr. Eden denied the motion, and refused to issue a summons. In his ruling, he held that the King family and NAN had not established a reasonably held concern about the representativeness and impartiality of the jury. He also said, "I do not believe that a jury roll from another judicial district at another time is adequately probative to impugn the 2009 Thunder Bay jury roll."

[18] NAN applied for judicial review of Dr. Eden's refusal to issue a summons to Mr. Gordon and for a stay pending the determination of its application. On May 29, 2009 Karakatsanis J. ordered a stay of the inquest proceedings.

(c) The decision of the Divisional Court

[19] The Divisional Court unanimously held that neither coroner erred in refusing to issue a summons to Mr. Gordon. The court gave three reasons: first, the coroner "had no statutory power to review the process for the selection of the jury roll"; second, "the coroner would have had no authority to remedy any problems with the jury roll, should they be present"; and third, each coroner's decision that the evidence submitted by the applicants was insufficient to warrant further inquiry was "deserving of deference."

C. ANALYSIS

[20] To put the issues in context, I will review briefly the function of a coroner's inquest, the process for selecting a coroner's jury and the importance of a representative jury, which lies at the heart of these appeals.

(a) The function of a coroner's inquest

[21] A coroner's inquest has two functions: a narrow investigative function and a broader public interest function. The inquest's investigative function is to inquire into the circumstances of the death, including answering the five questions set out in s. 31(1) of the *Coroners Act* – who the deceased was, and how, when, where and by what means the deceased came to his or her death. The inquest's public interest function, which is found in s. 31(3) of the Act, is to make recommendations directed at avoiding a death in similar circumstances or on any matter arising out of the inquest.

[22] Although an inquest jury cannot make findings of legal responsibility, recent case law has emphasized the importance of the inquest's public interest function in exposing systemic failings that cause death. In *People First of Ontario v. Porter, Regional Coroner Niagara* (1991), 5 O.R. (3d) 609 (Div. Ct.), reversed on other grounds (1992), 6 O.R. (3d) 289 (C.A.), the Divisional Court wrote about this public interest function:

> A separate and wider function is becoming increasingly significant; the vindication of the public interest in the prevention of death by the public exposure of conditions that threaten life. The separate role of the jury in recommending systemic changes to prevent death has become more and more

> important. The social and preventive function of the inquest which focuses on the public interest has become, in some cases, just as important as the distinctly separate function of investigating the individual facts of individual deaths and the personal roles of individuals involved in the death.

(b) The process for selecting a coroner's jury

[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 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.

[26] Under s. 34 of the *Coroners Act*, the coroner has the authority to direct the sheriff to provide a list of jurors taken from the jury roll.

> (1) A coroner may by his or her warrant require the sheriff for the area in which an inquest is to be held to provide a list of the names of such number of persons as the coroner specifies in the warrant taken from the jury roll prepared under the Juries Act.
>
> (2) Upon receipt of the warrant, the sheriff shall provide the list containing names of persons in the number specified by the coroner, taken from the jury roll prepared under the Juries Act, together with their ages, places of residence and occupations.

[27] Under s. 33(2) of the Act, the coroner directs a constable to choose five persons from that list to serve as jurors at an inquest:

> The coroner shall direct a constable to select from the list of names of persons provided under subsection 34(2) five persons who in his or her opinion are suitable to serve as jurors at an inquest and the constable shall summon them to attend the inquest at the time and place appointed

(c) The importance of a representative jury

[28] To function properly, a jury must have two key characteristics: representativeness and impartiality. A representative jury is one that corresponds, as much as possible, to a

cross-section of the larger community. And a representative jury enhances the impartiality of a jury. In *R. v. Gayle* (2001), 54 O.R. (3d) 36 (C.A.) at para. 56, Sharpe J.A. discussed the importance of a representative jury:

> Canadian law recognizes the importance of a representative jury. The importance of representativeness, along with impartiality, was discussed in *R. v. Sherratt*, at p. 525 S.C.R., p. 204 C.C.C. per L'Heureux-Dubé J.: "[W]ithout 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." Representativeness was described at p. 525 S.C.R., p. 204 C.C.C. as a "crucial characteristic of juries" to which "little if any objection can be made". Representativeness was also accepted as an important characteristic of the jury in *R. v. Bain*, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481 at pp. 159-60 S.C.R., p. 530 C.C.C., per Stevenson J. Gonthier J., dissenting in the result but not on this point, stated at p. 115 S.C.R., p. 494 C.C.C. that "[t]he well-informed observer certainly knows that a jury should be impartial, representative and competent." In *Williams* at p. 500 C.C.C., McLachlin J. described a "representative jury pool" as one of the safeguards included in the s. 11(d) right to a fair trial and impartial jury. Securing a representative jury enhances impartiality and, as this Court stated in *R. v. Church of Scientology of Toronto* (1997), 33 O.R. (3d) 65, 116 C.C.C. (3d) 1 at p. 119 O.R., p. 61 C.C.C. "[t]he 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."

[29] Of course, a party with standing at an inquest has no right to insist on a juror that is "representative" of a particular racial, ethnic or linguistic group. Nonetheless, representativeness in the preparation of a jury roll is important, not only for ensuring a properly constituted jury, but also for maintaining the public's confidence in a coroner's

inquest and preserving its integrity. A coroner's power to inquire into the impartiality of an individual juror – a power the coroner undoubtedly possesses – cannot remedy the unrepresentativeness of a roll from which the jurors are chosen. The representativeness of a jury roll depends on compliance with the *Juries Act*, and in the present case, on compliance with s. 6(8) of that Act.

First Issue: Does a coroner have jurisdiction to inquire into the representativeness of a jury role?

[30] This is the principal issue on these appeals. The Divisional Court concluded that a coroner has no jurisdiction to inquire into how a jury roll is established and, even if a coroner does have this jurisdiction, coroners are powerless to grant a remedy for an unrepresentative jury roll. The Attorney General supports the Divisional Court's conclusions and adds a third prong to its argument: both s. 36 of the *Coroners Act* and s. 44 of the *Juries Act* "cure" any failure to comply with any statutory requirement concerning the selection of inquest jurors.

[31] I do not accept the Attorney General's position. Admittedly, a coroner's jurisdiction is derived from the *Coroners Act* and the common law rules of natural justice. And while both s. 34(6) of the Act and the rules of natural justice give the coroner jurisdiction to exclude a potential juror for partiality, there is no express statutory or common law authority entitling a coroner to question the representativeness of a jury roll.

[32] The legislature's silence, however, does not automatically mean the coroner lacks the power to inquire into the representativeness of a jury roll. The court must examine the *Coroners Act* to determine whether the legislature intended the coroner to have this power by necessary implication. A statutory tribunal, such as the office of the coroner, has not only those powers expressly granted by its enabling statute, but as well, by implication, all the powers needed to accomplish its statutory mandate. Bastarache J. affirmed this proposition in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140 at para. 51:

> The powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be served by the statutory regime created by the legislature.

[33] The Supreme Court of Canada recently re-affirmed this principle in *R. v. Cunningham*, [2010] 1 S.C.R. 331. Rothstein J., writing for a unanimous court stated at para. 19 that "a 'doctrine of jurisdiction by necessary implication' [applies] when determining the powers of a statutory tribunal".

[34] In *ATCO*, the Supreme Court of Canada enumerated the circumstances in which the doctrine of jurisdiction by necessary implication may be applied:

> i. when the jurisdiction sought is necessary to accomplish the objects of the legislative scheme and is essential to the statutory body fulfilling its mandate;

ii. when the enabling act fails to explicitly grant the power to accomplish the legislative objective;

iii. when the mandate of the statutory body is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;

iv. when the jurisdiction sought is not one which the statutory body has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and

v. when the legislature did not address its mind to the issue and decide against conferring the power to the statutory body.

[35] Here, the first circumstance listed in *ATCO* applies. Coroners have jurisdiction to inquire into the representativeness of a jury roll by necessary implication, in order to fulfill their statutory mandate.

[36] I agree with the appellants that this necessarily implied jurisdiction rests both in ss. 34(1) and 33(2), and in s. 50(1) of the *Coroners Act*. That it does so is evident from examining the coroner's statutory mandate and the purpose of these provisions.

[37] The *Coroners Act* confers on a coroner the statutory mandate to preside over an inquest. This mandate includes the legal duty to arrange for an inquest jury. Sections 34(1) and 33(2) of the Act give the coroner the power to satisfy this part of the coroner's mandate. Section 34(1) gives the coroner the power, by warrant, to require the sheriff to produce a list of potential jurors taken from the jury roll prepared under the *Juries Act*.

Section 33(2) gives the coroner the power to direct a constable to choose from that list five persons suitable to serve as jurors at an inquest.

[38] The coroner's mandate to arrange for an inquest jury must necessarily include the power to ensure that the jury is lawfully constituted. A lawfully constituted jury is one that is representative and impartial. To be representative and impartial the jurors must initially be chosen from a jury roll that complies with the *Juries Act* – in other words, from a jury roll that is representative. Thus, to fulfill the mandate conferred by the Act, a coroner has the necessarily implied jurisdiction to inquire into the representativeness of a jury roll from which an inquest jury is chosen.

[39] Section 50(1) of the *Coroners Act* give a coroner the authority to prevent abuse of an inquest's processes:

> A coroner may make such orders or give such directions at an inquest as the coroner considers proper to prevent abuse of its processes.

[40] A coroner's jurisdiction to control an inquest to prevent an abuse of process is not open ended. It must be exercised within the limits and objects of the *Coroners Act*. Still, it is a broad and flexible jurisdiction. It can be exercised to prevent an inquest that is unfair or unjust, or an inquest in which the public would lose confidence: see, for example, *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 at para. 37; and *Booth v. Huxter* (1994), 16 O.R. (3d) 528 (Div. Ct.) per Moldaver J. stating at p. 542 that, in circumstances which could "undermine the public confidence in the administration of

justice and the integrity of the process, the coroner should be able to act under s. 50(1) [of the *Coroners Act*] to cure the defect."

[41] An inquest into the death of a First Nations person that is adjudicated by a jury chosen from a jury roll that excludes First Nations persons on reserves would not, in my view, be seen as a fair and just inquest or an inquest in which the public would have confidence. It would amount to an abuse of process within s. 50(1) of the Act.

[42] Again, therefore, in order to fulfill the coroner's statutory mandate to prevent an abuse of process at an inquest, the coroner, by necessary implication, has the jurisdiction to inquire into the representativeness of a jury roll.

[43] That brings me to the question of remedy. Both the Divisional Court and the Attorney General maintain that, even if the coroner has jurisdiction to inquire into the representativeness of a jury roll and even if, for example, evidence were presented to the coroner showing that the jury roll was likely unrepresentative, there is nothing the coroner can do about it.

[44] The Divisional Court suggested that the appellants could challenge the jury roll by an application under the *Charter*. In oral argument, the Attorney General suggested that the appellants could seek declaratory relief in the Superior Court. Both suggestions are unattractive because they would require the appellants to go outside of the inquest. The

question remains, however, whether a coroner has the jurisdiction to make an order remedying a juror list drawn from an unrepresentative jury roll.

[45] In one sense, as the appellants argue, the question is premature. All the appellants have asked for is an order requiring each coroner to issue a summons to Mr. Gordon. If the summons is issued, then depending on Mr. Gordon's evidence, a further remedial order may be unnecessary.

[46] In another sense, however, the question of a remedy is a live question. To ask the coroner to inquire into the representativeness of the jury roll when the coroner can do nothing about an unrepresentative roll would delay the inquest with arguably little corresponding benefit.

[47] Yet, it seems to me that a coroner does have remedial authority to address concerns about an unrepresentative jury roll. For example, suppose the list of jurors the sheriff is required to produce under s. 34(1) of the *Coroners Act* reflects a jury roll that does not comply with s. 6(8) of the *Juries Act*. In that case, the coroner could say that the list has not been taken from a jury roll that complies with s. 6(8) and could order the sheriff to produce a list of jurors from a proper jury roll. At least to that extent, a remedy is available to rectify an unrepresentative jury roll.

[48] That takes me to the curative provisions of the statutes, s. 36 of the *Coroners Act* and s. 44 of the *Juries Act* on which the Attorney General relies:

> 36. The omission to observe any of the provisions of this Act or the regulations respecting the eligibility and selection of jurors is not a ground for impeaching or quashing a verdict.
>
> 44. (1) The omission to observe any of the provisions of this Act respecting the eligibility, selection, balloting and distribution of jurors, the preparation of the jury roll or the drafting of panels from the jury roll is not a ground for impeaching or quashing a verdict or judgment in any action.
>
> 44. (2) Subject to sections 32 and 34, a jury panel returned by the sheriff for the purposes of this Act shall be deemed to be properly selected for the purposes of the service of the jurors in any matter or proceeding.[2]

[49] The Attorney General submits that these provisions entitle a coroner to accept as "properly selected" the list of jurors taken from a jury roll. In short, these provisions would "cure" any list that is defective because it was drawn from an unrepresentative jury roll.

[50] I do not accept this submission. These curative provisions are designed to relieve against minor or technical deficiencies, or procedural irregularities in the selection of jurors. They are not intended to relieve against something as fundamental as an unrepresentative jury roll.

[51] Representativeness is a key characteristic of a jury, a characteristic that enhances the likelihood of the other key characteristic of a jury, its impartiality. It is a substantive and not merely a technical requirement for the proper functioning of a jury. Thus, neither

[2] Sections 32 and 34 of the *Juries Act* deal with juror challenges.

s. 44 of the *Juries Act* nor s. 36 of the *Coroners Act* can "cure" an unrepresentative jury roll. And they certainly cannot be used to cure a roll that reflects the systemic discrimination or exclusion of First Nations persons.

[52] The Supreme Court of Canada's judgment in *R. v. Barrow*, [1987] 2 S.C.R. 694, supports this position. There, the Supreme Court dealt with the curative provisions in the *Criminal Code* relating to deficiencies in the jury selection process. Section 598(a), now s. 670(a), read as follows:

> Judgment shall not be stayed or reversed after verdict upon an indictment
>
> (a) by reason of any irregularity in the summoning or empanelling of the jury

Section 599, now s. 671, included language as broad as that of s. 44(1) of the *Juries Act*:

> 599. No omission to observe the directions contained in any Act with respect to the qualification, selection, balloting or distribution of jurors, the preparation of the jurors' book, the selecting of jury lists, or the drafting of panels from the jury lists, is a ground for impeaching or quashing a verdict rendered in criminal proceedings.

[53] According to the majority in *Barrow*, at paras. 37-38, "[t]he import of these two provisions is that an irregularity of form which does not affect the substance of a trial cannot be used to challenge the result". In the case before the court, these provisions were of no assistance and did not apply because the omission complained of was "not an

irregularity of form. It [cast] into doubt two of the most basic aspects of a fair trial, the impartiality of the jury and the appearance of justice."

[54] Likewise in this case, an unrepresentative jury is not an "irregularity of form" it is a matter of "substance". An unrepresentative jury roll casts into doubt the public's confidence in the impartiality of the jury and the fairness of the inquest. It compromises the very appearance of justice. The words of Dickson C.J.C. in *Barrow*, at para. 33, are apt:

> The argument of the Crown in this appeal does not address what may be the most important aspect of the case, namely, the appearance of justice. Even if the two-stage analysis of the empanelling process is a legally accurate description of the interplay of the *Criminal Code* and the Nova Scotia *Juries Act*, it leaves out of account the effect of the proceedings in this case as they would appear to the average citizen …

Consistent with *Barrow*, neither s. 36 of the *Coroners Act* nor s. 44 of the *Juries Act* can cure a list drawn from a jury roll that almost wholly excludes First Nations persons.

[55] I add that, historically, curative provisions such as the ones considered by the court in *Barrow* have been construed narrowly: see e.g. *R. v. Butler* (1984), 63 C.C.C. (3d) 243 (B.C.C.A.), at p. 261; *R. v. Varga* (1985), 18 C.C.C. (3d) 281 (Ont. C.A.), at pp. 287-288 and *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.), at p. 33. This court has also construed s. 44(1) of the *Juries Act* narrowly: *Hrup v. Cipollone* (1994), 19 O.R. (3d) 715 (C.A.), at pp. 718-719.

[56] Thus, s. 36 of the *Coroners Act* and s. 44 of the *Juries Act* must be interpreted to apply only to technical or procedural irregularities in "the eligibility and selection of jurors", "the preparation of the jury roll" and "the drafting of panels from the jury roll", and not to a requirement as fundamental as the representativeness of an inquest jury. I conclude that the coroner has the jurisdiction to inquire into the representativeness of the jury roll and to remedy a list drawn from an unrepresentative roll.

Second Issue: Have the appellants put forward sufficient evidence to warrant the issuance of a summons?

[57] Section 40(1) of the *Coroners Act* give a coroner authority to issue a summons:

> A coroner may require any person by summons,
>
> (a) to give evidence on oath or affirmation at an inquest; and
>
> (b) to produce in evidence at an inquest documents and things specified by the coroner,
>
> relevant to the subject-matter of the inquest and admissible.

[58] To obtain an order requiring each coroner to issue a summons to Mr. Gordon, the appellants must show two things: first, a nexus between the expected evidence of Mr. Gordon and the purpose of the inquest: see *Reid v. Wigle* (1980), 29 O.R. (2d) 633 (Div. Ct.); and second, sufficient evidence to justify a further inquiry into the alleged lack of representativeness of the jury roll in the District of Thunder Bay.

[59] The appellants meet the first requirement. The Attorney General accepts that Mr. Gordon was the most knowledgeable person within the Ministry to testify about the establishment of the jury roll in the District of Thunder Bay. Moreover, on my view of the coroner's jurisdiction, an inquiry into the representativeness of the jury roll is relevant to the purpose of the inquest.

[60] The purpose of the inquest – to examine the circumstances of the death and make recommendations to avoid similar deaths in the future – cannot be satisfied with a jury selected from a jury roll that was not established in accordance with the requirements of the *Juries Act.* With an unrepresentative jury roll, the inquest jury cannot be seen to represent – as far as possible and appropriate – the larger community, and its impartiality is undermined.

[61] In short, without the two characteristics of representativeness and the impartiality, a jury cannot perform, in an acceptable way, the functions that make juries desirable in the first place: see *R. v. Sherratt* [1991], 1 S.C.R. 509 at 525. The appellants have thus shown a nexus between the evidence of Mr. Gordon and the purpose of the inquest.

[62] The important question on this branch of the appeals is whether the appellants have met the second requirement. Have they put forward sufficient evidence to justify an inquiry into the representativeness of the jury roll? Each coroner found that the families of the deceased and NAN had not put forward adequate evidence. The Divisional Court held that their findings were entitled to deference.

[63] I agree that the coroners' findings are entitled to deference. If those findings were reasonable, I would not interfere with them. However, respectfully, I consider each finding to be unreasonable. In saying that, I do not think it is necessary to specify the evidentiary threshold needed to justify a further inquiry. Even if strong evidence were needed, as I view the record, the appellants have put forward a strong case for further inquiry into the representativeness of the jury roll in the District of Thunder Bay.

[64] The appellants' case consists principally of three items of evidence: the decision of the Federal Department of Indian and Northern Affairs (INAC), taken a decade ago, to cease providing band electoral lists to the Provincial Jury Centre; the state of the jury roll in the District of Kenora in the aftermath of INAC's decision; and the unwillingness of either Mr. Gordon or coroners' counsel to be forthcoming about whether First Nations persons living on reserves were included on the jury roll from which the inquest juries were to be chosen.

[65] Up until 2000, INAC provided the names of First Nations persons living on reserves by sending band electoral lists to the Provincial Jury Centre. The Centre is responsible for sending jury questionnaires to all Ontario residents, including First Nations persons. Thus, the band electoral lists played a central role in ensuring that First Nations persons on reserves were included in the County or District jury rolls. They enabled sheriffs to fulfill their statutory obligation under s. 6(8) of the *Juries Act* to

"select names of eligible persons inhabiting the reserve in the same manner as if the reserve were a municipality."

[66] In 2000, however, INAC stopped sending these band electoral lists to the Centre. The material before us does not disclose why the federal department stopped this practice. Whatever the reason, without these lists, the Centre did not have an accurate, up-to-date record of the names of on-reserve First Nations persons. Therefore, to meet their obligation under s. 6(8) of the *Juries Act* to create representative jury rolls that included First Nations persons, court officials had to find the names of persons on reserves form other available records.

[67] The families of Jacy Pierre and Reggie Bushie together with NAN expressed to the coroners their concerns that court officials had not sought other available records to ensure a representative jury roll. Their concerns were entirely reasonable in the light of what had happened in the neighbouring District of Kenora. There, in 2006, a First Nations person from the Kashechewan community died and an inquest was ordered into his death. Rolanda Peacock, Mr. Gordon's counterpart in the District of Kenora, filed an affidavit in connection with that inquest. Her affidavit is included in the record for the two appeals before us.

[68] Ms. Peacock's affidavit shows that court officials did very little to obtain other records and, as a result, the District of Kenora jury roll was manifestly unrepresentative. Her affidavit documents the following:

- As INAC no longer supplied up to date band electoral lists, court officials tried to obtain band lists directly from First Nations reserves within the district. In August 2006, they faxed a letter to the chiefs of 42 of the 45 First Nations communities in the District of Kenora, requesting up to date band lists. Only four of the 42 communities responded.

- In 2007, court officials traveled to 14 remote First Nations communities in the District of Kenora. Their efforts produced only eight more band electoral lists.

- In 2006 and 2007 the District of Kenora jury roll was based on jury questionnaires sent to 1,200 persons living in municipalities and 484 First Nations persons living on reserves. The rate of return from persons living in municipalities was 66 per cent in 2006 and 56 per cent in 2007. The corresponding rate of return from First Nations persons on reserves was 10.72 per cent and 7.83 per cent.

- Of a population of over 12,000 First Nations persons living on reserves in the District of Kenora, only 44 were listed on the 2007 jury roll.

- Although the inquest concerned the death of a First Nations person from Kashechewan, not a single person from that community was included on the District of Kenora jury roll.

[69] Ms. Peacock's affidavit shows that much more needed to be done to produce a representative jury roll in the District of Kenora. The annual roll in the years after INAC stopped sending band electoral lists to the Provincial Jury Centre almost entirely excluded First Nations persons living on reserves.

[70] Nonetheless, Dr. Eden took the position that what occurred in the District of Kenora was not "adequately probative" of the representativeness of the jury roll in the District of Thunder Bay. I cannot agree with his assessment. Nor do I find reassuring the bald assertion of the coroner's counsel in the Bushie inquest that the practices in the District of Thunder Bay complied with the *Juries Act*.

[71] There is no reason to think that the unrepresentativeness of the jury roll in the District of Kenora is unique. After 2000, the Provincial Jury Centre no longer received band electoral lists for the reserves in the District of Thunder Bay. No evidence was produced in connection with either inquest that court officials in the District of Thunder Bay had made any greater efforts than their counterparts in the District of Kenora to obtain up-to-date band lists.

[72] My concern about the representativeness of the jury roll in the District of Thunder Bay is fuelled by the unwillingness of either the coroners or Mr. Gordon to be forthcoming about how the roll was established. The Pierre family and the King family requested information about the records used to obtain the names of First Nations persons on reserves, the number of jury questionnaire sent to on-reserve residents, and the number of First Nations persons on the jury roll from which inquest jurors are chosen (see for example the letter reproduced at para. 8 of these reasons). Their request for this information was quite reasonable. But they did not get any answers. Instead, they got

the run around. A lot of time and money might have been saved had the Ministry and the coroners simply provided this information.

[73] INAC's decision to stop sending band electoral lists to the Provincial Jury Centre, the unrepresentativeness of the recent jury rolls in the District of Kenora and the unwillingness of Mr. Gordon and the coroners to provide information about the jury roll in the District of Thunder Bay make out a strong case for summonsing Mr. Gordon. I would order that a summons be issued to him (or the current occupant of his position) to appear at the Bushie inquest and testify about the establishment of the jury roll in the District of Thunder Bay, and especially about the efforts to comply with s. 6(8) of the *Juries Act*, as well as the result of those efforts.

[74] As will be evident, since I would order a new inquest into the death of Jacy Pierre, I would also order Mr. Gordon (or his successor) to appear before that inquest and similarly testify about the establishment of the jury roll in the District of Thunder Bay.

Third Issue: Should this court order a second inquest into the death of Jacy Pierre?

[75] I would order a new inquest into the death of Jacy Pierre. I would do so for two reasons.

[76] First, although Karakatsanis J. denied a stay of the inquest, she noted at para. 21 of her reasons, that "[i]f the application for judicial review is successful, a new Inquest may be held." Indeed, she found that counsel for the Pierre family "was diligent in pursuing

her concerns relating to whether the jury roll was representative of the community that includes First Nations". Only the "tight timeframes" prevented that concern from being resolved before the Jacy Pierre inquest began. Otherwise, undoubtedly, Karakatsanis J. would have stayed this inquest as she did the Reggie Bushie inquest.

[77] Second, a new inquest is needed to restore the public's confidence in the inquiry into the circumstances of Jacy Pierre's death. The first inquest was marred by the legitimate concern about the unrepresentativeness of the jury roll and the consequent withdrawal of the Pierre family. The First Nations community, and by extension the public, could have little confidence in the impartiality of the jury at that inquest. Those memorable, even if well-worn, words apply here; justice must not only be done, it must be seen to be done. A new inquest, where the alleged lack of representativeness of the jury roll may be fairly considered, is thus necessary.

D. CONCLUSION

[78] A coroner has jurisdiction by necessary implication to inquire into the representativeness of a jury roll. The appellants have put forward sufficient evidence to justify an inquiry into the representativeness of the jury roll in the District of Thunder Bay.

[79] Therefore, I would allow both appeals, and would grant the applications for judicial review. I would also order a new inquest into the death of Jacy Pierre.

[80] I would order that a summons be issued to Mr. Gordon (or his successor) to appear at the Reggie Bushie inquest and the Jacy Pierre inquest, and give evidence about the establishment of the jury roll in the District of Thunder Bay, and especially about the efforts to comply with s. 6(8) of the *Juries Act* and the results of those efforts.

[81] The parties may make brief written submissions on costs within 15 days of the release of these reasons.

RELEASED: Mar 10, 2011

"JL"

"John Laskin J.A."
"I agree K.M. Weiler J.A."
"I agree Robert J. Sharpe J.A."