



# The Jury Journey: From Voiceless to Volunteer

## *Indigenous Jury Representation*

The Indigenous Justice Forum  
September 28, 2018



Litigation with a conscience.

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## THE JURY JOURNEY



- Jamie Goodwin and Ricardo Wesley: The Kashechewan Inquest
- The Peacock Affidavit
- Jacy Pierre
- NAN v Eden*
- R v Wareham*
- Iacobucci Review
- Project Invite
- R v Kokopenace*
- Colton Boushie

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# THE KASHECHEWAN INQUEST



- ✎ Ricardo Wesley and Jaime Goodwin died on January 8<sup>th</sup>, 2006, in the cellblock of the Nishnawbe-Aski Police Service detachment in Kashechewan.
- ✎ Pre-inquest motions were heard and raised concerns about the adequacy of the jury roll that was used in the Kenora district, as the five jurors were not from Kashechewan.
- ✎ In response, Coroner's Counsel filed the Peacock affidavit.

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## THE PEACOCK AFFIDAVIT



1. I am the Acting Supervisor of Court Operations in the Court Services Division of the Ministry of the Attorney General for the territorial district of Kenora. I have held this position for three years. My duties include coordination, direction, scheduling, planning and supervising of the activities of court operations. I am the affiant herein and as such have direct knowledge of the facts hereinafter deposed.
2. The jurisdiction of the territorial district of Kenora encompasses 45 First Nation reserves, including the First Nation community of Kashechewan. For reasons to follow, no member of the First Nation community of Kashechewan is represented on the Kenora jury roll.

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## WHY?



- Under the *Juries Act*, the sheriff prepares a jury roll each year.
- The roll is composed of people who have been sent and have returned a jury service notice.
- The persons randomly selected to receive a notice are taken from municipal service lists.
- The names of persons on reserves are not included on those lists.
- Section 6(8) prescribes an alternative procedure for First Nations people living on reserve, stating that the sheriff may obtain the names from *any record available*.
- Until 2000, INAC had provided band electoral lists. When INAC stopped providing these, little was done to obtain other records.

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## JACY PIERRE, REGGIE BUSHIE, and the THUNDER BAY DISTRICT



- Jacy Pierre and Reggie Bushie were both young Indigenous men who died in Thunder Bay.
- Before their inquests began, their families and Nishnawbe Aski Nation again raised concerns about the representativeness of the jury roll.
- They asked for a summons to the Director of Court Operations, to find out how the jury roll in the District of Thunder Bay was established.
- The motions were denied and these decisions were appealed.

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The Ontario Court of Appeal, in March 2011, described the jury roll as "manifestly unrepresentative" of First Nations people, and declared that inquest proceedings without a properly representative jury were invalid.

*(NAN v. Eden, 2011 ONCA 197)*

[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.


## R v WAREHAM VOIR DIRE

[6] Therefore of the jury panel as comprised, (which I might say offers no assistance as to whether there are any individuals resident on the reserves in the Thunder Bay District), I am drawn to the conclusion that the panel is not representative in the sense that is contemplated by the Court of Appeal in *Pierre v. McRae* and understanding that this voir dire is distinct from the challenge to the array contemplated in the *Criminal Code*.

[Justice Pierce, March 2011]

## CRISIS IN THE JUSTICE SYSTEM

 Jury Roll Issues Could Cripple the Justice System

 Judicial Inquiry into Local Jury Rolls Ordered

 Jury Rolls in Crisis

# ONTARIO ORDERS A REVIEW

FALCONERS  
LLP



## Enhancing First Nations Representation On Juries

### McGuinty Government Appoints Respected Jurist To Conduct Review

August 11, 2011, 6:00 P.M.

Former Supreme Court of Canada Justice, the Honourable Frank Iacobucci, will review the process for including individuals living in First Nations reserve communities on the province's jury rolls.

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Ontario  
Executive Council  
Conseil exécutif

#### Order in Council Décret

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and concurrence of the Executive Council, orders that:

WHEREAS the *Juries Act*, R.S.O. 1990, c. J.3, governs the jury process in Ontario, including the process for preparing the jury roll;

WHEREAS subsection 6 (8) of the *Juries Act* prescribes the process for selecting persons living on reserve communities for potential inclusion on the jury roll;

WHEREAS it has been determined that it is desirable to authorize under the common law, pursuant to the prerogative of Her Majesty the Queen in right of Ontario, and in the discharge of the government's executive functions, an individual to review the process for including persons living on reserve communities on the jury roll and to do so independently of government and on a systemic basis;

WHEREAS Nishnawbe Aski Nation has resolved as a political territorial organization to work with the Ontario government and the Independent Reviewer to enhance the representation on jury rolls of First Nations persons living on reserve communities in its territories;

WHEREAS other First Nations have been, and are, or may be desirous of the same goal;

AND WHEREAS it is desirable to set out the terms of reference for such a review;

Sur la recommandation de la personne soussignée, le lieutenant-gouverneur, sur l'avis et avec le consentement du Conseil exécutif, détermine ce qui suit :

ATTENDU QUE la *Loi sur les jurés* (L.R.O. 1990, chap. J.3) régit le processus de sélection des jurés en Ontario, y compris la préparation de la liste des jurés;

ATTENDU QUE le paragraphe 6 (8) de la *Loi sur les jurés* prescrit le processus de sélection des personnes vivant dans des réserves en vue de leur éventuelle inclusion sur la liste des jurés;

ATTENDU QU'il a été déterminé qu'il est souhaitable d'autoriser, en common law et selon la prérogative de Sa Majesté la Reine du chef de l'Ontario, et dans le cadre des fonctions exécutives du gouvernement, un particulier à examiner la procédure d'inclusion des personnes vivant dans des réserves sur la liste des jurés et ce, indépendamment du gouvernement et sur une base systémique;

ATTENDU QUE Nishnawbe Aski Nation a résolu, en tant qu'organisation territoriale politique, de travailler avec le gouvernement de l'Ontario et l'examineur indépendant pour accroître la représentation, sur les listes de jurés, des membres des Premières nations vivant dans des réserves situées sur ses territoires;

ATTENDU QU'il est souhaitable d'énoncer le cadre de référence d'un examen de ce genre;

ET ATTENDU QU'il est souhaitable d'énoncer le cadre de référence d'un examen de ce genre;

THEREFORE, it is ordered that the Honourable Frank Iacobucci be appointed as an Independent Reviewer and authorized to conduct such a review;

AND THAT the terms of reference for the Honourable Frank Iacobucci be as follows:

#### Mandate

1. The Independent Reviewer shall conduct a systemic review and report on any relevant legislation and processes for including First Nations persons living on reserve on the jury roll from which potential jurors are selected for all jury trials and coroners inquests, in order to make recommendations:
  - a. to ensure and enhance the representation of First Nations persons living on reserve communities on the jury roll; and
  - b. to strengthen the understanding, cooperation and relationship between the Ministry of the Attorney General and First Nations on this issue.
2. The Independent Reviewer shall conduct the review in an expeditious manner and shall deliver his final report and recommendations to the Attorney General no later than August 31, 2012.
3. While promoting the achievement of the goals described above, any recommendations developed should take into account the challenging fiscal context for government and First Nations in Ontario.
4. In conducting the review, the Independent Reviewer shall:
  - a. review the existing legislation and processes, practices and past practices;

EN CONSÉQUENCE, il est ordonné que l'honorable Frank Iacobucci soit nommé à titre d'examineur indépendant et autorisé à procéder à cet examen;

ET QUE le mandat de l'honorable Frank Iacobucci soit le suivant :

#### Mandat

1. L'examineur indépendant procède à un examen systémique et prépare un rapport sur les dispositions législatives et la procédure pertinentes en vue d'inclure des membres des Premières nations vivant dans des réserves sur la liste des jurés à partir de laquelle sont choisis les jurés potentiels pour tous les procès devant jury et toutes les enquêtes du coronier, dans le but de faire des recommandations visant ce qui suit :
  - a. garantir et accroître la représentation, sur la liste des jurés, des membres des Premières nations vivant dans des réserves;
  - b. consolider la compréhension, la collaboration et les relations entre le ministère du Procureur général et les Premières nations en ce qui concerne cette question.
2. L'examineur indépendant procède promptement à l'examen et remet son rapport final et ses recommandations au procureur général au plus tard le 31 août 2012.
3. Bien qu'elles visent à favoriser la réalisation des buts énoncés ci-dessus, les recommandations formulées devraient tenir compte de la conjoncture fiscale difficile à laquelle font face le gouvernement et les Premières nations de l'Ontario.
4. Dans le cadre de son examen, l'examineur indépendant :
  - a. examine les dispositions législatives et la procédure en vigueur ainsi que les pratiques actuelles et passées;

O.C./Décret 1388/2011

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## AN INDEPENDENT REVIEW



**Mandate:** The Independent Reviewer shall **conduct a systemic review** and report on any relevant legislation and processes for including First Nations persons living on reserve on the jury roll from which potential jurors are selected for all jury trials and coroners inquests, in order **to make recommendations:**

- a. to **ensure and enhance the representation of First Nations persons living on reserve communities on the jury roll;** and
- b. to **strengthen the understanding, cooperation and relationship** between the Ministry of the Attorney General and First Nations on this issue.

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## AN INDEPENDENT REVIEW (Continued)



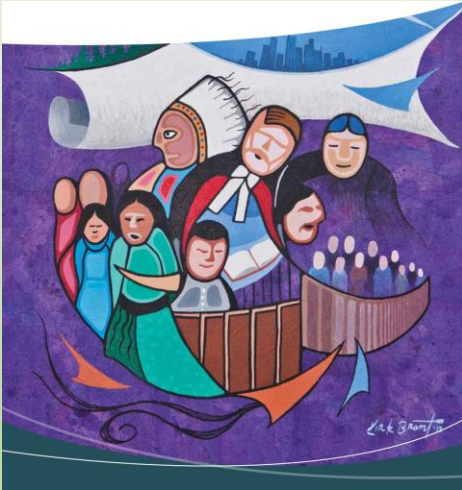
The communities in which preparation and consultation meetings were conducted were as follows: Sachigo Lake, Sandy Lake, Keewaywin, Poplar Hill, Pikangikum, Kasabonika Lake, Webequie, Mishkeegogamang, Ginoogaming, Mattagami, Moose Cree, and Constance Lake.

In total, 24 preparation and consultation meetings were conducted by NAN and the Iacobucci Review team.



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## FIRST NATIONS REPRESENTATION ON ONTARIO JURIES (“IACOBUCCI REPORT”)



**The justice system generally as applied to First Nations Peoples, particularly in the North, is quite frankly in a crisis. If we continue the status quo we will aggravate what is already a serious situation, and any hope of true reconciliation between First Nations and Ontarians generally will vanish. Put more directly the time for talk is over, what is desperately needed is action.**

(para. 371)

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## IACOBUCCI REPORT (Continued)



Justice Iacobucci summarized some of these systemic issues as follows (para. 372):

- ☞ the conflict between First Nation and Euro-Canadian approaches to criminal justice;
- ☞ the systemic racism that remains present in the Ontario justice system, including instances of mistreatment of First Nation inmates in prison, general disrespect by police and discriminatory public reaction to First Nation complaints;
- ☞ the almost universally-held view of First Nation individuals that the justice system is alien or foreign;
- ☞ the problem of inadequate legal representation of First Nation individuals, particularly in the north, resulting in virtually automatic guilty pleas; and
- ☞ inadequate funding of police services and lack of enforcement of First Nation bylaws.

Justice Iacobucci pointed out that until this crisis in the justice system is resolved, the lack of representation of First Nation people on juries will continue.

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## IACOBUCCI REPORT (Continued)



RECOMMENDATION 12: the Ministry of the Attorney General, in consultation with the Implementation Committee, consider a procedure whereby First Nations people on reserve could volunteer for jury service as a means of supplementing other jury source lists. This is practised in New York State as a way to supplement jury rolls drawn from several other lists that might overlook certain individuals, and could serve a similarly valuable purpose with respect to First Nations peoples in Ontario. By supplementing other jury source lists in this manner, the Ministry of the Attorney General and the Implementation Committee would wish to be satisfied that this would not offend the randomness principle.

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## SEVEN YOUTH INQUEST



- In addition to the independent review, the inquest into the death of Reggie Bushie was expanded to look into six other deaths in similar circumstances.
- This was the largest, multi-death inquest in Canadian history.



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## IN THE MEANTIME... *R v KOKOPENACE*

- ✎ The Court determined that the state met its representativeness obligation with regard to jury selection and that a fair opportunity was provided for a broad cross-section of society to participate in the jury process.
- ✎ In dissent, Chief Justice McLachlin and Justice Cromwell stated that the jury roll was not representative due to its composition being a “substantial departure from what random selection among all potentially eligible jurors in the district would produce, in view of the under-representation of Aboriginal on-reserve residents on the jury roll.”

*R v Kokopenace* (2015 SCC 28)

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## PROJECT INVITE

- ✎ The Seven Youth inquest was delayed while measures were being taken to address the issues with the jury roll – DESPITE the SCC ruling in *Kokopenace*;
- ✎ Known as Project Invite, Ontario took up Recommendation #12 from the Iacobucci Report, travelling to 22 First Nations Communities.
- ✎ Project Invite would see **473** Indigenous persons volunteer to be jurors for Coroners’ Inquests.

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## PROJECT INVITE (Continued)



- ✎ Ontario Regulation 266/14 was drafted with the following purpose: “to provide for a **pilot project** in the territorial districts of Kenora and Thunder Bay **to address the underrepresentation, on juries at coroners’ inquests of persons who reside on reserves.**”
- ✎ Project Invite was **limited to the territorial districts of Thunder Bay and Kenora.** Within these two areas, **twenty-two First Nation communities were visited by a team tasked with the creation of the Volunteer List.** Within the traditional territory of Nishnawbe Aski Nation (NAN), the team visited twelve communities: Sandy Lake, Bearskin Lake, Kasabonika Lake, Keewaywin, Muskrat Dam, Sachigo, Webequie, Cat Lake, Eabametoong, Mishkeegogamang, Kashechewan and Pikangikum. Within Treaty #3 territory, the team visited Couchiching, Grassy Narrows, Wauzhushk Onigum, Lac Seul, and Naotkamegwanning. The team also visited the Independent and Anishinaabek Nation communities of Fort William, Red Rock, Pic River, Pic Mobert and Long Lake.

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## SEVEN YOUTH INQUEST: REPRESENTATIVE JURIES



- ✎ The first beneficiary of the work of Project Invite was the Seven Youth Inquest.
- ✎ Of the five person panel, one was a volunteer juror from Sachigo First Nation.
- ✎ The Seven Youth Inquest resulted in over 100 recommendations to improve education and safety for First Nations children.

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## COLTEN BOUSHIE



- Gerald Stanley (56-year-old farmer from Biggar, Sask), **acquitted of second-degree murder** in the shooting death of Colten Boushie (22-year-old man from Red Pheasant Cree Nation), on **February 9, 2018**.
- Of 45 potential jurors selected at random, **five appeared to be Indigenous**, Mr. Murphy (the lawyer for the Boushie family) said. They were **rejected by Stanley's lawyer through peremptory challenges**, which can be made without having to give a reason.
- **Jury reform is met with incredible resistance.** Consider Nicholas Stooshinoff, president of the Saskatchewan Trial Lawyers Association, who believes Canada's justice system is the finest in the world and doesn't need an overhaul because of "knee-jerk" reactions to the Stanley verdict.

"I have not seen any evidence or any indication that an all-First-Nations jury would not have come to the same conclusion," Stooshinoff said. "There is an assumption among some individuals, politicians included, that this man was acquitted because of racism on the part of the jury."

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## COLTEN

*Posted February 10, 2018  
by Senator Murray Sinclair*

Today I grieve for my country.  
I grieve for a family  
that has not yet seen justice  
from the moment a handgunned farmer  
pulled the trigger and killed their son.  
(why does a farmer need such a gun?)

I grieve for a mother  
who saw the police  
arrive at her house as though on a raid  
and treat her like a criminal  
and not like the victim she really was.

I grieve for those mothers  
with empty arms  
who think of their loss  
at the hands of such others.  
and the lack of the answers  
that haunt them still.

...



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## COLTEN

...

I grieve for the youth  
who now see no hope,  
and whose hunger for justice  
gives rise to an anger  
that more and more turns  
from a dangling rope  
to a violence directed at them.

I grieve for the children  
whose lives have embraced  
an unwanted, dangerous, jeopardy.

I grieve for the elders  
who've seen this before.  
And whose wisdom will not be enough  
to get all of us through this evenly.

...



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## COLTEN

...

I may grieve for some time to come.

But then to be true...  
we have all been in grieving a very long time.  
So long, it is part of our DNA

And so, this is why  
No matter how hard we might try  
we can't "just get over it and move on".  
We all can easily say:  
"My country won't let me."



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## SASKATCHEWAN *The Coroner's Act, 1999*



### **Preparation of jury list**

27(1) The coroner shall request the chief coroner to obtain a list of persons in the number specified by the coroner who are resident in the geographical area specified by the coroner.

(2) The chief coroner shall request from the person in charge of the register maintained pursuant to subsection 11(1) of The Saskatchewan Medical Care Insurance Act a list of names and addresses of persons in the number specified by the coroner who are resident within the geographical area indicated in the request.

### **Selection of jury**

29(1) The coroner may question the persons who are present as a result of a summons to determine their eligibility and suitability as jurors and shall select six persons from those who are present.

...

(3) Notwithstanding section 27, where, in the opinion of the chief coroner, the circumstances surrounding the death require the jury to be composed, wholly or in part, of persons from a specific racial or cultural group, the coroner shall summon the jury in accordance with the regulations.

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## VOLUNTEERISM'S POTENTIAL



- The proposition was not to allow individuals to volunteer directly to a particular jury or even a jury roll, but rather to be included on source lists from which those individuals would otherwise be unintentionally omitted.
- The "randomness principle" is fundamental to the creation of a jury roll, but not applicable to the creation of source lists.
- The source lists should not be created randomly, but rather should be designed to be as inclusive as possible of all eligible jurors.
- Departures from pure random selection are not only sometimes appropriate, but often necessary. Consider the arbitrary drawing of judicial districts, the statutory exclusions of certain potential jurors, and the ability to excuse jurors for hardship are all reasonable departures from randomness.

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## NATION TO NATION RELATIONS



- It became evident from experience that First Nation volunteering can only succeed as part of a government-to-government relationship and a process that reflects such a relationship.
- “We have never been asked”, was the oft-repeated refrain of Project Invite. The switch from directive force to request participation in the justice system was pointed out to the team members by Elders, Chief and Council, and community members alike.
- In stark contrast to the imposition of a justice system disproportionately imprisoning Indigenous peoples, for the first time, there was a consent-based request to participate in the justice system.

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# Miigwetch!



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