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Trial by Jury: The Canadian experience

PART 1: BACKGROUND

Any person charged with an offence has the right... to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.

The right to be tried by a jury, enshrined in section 11(f) of the *Canadian Charter of Rights and Freedoms* set out above, has been a cornerstone of the criminal justice system in Canada since Canada became a country.

The present-day jury system evolved over centuries as part of the English common law. Early trials by jury in England developed to assist courts to determine the facts of a case. Juries were made up of local residents summoned by Crown officials to provide sworn information about crimes that had been committed and the people suspected of committing them. Over time, English judges became reluctant to take on the responsibility of weighing the facts as found by the jury and passing judgment. Consequently, the jury's role was extended from simply determining the facts of the case to making the final decision about the guilt or innocence of the accused person. When the right to trial by jury in criminal cases was first incorporated into Canadian law, this important role of the jury to determine guilt or innocence was already well established.[1]

In stark contrast to the historic jury system, however, jurors in today's system do not know anything about the case before they begin the trial, other than what they may have read in the media. Great pains are taken to screen potential jurors to ensure that they have no relationship with the accused person and no special knowledge about the case.

What kind of cases do juries hear?

In Canada, jury trials are held primarily in criminal cases. Although a jury can hear a civil case, only about 15 percent of all jury trials in Canada occur in civil cases.[2] That said, the overwhelming number of trials, criminal

1 For a full discussion of the history of jury trials, see Christopher Granger, *The Criminal Jury Trial in Canada*, 2d ed. (Toronto: Carswell, 1996).

2 *Canada's System of Justice: The Role of the Public*, online: Department of Justice <http://www.justice.gc.ca/eng/dept-min/pub/just/09.html>.

and civil, are tried by judges without juries. This paper deals only with jury trials held in criminal cases.

Trial by jury is a benefit available to a person accused of committing an indictable offence that is punishable by five years or more in prison. Indictable offences in Canada are generally more serious offences. This means that trial by jury is not imposed upon an accused person. Rather, a person accused of certain offences may *choose* to be tried by a jury, but is not required to do so. An accused person charged with an indictable offence can choose to be tried by a judge alone, or by a judge and jury.

For less serious indictable offences and summary conviction offences, the accused person does not have a choice; the accused is simply tried by judge alone. On the other hand, some of the most serious indictable offences, including murder and treason, are almost always tried by a judge and jury.[3]

How is a jury selected?

The process of jury selection begins with the jury roll, a list of citizens who reside within the territorial district of the court who are eligible to perform jury duty. Every Canadian province has legislation that sets out who is eligible to be a juror, and the process for producing the jury roll. In Ontario, this legislation is the *Juries Act*. Jurors must be Canadian citizens, be at least 18 years of age, and reside in the province where the court is located. Certain people are not eligible to be jurors because of their occupation. For example, judges and lawyers cannot serve on juries. Neither can prison guards nor police officers. Also, a person with a criminal record for an indictable offence cannot be a juror.

To summon people for jury duty, the sheriff, who is a court official, sends a notice by ordinary mail to the people on the jury roll. Those people attend at the courthouse on a specified date. These people form what is known as the jury panel. The prosecutor and the defence counsel are both provided with a list of the people on the jury panel. The list includes the name, place of residence and occupation of each person on the jury panel.

Twelve jurors must be selected from the jury panel to hear a criminal case. During the selection process, the prosecutor and the accused have the right to "challenge" or reject any potential juror. The number of jurors they can challenge varies depending on the seriousness of the offence with which the accused person is charged. They may be permitted to challenge as few as four potential jurors, or as many as twenty. The prosecutor and accused have an equal number of challenges. This type of challenge is known as a "peremptory challenge" because no reason has to be provided for challenging or rejecting the potential juror.

Peremptory challenges are distinct from another kind of challenge that the prosecutor or defence can make to a potential juror –a challenge for cause. The prosecutor and accused can challenge an unlimited number of potential jurors for cause, but they must provide a sound reason for believing that the potential juror should be rejected. The most common challenges for cause relate to cases in which there has been extensive pre-trial publicity that may have prejudiced potential jurors against the accused, and to cases in which the accused person is from a racial minority and there is a concern that potential jurors may discriminate against the accused person for that reason.

The *Criminal Code* sets out the procedural rules that govern challenging potential jurors for cause. Briefly, the prosecutor and accused are permitted to ask each potential juror questions to try to determine if the juror should be

3 Certain offences can only be tried by a superior court of criminal jurisdiction. If the prosecutor and the trial judge agree, even murder and treason can be tried by a judge alone. This is rarely done; virtually all murder cases are tried by a judge and jury.

challenged. The trial judge must approve the questions before they are asked.

Twelve jurors hear a criminal trial. They are chosen from the jury panel according to the following process:

- The jury panel is assembled in a courtroom along with the accused, defence counsel, the prosecutor, court staff and the trial judge.
- The names of all members of the jury panel are placed in a box. The court staff draws the names of potential jurors from the box. As each name is called, the potential juror from the jury panel comes to the front of the courtroom.
- If the jury panel is not being challenged for cause, the prosecutor and the accused alternate turns indicating whether they "challenge" the potential juror or are "content" with the potential juror.
- If either the prosecutor or the accused "challenges" the potential juror, the juror is excused and rejoins the rest of the jury panel. That potential juror is eligible to be selected as a juror in another case.
- If both the prosecutor and accused are content with the potential juror, the juror is sworn or affirmed as a member of the jury. The steps are repeated until twelve jurors have been selected.

How does a jury trial proceed?

Once the jury is selected, the charge is read to the accused, who is asked to plead guilty or not guilty. The trial judge will briefly instruct the jury about issues such as their duties, and the way the trial will proceed. The prosecutor makes an opening statement to the jury, and then calls witnesses to prove the charge against the accused. Once the prosecutor's case is finished, the defence counsel may make an opening statement to the jury and call witnesses. After the evidence is finished, the prosecutor and the defence counsel make closing statements to the jury. If the accused calls evidence during the trial, the prosecutor addresses the jury last. If the accused calls no evidence during the trial, the defence counsel addresses the jury last.

There are certain features of jury trials that distinguish them from trials before a judge alone. For example, the jury must hear all of the evidence at trial, but the trial judge alone must consider questions about the admissibility of evidence. Some questions of admissibility are determined by the trial judge before the jury is selected. However, questions about admissibility may arise during the trial. This requires the jury to leave the courtroom and wait in the jury room while the trial judge determines the admissibility of the evidence. To determine the admissibility of evidence, the trial judge may hear witnesses, and will hear the arguments of the prosecutor and the accused. The jury cannot hear any of that. If the trial judge rules that the contested evidence is not admissible, the jury will never hear it. If the trial judge rules the evidence admissible, the evidence will be presented once the jury returns to the courtroom.

Another distinguishing feature involves the jury charge. At the end of the trial, after all of the evidence has been heard and the prosecutor and the accused have addressed the jury, the trial judge then "charges" the jury. The jury charge consists of the judge's instructions to the jury about the law that applies to the case being tried.

Jury verdicts in criminal trials must be unanimous. All twelve jurors must agree on the verdict. Once the trial judge charges the jury, jurors deliberate until they reach agreement. If the jurors cannot agree after an extended period of deliberation, the trial judge may declare a mistrial and a new trial may be ordered. The jury's decision-making process is secret and cannot be discussed with anyone outside of the jury room, even after the jury delivers its verdict. It is a criminal offence for anyone to disclose any information about a jury's deliberations.

During a jury trial, the prosecutor and defence counsel must be particularly alert about what they say before the jury. In opening and closing statements, they must not make statements that are not supported by the evidence or are unduly inflammatory. They must not refer to facts that are not admitted in evidence, or express a personal opinion about the credibility of a witness. They can only refer to the law to the extent that it is necessary to adequately explain the facts. It is for the trial judge to explain the law to the jurors.

How does the jury know what law to apply?

The trial judge is responsible for determining what law applies to the case and explaining it to the jury in the jury charge. The jury charge is fundamentally important to enable jurors to properly carry out their fact-finding functions and arrive at a proper verdict. Jurors must follow all of the instructions the trial judge gives them about the law. If required during their deliberations, jurors can ask the trial judge to clarify any questions they have about the law. Generally, the jurors will put their question in writing and a member of the court staff will deliver it to the trial judge. The trial judge will then inform the prosecutor and the accused about the question and hear their submissions about the appropriate response. The jury will return to the courtroom and the trial judge will answer the question. The trial judge must always deal with the jury in open court in the presence of the accused person.

Every jury charge is different. It will vary according to the offence the accused is charged with, the type of evidence heard at the trial, and the style of the individual trial judge. There is no single recipe for a perfect jury charge. The trial judge may review all of the evidence for the jury, or only those pieces of evidence that relate to the law the jurors must apply. The trial judge may express an opinion on the weight jurors ought to give certain evidence as long as it is clear to jurors that the question of weight is theirs alone to decide. On the other hand, the trial judge may say nothing about the weight that should be assigned. The jury charge must make clear to the jury which party has the onus of proof and what burden of proof applies. Depending on the evidence heard during the trial, the trial judge may be required to give jurors special instructions about things such as the use they can make of expert evidence, the testimony of disreputable witnesses, or evidence that jurors mistakenly heard that they should not have.

As the complexity of criminal trials has increased, so too has the complexity of jury charges. This has led to many trial judges providing jurors with written copies of their jury charges to take into the jury room with them while they deliberate.

How does an appeal court review a jury verdict?

It is particularly difficult to assess the reasonableness of a verdict following a jury trial. In Canada, jurors cannot tell anyone about the decision-making process they followed in the jury room. No reasons or explanations for a jury verdict are permitted. This decision-making model makes appellate review following a jury trial quite different from a trial by judge alone. In a judge alone trial, the focus of the appeal tends to be the trial judge's reasons for decision. Appellate review of jury trials tends to focus on the trial judge's decisions about the admissibility of evidence and the adequacy and correctness of the trial judge's instructions to the jury in the charge. It is well accepted that a jury charge must be examined as a whole to determine if there has been any error. It ought not to be dissected piece by piece. Instead, the appellate court will consider the overall effect and general sense conveyed by the charge. Essentially, the question on an appeal is whether, in all likelihood, the jury correctly understood the law as it applied to the circumstances of

the case. Exceptionally, the appeal court may set aside a conviction by a jury on the basis that the verdict was unreasonable. However, this is extremely rare.

PART 2: EVIDENTIARY RULES SHAPED BY JURY TRIALS

The involvement of juries in the criminal trial process has helped to shape many of Canada's rules of evidence. In this part, we explore three examples that demonstrate the influence of juries on the rules of evidence. But first, it is important to understand the procedure used to determine the admissibility of evidence in a jury trial. This process is known as a *voir dire*.

What is a voir dire?

The easiest way to think of a *voir dire* is to imagine a mini-trial before the trial judge alone within the larger trial before the jury. The *voir dire* takes place in the absence of the jury. Typically, the prosecutor or defence counsel will inform the trial judge, in the absence of the jury, that there is evidence they wish to present to the jury that is objected to by the other side. In those circumstances, the trial judge must rule on the admissibility of the evidence before the jury can hear it. Often, this will take place before the jury is even selected. This is the most efficient method of proceeding. The trial judge rules on the admissibility of contested evidence before the trial begins. This allows the prosecutor and defence counsel to know whether they can mention the evidence in their opening addresses to the jury. It also makes the trial run more smoothly because there are fewer disruptions requiring the jury to be excused to the jury room. If an evidentiary issue that requires a *voir dire* arises in the middle of the trial, the jury must leave the courtroom.

During a *voir dire*, the trial judge will hear evidence and the submissions of counsel and rule on admissibility. If the evidence is ruled admissible, it will be presented again in the presence of the jury. If it is ruled inadmissible, the jury will never hear it.

Voir dires can be lengthy and complex or short and fairly simple. The trial judge may be able to deliver a ruling on admissibility from the bench or may require time to consider the matter. The outcome of a *voir dire* can determine the outcome of the trial. For example, if the prosecutor's case depends on the accused's confession, and the confession is ruled inadmissible, the prosecutor is not likely to continue with the trial if there is no reasonable prospect of obtaining a conviction.

Three types of evidence provide excellent examples of the way in which jury trials have shaped the law of evidence – similar fact evidence, evidence of the accused's prior convictions, and statements of the accused.

Similar Fact Evidence

The Supreme Court of Canada has held that evidence of an accused person's general bad character is inherently prejudicial and presumptively inadmissible.[4] The fear is that if jurors hear this type of evidence they may convict the accused on the basis that the accused is "the type of person" who would commit the crime. There is also a fear that jurors might give too much weight to the other examples of the accused's misconduct and use them as proof that the accused committed the crime in question, and fail to adequately consider the other evidence in the case. The risk of a wrongful conviction greatly increases if jurors draw an inference of guilt from an accused person's bad character.

In spite of these fears, the Supreme Court of Canada has also recognized that **sometimes** evidence of the accused's previous misconduct can be highly relevant to the search

4 *R. v. Handy,* [2002] 2 S.C.R. 908.

for the truth.[5] The evidence of previous misconduct must go beyond the general bad character of the accused, and demonstrate that the accused is likely to act in a specific way in particular circumstances. For example, assume an accused is charged with robbery. The prosecution alleges that the accused entered a bank and gave the bank teller a note written in a child's crayon that said, "Give me all your five and ten-dollar bills and you won't get hurt." Evidence that the accused robbed another bank in which he gave the teller a similar note written with a child's crayon may be admissible to prove that the accused is the robber. The greater the similarity between the offence with which the accused is charged and the prior misconduct, the more valuable the evidence is in the search for the truth.

If the prosecution wants to lead similar fact evidence, a *voir dire* must be conducted. The prosecutor and defence counsel will make submissions for and against the admissibility of the potentially dangerous evidence in the absence of the jury. The jury will only hear the evidence of prior misconduct if the trial judge rules that it is admissible.

If the trial judge allows the jury to hear the evidence, the trial judge must also instruct the jurors about how they can and cannot use the evidence in their deliberations. The jurors may only use the evidence to decide the specific issue to which it is relevant; in our example, the identity of the accused as the robber. The prosecutor will likely have identified the issue for the trial judge at the beginning of the *voir dire*. The jury may not use the evidence to decide that the accused is a person of bad character and for that reason alone more likely to have committed the robbery with which he is charged. The trial judge may give this instruction to the jury right after the jury has heard the evidence and again at the end of the trial in the jury charge.

5 See *R. v. Sweitzer*, [1982] 1 S.C.R. 949.

Evidence of Prior Convictions of the Accused

Evidence of an accused person's prior convictions can be relevant in a trial, particularly if the accused testifies. It can also be highly prejudicial to the accused. Like similar fact evidence, the fear is that jurors might consider it more likely that the accused is guilty of the offence if they know that the accused has previously been convicted of crimes. The trial would be unfair if the jury used an accused person's record of prior convictions to support a finding of guilt.

At common law, evidence of the accused's prior convictions is admissible to attack the accused's credibility. This rule is codified in the *Canada Evidence Act,* which applies to all criminal trials. Section 12 of the *Canada Evidence Act* permits a witness to be questioned about whether the witness has been convicted of any offence. So, the trial judge has the discretion to permit the prosecutor to ask an accused who testifies at the trial about prior convictions.

Despite these statutory provisions and the common law rule, there are circumstances in which allowing the jury to hear evidence of the accused's prior convictions could result in an unfair trial. Like other evidence of prior misconduct, the risk is that the jury will give undue weight to the evidence of prior convictions. In other words, the risk is that the jury will not limit the use of the prior convictions to assessing the accused's credibility, but will use the prior convictions as evidence that the accused committed the offence for which he or she is on trial. The greater the similarity between the prior convictions and the charged offence, the greater the risk the evidence of prior convictions will be misused. For example, if an accused is charged with assault, and has a prior conviction for assault, the judge will often not permit the prosecutor to question the accused on that conviction, but permit questioning on other prior convictions, especially for crimes of dishonesty, which are much more relevant to credibility.

If the trial judge permits the accused to be questioned about prior convictions, the jury must be instructed about how it may and how it may not use the evidence. Again, the trial judge may instruct the jury as soon after it hears the evidence and again at the end of the trial in the jury charge.

Statements of the Accused

Before a jury is permitted to hear evidence about a statement an accused person gave to a person in authority, such as a police officer, the prosecutor must satisfy the trial judge that the accused made the statement voluntarily. The trial judge must determine this on a *voir dire* conducted in the absence of the jury. The issue on the *voir dire* is whether the accused made the statement voluntarily. This issue is never considered by the jury – it is an issue for the trial judge alone. If the statement is admitted, the jury will consider whether it is reliable evidence or not. Voluntariness as an issue is not decided by the jury.

The accused is permitted to testify on a *voir dire*. It does not happen very often except in the case of a *voir dire* to determine the admissibility of a statement made by the accused. The accused is not required to testify. The accused may testify on the *voir dire*, and not testify at the trial.

As these examples demonstrate, certain procedures have developed in the Canadian law of evidence to ensure that jurors hear only admissible evidence.

We now turn to the lessons learned from the Canadian experience with jury trials.

PART 3: LESSONS LEARNED FROM THE CANADIAN EXPERIENCE

As we have explained, in Canada, judges without juries hear the overwhelming number of civil and criminal cases. Jury trials nevertheless remain an important component of the Canadian criminal justice system. Evidentiary rules are based on the theory that a jury composed of ordinary citizens without any legal background will hear the case. The instructions to the jury in the jury charge about how to use the evidence the jurors have heard and how to apply the law are also based on the assumption that the jurors have no legal training. Yet, because in criminal cases, juries simply deliver a verdict of guilty or not guilty and do not provide reasons, it is almost impossible to determine whether the jury has followed these instructions; has properly applied the law as it has been explained; and has properly used the evidence that they have heard.

Nevertheless, most trial judges believe, based on their experience, that the jury almost always delivers the correct verdict. Much of the system's faith in the jury process is based on the view that most criminal cases turn upon findings of fact and that 12 ordinary citizens without special legal training are well-suited to make such findings. Legal norms and rules are usually based in experience and common sense and by bringing together a group of 12 strangers with different and varied backgrounds it is possible to arrive at a factually and legally correct verdict.

What are the advantages of a jury system?

The jury system provides a number of important advantages. The most obvious is citizen involvement in the justice system. Most people never become involved in the criminal justice system. If they do, it is because they are victims, accused persons or witnesses. By being on a jury, the citizen has the opportunity to observe an entire trial and to gain a much better appreciation of, and value of, a properly functioning justice system. The experience of almost everyone who has served on a jury is that while they were initially somewhat reluctant to become involved because of the time

commitment, in the end they found the experience to be very worthwhile.

Secondly, the jury system contributes to the openness and transparency of criminal proceedings. Except when they are excluded so that the judge can make evidentiary rulings, the jurors are present throughout the trial and observe the system in action. Their mere presence guards against secrecy and censorship of criminal proceedings.

Thirdly, on very rare occasions, the jury system serves as a safeguard against irrational and inhumane laws. As we have said, judges are convinced that almost always juries correctly apply the law as it has been explained to them and come to a correct verdict on the facts. There have been occasions, however, in most common law countries that have a jury system where the jury has refused to apply the law when it was considered unfair or inhumane. The most striking examples in Canada occurred over 35 years ago when doctors were prosecuted for performing therapeutic abortions in violation of the law against abortion. Juries consistently refused to convict the doctors despite the overwhelming evidence that the offences were committed. The law was viewed as inhumane and irrational, and juries refused to apply it. In the end, after the *Canadian Charter of Rights and Freedoms* came into force in 1982, the Supreme Court of Canada struck down the abortion laws because they violated the rights of women. While so-called jury nullification is rare, it is an important safeguard and, if nothing else, acts to deter prosecutors from seeking to enforce legislation that is out-dated and inhumane.

How does the jury system deal with the open court principle?

It is a fundamental principle of the Canadian criminal justice system that the courts are open to the public, and the media are free to publish reports of what occurs in court. While judges trust juries to arrive at the correct verdict, there are several safeguards in place to protect against decision-making based on irrelevant or inflammatory information. We have already discussed the fact that *voir dires* are conducted in the jury's absence so that if the judge rules that the evidence is inadmissible, it never comes to the jury's attention. Canadian courts, however, are open to the public, including members of the media. Conducting the *voir dire* in the jury's absence would be of little value if the media could report the proceedings. Accordingly, the *Criminal Code* prohibits publication of anything that occurs in the absence of the jury until the trial is over. This ban on publication extends to other pre-trial proceedings such as evidence heard on a bail hearing, at the preliminary inquiry[6] and in pre-trial motions before the jury is selected.

The important value of the open-court principle is not, however, compromised by these publication bans. Although the jury is excluded during the *voir dire*, the court remains open to everyone else. Once the trial is finished, the media can report on all of the pre-trial proceedings and proceedings that took place in the absence of the jury.

What are the problems with appellate review of jury verdicts?

We have mentioned that appellate review of jury verdicts is generally limited to a review of the trial judge's rulings on admissibility of evidence and instructions to the jury. The limits on appellate review derive from the fact that, in Canada, as in most common law jurisdictions, juries do not provide reasons for their verdicts in criminal cases. It is therefore impossible to review the path that the jury took

6 A preliminary inquiry is a hearing before a judge in which the prosecution calls witnesses to establish that there is sufficient evidence to justify the accused being put on trial. The accused or the accused's counsel has the opportunity to cross-examine witnesses and to try and persuade the judge that the case should not proceed because of the insufficiency of the evidence.

in finding the facts and whether it correctly applied the law to the facts. It is impossible to tell whether the jury overlooked important evidence or misunderstood important evidence. This can be a troubling aspect of jury proceedings and has led to several developments.

The first is an increasingly robust role for the trial judge in screening evidence that has the potential to be misleading and unreliable. This has become known as the gatekeeper function and has assumed special importance in the area of expert evidence. The unfortunate experience in Canada over the last 20 years in which unreliable expert evidence was admitted in both jury and non-jury cases has led the Supreme Court of Canada to require judges to more carefully scrutinize expert evidence. The Court has come to appreciate that expert scientific evidence that is not properly explained, that may be unreliable, and that does not adhere to strict scientific principles may overwhelm and confuse the jury. Judges are now expected to be much more rigorous in examining the reliability of proposed expert evidence. This gatekeeper function is not confined to expert evidence. The judge is also required to critically examine other evidence that may be of limited value in reaching an accurate verdict. An example is demeanour. Until relatively recently, it was not unusual for the prosecution to lead evidence of the reaction of the accused to events in an attempt to bolster its case. For example, evidence would be led at the trial in a case involving the death of a child, where the parent was suspected of the killing, that the parent did not act "appropriately," or was not sufficiently concerned about the child's welfare. Experience has shown that this type of evidence is so subjective, so highly unreliable and of such limited real value that it should not be led before the jury. The judge, in carrying out the gatekeeper function, will exclude this evidence from the jury.

The second development has been touched on earlier. Judges are expected to bring to the jury charge the lessons learned over the last almost 50 years from inquiries into wrongful convictions. Judges must instruct the jury, for example, on the particular dangers associated with eye-witness identification, evidence from jail-house informers, or other persons with special interests in the prosecution. Based on the wealth of experience gained from these inquiries, judges will explain to the jury the dangers of relying upon certain kinds of evidence and why this evidence may be unreliable or dangerous and why it must be subjected to special scrutiny.

The third development is the increasing role appellate courts are playing in reviewing the facts in a jury case. Although juries do not give reasons, the appellate court still has the power to overturn a conviction because it is satisfied that the verdict is unreasonable. The test for overturning a jury verdict is necessarily a strict one. The values of transparency, citizen involvement and openness would be undermined if the appellate courts too frequently intervened to overturn jury verdicts simply because they did not like the result. Nevertheless, the appeal court will examine the transcript of the proceedings to determine whether the verdict is unreasonable. The appeal court is more likely to find the verdict is unreasonable where it is based upon evidence that in the court's experience has led to miscarriages of justice, such as eye-witness identification or problematic circumstantial evidence.

What are the concerns about jury trials?

No criminal justice system delivers perfect justice. In this final part of the paper we highlight problems that are particular to the Canadian jury system. The first concerns the length and complexity of the system. There is no question that jury trials take longer. This is a function of the manner in which the jury trials are conducted in Canada. Since evidentiary rulings are made in the absence of the jury, considerable time may be taken up in these proceedings. Then, if the evidence is admitted, it must be repeated before the jury. In a case where there are many rulings

to be made or many objections by counsel, the proceedings can be very lengthy. Even in a relatively straight-forward case, a trial by a jury takes twice as long as the same case being tried by a judge without a jury.

The second problem is with the complexity of jury instructions. As jury instructions have come under more intense scrutiny by appeal courts, trial judges have reacted by giving juries longer and more complex instructions to ensure that the jury charge conforms to the directions given by appeal courts in previous cases. The concern is that these complex and lengthy instructions are too difficult for the jury to properly apply. There have been some efforts to simplify jury instructions and put the instructions in "plain language." It is not clear that these efforts have been successful.

It has also become a common feature of jury charges in Canada that trial judges review, at considerable length, the evidence that has been called at the trial. Some feel that this lengthy review of evidence is unnecessary given that the jury has also heard the evidence, is entitled to make notes as the evidence is presented, and is then given summaries of the important parts of the evidence in the closing arguments by counsel for the prosecution and for the accused. This review of evidence by the trial judge is probably a function of the concern that the jury may not have appreciated the important parts of the evidence or may have misunderstood it. Unfortunately, some judges simply repeat at great length the testimony without really performing the critical function of identifying the important pieces of evidence that the jury should take into consideration in applying the law.

Finally, the increasing length and complexity of jury cases has led to concern about the continued viability of the jury system. Are jurors being asked to pay too high a price in lost time and wages while they serve on juries? As well, to date, cases of jury intimidation are almost non-existent in Canada. However, as Canada deals with more terrorism and organized crime cases, it may have to face problems that have occurred in other jurisdictions and have led to the abolition of jury trials in some cases. For example, in the United Kingdom, alleged IRA terrorists were not allowed jury trials because of the concern over jury intimidation. To date, there is no reason to take similar measures in Canada and such a change would face constitutional issues because of the entitlement to a jury trial in the *Charter of Rights and Freedoms.* However, other safeguards, some of them very costly, may have to be considered at some point to preserve the integrity of the system.

PART 4: CONCLUSION

More than twenty years ago, the Supreme Court of Canada described the important role of the jury this way:

> The jury, through its collective decision making, is an excellent fact finder; due to its representative character, it acts as the conscience of the community; the jury can act as the final bulwark against oppressive laws or their enforcement; it provides a means whereby the public increases its knowledge of the criminal justice system and it increases, through the involvement of the public, societal trust in the system as a whole.[7]

While the number of jury trials in Canada has steadily declined, the jury remains a defining element of the Canadian criminal justice system. Despite the challenges the present system faces, with appropriate attention to evidentiary rules and other safeguards, the jury continues to serve its invaluable function in the Canadian criminal justice system. ■

7 *R. v. Sherratt,* [1991] 1 S.C.R. 509, at 523-24.