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THE CANADIAN CRIMINAL JURY*

REGINA SCHULLER** AND NEIL VIDMAR***

INTRODUCTION

The Canadian jury is derived from English common law, and in many respects Canadian judges still look to English law as a primary standard when making decisions on matters relevant to the jury. Nevertheless, the Canadian jury system has some strikingly unique characteristics regarding potential juror prejudice that distinguish it from the contemporary English jury system and the jury systems of other common law countries, particularly that of the United States. In recent years, however, Canadian courts have struggled with issues of racial and ethnic prejudice, pretrial publicity, jury trials deemed too lengthy, and new forms of scientific evidence. Additionally, Canadian jury law has had to modify jury procedures for trials involving aboriginal peoples in its arctic regions.

I. A BRIEF HISTORY OF THE CANADIAN JURY SYSTEM

English common law, including the right to trial by jury, was followed almost from the beginning of the development of the separate English colonies that eventually became the nation of Canada. For example, Nova Scotia recognized the right to jury trial in the 1750's, after the English population began to exceed the original Acadian (French speaking) population.¹ Jury trials were used in the inferior Courts of Common Pleas as well as in the Supreme Courts (superior courts) for civil as well as criminal matters.² A General Sessions Court also used juries, and additionally there were coroner's juries and grand juries, the latter working with magistrates

* This article is a substantially revised and up-dated version of a chapter by Neil Vidmar, *The Canadian Criminal Jury: Searching for a Middle Ground*, that appeared in Vidmar, N. (Ed.) *WORLD JURY SYSTEMS*, Oxford England: Oxford University Press (2000). The authors are indebted to The Honourable John Vertes, Senior Judge of the Supreme Court of the Northwest Territories for comments on an earlier draft of this article.

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1. R. BLAKE BROWN, *A TRYING QUESTION: THE JURY IN NINETEENTH-CENTURY CANADA* 17-42 (2009).

2. *Id.*

to help administer local government.³ However, jury duties were reserved only for propertied men, and considered onerous—in some instances, jury duty required travel from distant areas, lodging at the juror's expense and trial duties that might last many weeks.⁴ By about 1880, the original jury systems were in sharp decline and primarily reserved for serious criminal offenses.⁵ Similar use and gradual decline of the jury occurred in Upper Canada (most of which became the Province of Ontario).⁶ Following the defeat of the French army outside Quebec City, the law of England was established in the colony of Quebec in 1763.⁷ Although French civil law was restored in Quebec in 1774, English criminal law remained in force.⁸

Under the British North America Act, which established the Dominion of Canada in 1867, Parliament passed the *Criminal Code* recognizing the right to jury trial for serious criminal offenses. When the Constitution Act, known as the Canadian Charter of Rights and Freedoms ("Charter"), was passed in 1982 it specifically recognized the right to jury trial: "Any person charged with an offence has the right . . . except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum penalty for the offence is imprisonment for five years or a more severe punishment. . . ."⁹

Although civil juries were once used with some regularity across Canada, today they are seldom used outside the provinces of Ontario and British Columbia.¹⁰

Prevailing law allows judges to decide whether the matters are too complex for a jury; and in common practice and in the other English speaking provinces, they are seldom used except for rare cases involving libel or similar matters.¹¹ Civil law, which does not provide for juries in civil matters, prevails in Quebec.¹² In Ontario and British Columbia civil jury trials

3. *Id.*

4. *Id.* at 20–31.

5. *Id.* at 14.

6. *Id.* at 214.

7. Neil Vidmar, *The Canadian Criminal Jury: Searching for a Middle Ground*, WORLD JURY SYS. 211, 217 (Neil Vidmar, ed., 2000).

8. *Id.*

9. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 § 11(f) (U.K.).

10. See W.A. Bogart, "Guardian of Civil Rights . . . Medieval Relic": *The Civil Jury in Canada*, in WORLD JURY SYS. 405, 407 (Neil Vidmar, ed., 2000).

11. *Id.* at 407–09. The Federal Court of Canada also does not provide for jury trial.

12. *Id.* at 407.

do occur, including trials for medical malpractice, but not at nearly the rates that they occur in the United States.¹³

II. LIMITATIONS ON THE RIGHT TO JURY TRIAL

Although the right to jury trial is enshrined in the Canadian Charter of Rights and Freedoms, that right needs to be understood in the context of the *Criminal Code*.¹⁴ When Parliament passed the uniform *Criminal Code* of 1892, it followed Sir James Fitzjames Stephen's draft English code of 1880.¹⁵ The basic structure of that draft is retained in the modern *Criminal Code*.¹⁶ The *Code* divides offenses into three types.¹⁷ Indictable offenses include the most serious crimes, such as murder and treason, which must be tried in a superior court before a judge and jury.¹⁸ Summary conviction offenses are less serious offenses, such as driving while disqualified, keeping a common bawdy house, and theft or fraud under \$5,000.¹⁹ Summary offenses are tried by judge alone in a lower court, and there is no right to jury trial.²⁰ The third category involves hybrid offenses (often called "either way offenses") that can be tried either as an indictable crime or as a summary conviction offense.²¹ Offenses falling under this category include assaults of all kinds, serious fraud, conspiracy, being an accessory to a crime, and drug offenses.²² The decision to proceed by indictment is solely determined by the prosecuting Crown Attorney and, with a few exceptions, is not subject to judicial review.²³ However, once the Crown has elected to proceed by indictment, for most of these offenses the accused person has the right to decide whether to be tried by judge and jury or by judge alone.²⁴

Canada has two official languages, English and French. Section 530 of the *Code* provides that an accused has the right to be tried by a judge and

13. *Id.* at 405, 409; ONTARIO LAW REFORM COMMISSION, CONSULTATION PAPER ON THE USE OF JURY TRIALS IN CIVIL CASES 14 (1994) (British Columbia).

14. Canadian Charter, *supra* note 9; Canada Criminal Code, R.S.C. 1985, c. C-46.

15. See DESMOND H. BROWN, THE GENESIS OF THE CANADIAN CRIMINAL CODE OF 1892 121-26 (1989).

16. CHRISTOPHER GRANGER, THE CRIMINAL JURY TRIAL IN CANADA 37 (2d ed. 1996).

17. *See id.* at 37-54.

18. *Id.* at 37, 39-40.

19. *Id.* at 42.

20. *Id.* at 37.

21. *Id.* at 38.

22. *See id.* at 39-42.

23. *Id.* at 38.

24. *Id.* at 42. However, a few offenses are not eligible for jury trial. *See* Canada Criminal Code, R.S.C. 1985, c. C-46 § 553.

jury who speak the language of the accused, or, if special circumstances warrant it, a judge and jury composed of persons who speak both languages.²⁵ Section 531 provides that a change of venue to a different territory within a province may be made in order to obtain a jury with the required language skills.²⁶ Additionally, as will be discussed in more detail below, exceptions are made for aboriginal peoples in Canada's arctic regions.²⁷

It is difficult to obtain nationwide statistics on the absolute number of criminal jury trials or what percentage of accused persons elect for jury trial when they have that option.²⁸ However, in 1994 in Ontario, the largest province with a population of eleven million persons (approximately one-third of Canada's entire population), there were 1,018 criminal jury trials in the general Division Court, a superior court.²⁹ In contrast, there were 1,368 nonjury trials.³⁰ Some of the jury trials involved murder or other offenses that are required to be tried by judge and jury.³¹ Even discounting these cases involving no option regarding the choice of fact finder, more accused persons who plead not guilty elected for trial by judge alone rather than trial by jury.³² When summary conviction offenses are taken into account, the vast bulk of criminal cases, at least ninety percent, are tried by judge alone.³³ That said, the institution of the criminal jury continues to occupy an important place in Canadian law.

III. THE STRUCTURE AND COMPOSITION OF THE JURY AND THE VERDICT

The composition of the jury list is controlled by provincial and territorial statute, and the general rule in the provinces is that the list is compiled by random selection from the electoral rolls in the province or local community.³⁴ That means being a Canadian citizen, 18 years of age or older, and a resident of the jurisdiction in which the trial will be held.³⁵

25. *See id.* at § 530.

26. *Id.* at § 531.

27. *See infra* at pp. 33–38.

28. An internet search provided some data on the incidence of trials across provinces but unfortunately the data do not distinguish between jury trials and trials by judge alone. *See* Statistics Canada, Table 7: Completed Cases in Adult Criminal Court, 10 Jurisdictions, 2000/2001 to 2008/2009, <http://www.statcan.gc.ca/pub/85-002-x/2010002/article/11293/tbl/tbl7-eng.htm>.

29. ONTARIO LAW REFORM COMMISSION, CONSULTATION PAPER ON THE USE OF JURY TRIALS IN CIVIL CASES (1994).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *See* GRANGER, *supra* note 16, at 8–142; *see also* TANOVICH, JURY SELECTION IN CRIMINAL TRIALS 39–58 (1997) (discussing the selection of jury lists from the Canadian provinces).

35. *See* GRANGER, *supra* note 16 at 83–142 for rules from each province and territory.

Although not too many years ago the typical Canadian jury consisted primarily of white males selected by the local sheriff, the jury has become much more representative of the population; however, certain classes of persons will be excluded from jury service. In Ontario, for example, excluded persons include police officers, lawyers, trustees in bankruptcy, and employees of the Ministry of the Attorney General.³⁶ Some provinces also exempt doctors, veterinarians, firefighters, ministers, and law students.³⁷ Additionally, “person[s] who [have] been convicted of certain criminal offences within the last five years” are excluded.³⁸

Litigation based on an unrepresentative jury pool is sparse. At the start of the trial the prosecution or defense may challenge the whole jury array on the grounds of fraud, partiality, or misconduct, but such challenges have been infrequent.³⁹ In *R. v. Catizone*⁴⁰ and *R. v. Nepoose*⁴¹ new arrays were ordered when too few women appeared on the original arrays. In *R. v. Nahdee*,⁴² the accused successfully challenged the array because of irregularities in the selection of aboriginal persons, and in *R. v. Born with a Tooth*⁴³ the Crown prevailed on a challenge to irregularities in the selection of aboriginal citizens. However, challenges to arrays on the grounds that they did not contain a sufficient proportion of persons of a racial or ethnic group have tended to fail if there were no irregularities in the selection process itself.⁴⁴ If the challenge to the array is not made at the start of trial, section 670 of the *Criminal Code* states that any irregularity in the summoning or empanelling of the jury shall not be grounds for reversing a verdict.⁴⁵ It is not clear how successful an appeal would be if strong evidence showing deliberate racial or gender biases in selection were produced after a conviction. Very recently a challenge to the array in Alberta was made in the case of an aboriginal man on the grounds that the jury pool had systematically excluded residents of an Indian reservation within that jurisdiction, but the outcome of that challenge has not yet been resolved.⁴⁶

36. *Id.* at 113.

37. *See id.* at 85 (law students), 100 (doctors, veterinarians, ministers, firefighters).

38. *Canadian Jury Duty*, CANADIAN LAW, <http://www.canadianlawsite.ca/jury-duty.htm> (last visited Jan. 27, 2011).

39. *See* GRANGER, *supra* note 16, at 149–51.

40. [1972] 23 C.R.N.S. 44 (Can. Ont. Co. Ct.).

41. [1988] 85 Alta. L.R. 2d 8, para.17, 19–21 (Can. Alta. Q.B.).

42. (1993), [1994] 26 C.R. 4th 109 (Can. Ont. Gen. Div.).

43. [1993] 10 Alta. L.R. 3d 1, para.4, 6, 12–16 (Can. Alt. Q.B.).

44. GRANGER, *supra* note 16, at 152–54.

45. *See* Canada Criminal Code, R.S.C. 1985, c. C-46 § 670.

46. *See*, Bob Weber, *Edmonton Jury Selection Violates Aboriginal Rights, Lawyer Claims*, GLOBE & MAIL, Sep. 12, 2010, [availab-](#)

The criminal jury is always composed of twelve persons.⁴⁷ Generally no provision is made for alternate jurors, and removal of a juror is considered to be a very serious matter.⁴⁸ A juror can be discharged, however, if he or she becomes ill at any time during the course of the trial or there is some other “reasonable cause” to discharge a juror.⁴⁹ The judge is also vested with the power to declare a mistrial.⁵⁰ The judge may continue the trial as long as ten jurors remain.⁵¹ Conviction of an accused by a jury of ten or eleven members has been held to be constitutional under the Charter.⁵²

With the very important exception of “challenges for cause,” which will be explained and addressed in a separate section below,⁵³ there is no equivalent of an American *voir dire*. The jurors are assumed to be impartial between the Queen and the accused.⁵⁴ The legal presumption behind this practice, as enunciated in a leading case on jury law, *R. v. Hubbert*, is that a juror will “perform his duties in accordance with his oath” and render a verdict with an impartial mind.⁵⁵ *Hubbert* discussed additional factors that bolster this presumption.⁵⁶ The jury is composed of twelve persons who will deliberate and cancel any individual biases that exist.⁵⁷ Additionally, *Hubbert* stated that the judge’s instructions to the jury will have a salutary effect by reminding the jurors that they have a solemn duty to be fair and impartial.⁵⁸ The *Hubbert* presumption was enunciated even more strongly in *R. v. Corbett*,⁵⁹ a case involving the issue of whether prior convictions of the accused could be introduced in evidence bearing on character if the accused chose to testify. Rejecting social science research that indicated that jurors were influenced by knowledge of criminal records, *Corbett* as-

leat<http://www.theglobeandmail.com/. . . jury. . . aboriginal. . . /article1704674/> - Canada (last visited Jan. 18, 2011).

47. Canada Criminal Code, R.S.C. 1985, c. C-46 § 631(5), 631(2.1).

48. GRANGER, *supra* note 16, at 143–44.

49. Canada Criminal Code, R.S.C. 1985, c. C-46 § 644.

50. *Id.* at § 644(2).

51. *See id.* at § 644(2); *see also* GRANGER, *supra* note 16, at 190–98 (discussing the discharge of jurors).

52. *See* GRANGER, *supra* note 16, at 197–98.

53. *See infra* at pp. 18–28.

54. *R. v. Hubbert* (1975), 11 O.R. 2d 464, para.14 (Can. Ont. C.A.).

55. *Id.* at para. 22. Courts continue to enunciate this legal presumption. *See R. v. Spence*[2005], 3 S.C.R., 458, para. 21–22.

56. *Hubbert*, 11 O.R. 2d 464 at para. 28.

57. *Id.* at para. 28.

58. *See id.* at para. 56–57.

59. [1988] 1 S.C.R. 670, para. 41 (Can.).

serted confidence in the experience of trial judges that firm instructions from the judge caused juries to perform their duties according to the law.⁶⁰

The trial judge may ask the assembled panel of prospective jurors if any of them has health or other problems that would pose a hardship and if anyone has a relationship with the parties or witnesses in the case, and those persons may be excused.⁶¹ The remaining jurors are then randomly selected and called one by one to face the accused.⁶² Prior to 1992, the Crown had the right to “stand-aside” (also called “standby”) up to forty-eight prospective jurors with no reason given.⁶³ The stand-aside procedure was adopted from English practice in the *Criminal Code* of 1892, with the rationale for its use being to allow the Crown to eliminate jurors deemed unfit or hostile to the Crown.⁶⁴ In 1992, however, in *R. v. Bain*, the Canadian Supreme Court ruled that stand-asides violated the Charter because a reasonable person would conclude that it provided the Crown with an unfair advantage over the accused.⁶⁵ Subsequently, Parliament amended the *Criminal Code* and abolished stand-asides, but it simultaneously gave the Crown an equivalent number of peremptory challenges, which prior to this time only the accused had a right to exercise.⁶⁶

In cases involving treason or murder, both the prosecutor and the accused are entitled to twenty peremptory challenges.⁶⁷ For offenses in which the accused may be sentenced to more than five years in prison, both sides have twelve peremptory challenges, and for other offenses each side has four.⁶⁸ The purposes of the peremptory challenge are recognized as the same as those originally articulated by Blackstone, who is oft and favorably quoted on the issue.⁶⁹ The ability to eliminate persons with whom the accused has an uncomfortable feeling, no matter what the basis behind the impression of the prospective juror, provides a perception of trial fairness to the accused. The jury list is provided to both sides shortly before trial,

60. *See id.* at para 42–43.

61. Canada Criminal Code, R.S.C. 1985, c. C-46 § 632.

62. *Id.* at § 631(3).

63. GRANGER, *supra* note 16, at 144–45.

64. *R. v. Bain*, [1992] 1 S.C.R. 91, para. 52, 54(Can.) (quoting 4 William Blackstone: Commentaries *353). Originally the number of stand-asides was unlimited, but in 1917 the number was reduced to forty-eight. *Id.* at para. 52.

65. *See id.* at para. 1, 12.

66. *See* GRANGER, *supra* note 16, at 144–45.

67. Canada Criminal Code, R.S.C. 1985, c. C-46 § 634(2)(a).

68. Canada Criminal Code, R.S.C. 1985, c. C-46 § 634(2)(a–c). When multiple defendants are involved in a trial, each co-accused has the same number of allotted peremptory challenges, but the Crown’s number is not increased. *See id.* at §§ 634(2)(b–c), 634(4).

69. *See Bain*, 1 S.C.R. 91, para. 54 (Can.) (quoting 4 William Blackstone: Commentaries *353).

and the Crown is permitted to examine the list to determine if any of the jurors have a criminal record.⁷⁰ Recently, in Ontario, a scandal erupted when it was discovered that in some instances Crown attorneys had gone beyond searching for criminal records and conducted background checks of persons on the jury list.⁷¹ That practice has been stopped.⁷² As we will discuss below in a separate section, there are important exceptions to the rule that the jurors are chosen without any questions about their impartiality.⁷³

Given the tighter controls in Canada on the trial process, coupled with the restrictive pretrial questioning of jurors and the fact that legal issues of jury representativeness are minimized by case law and the *Criminal Code*, peremptory challenges have not been as controversial as they have been in England or the United States.⁷⁴ However, *R. v. Biddle*⁷⁵ deserves brief comment because it can be compared with the U.S. case of *J.E.B. v. Alabama*,⁷⁶ which forbids the use of gender-based peremptory challenges. *Biddle* was convicted by an all-female jury of two counts of assault causing bodily harm and two counts of choking with intent to commit an indictable offense, largely on the basis of contested eyewitness identification evidence.⁷⁷ The Crown had exercised its then-available stand-by privileges to eliminate male jurors.⁷⁸ *Biddle*'s conviction was overturned on other grounds; and since *Bain* had subsequently ruled the stand-by provision unconstitutional,⁷⁹ the question of the all-female jury was only academic.

70. Canada Criminal Code, R.S.C. 1985, c. C-46 § 638(1)(c).

71. See Shannon Kari, *Nova Scotia Prosecutors Deny They Vet Jurors*, NAT'L POST, Oct. 9, 2009, available at <http://www.nationalpost.com/related/topics/Nova+Scotia+prosecutors+deny+they+jurors/2083855/story.html> (last visited Jan. 18, 2011); Tim Naumetz, *Jury Vetting Practice Used in Nine Trials*, LAW TIMES, Aug. 10, 2009, available at <http://www.lawtimesnews.com/200908105209/Headline-News/Jury-vetting-practice-used-in-nine-trials> (last visited Jan. 18, 2011); Kirk Makin, *Ontario Court Upholds Jury Vetting by Police*, THE GLOBE & MAIL, Oct. 5, 2010, available at <http://www.theglobeandmail.com/news/national/ontario/ontario-court-upholds-jury-vetting-by-police/article1743401/> (last visited Jan. 18, 2011).

72. Shannon Kari, *Ontario Court Refuses To Order New Trial In 'Jury Vetting' Case*, NAT'L POST, Oct. 5, 2010, available at <http://www.canada.com/news/Ontario+court+refuses+order+trial+jury+vetting+case/3627289/story.htm> 1 (last visited Jan. 18, 2011).

73. See *infra* at pp. 18–28.

74. See Sally Lloyd-Bostock & Cheryl Thomas, *Decline of the "Little Parliament": Juries and Jury Reform in England and Wales*, 62 LAW & CONTEMP. PROBS. 7, 23–27 (1999).

75. [1995] 1 S.C.R. 761 (Can.).

76. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994).

77. *Biddle*, [1995] 1 S.C.R. 761 at para. 1, 6.

78. *Id.* at para. 6.

79. *Id.* at para. 6, 9–10.

In a concurring opinion, however, one justice commented that “[w]hile representativeness is not an essential quality of a jury,” it is a “characteristic which furthers the perception of impartiality.”⁸⁰ Consequently, the prosecution’s “apparent attempt” to modify the jury’s composition undermined jury impartiality.⁸¹ In opinions that concurred with overturning the conviction, however, two Justices disagreed with this assessment, with one stating:

I agree that a jury must be impartial and competent. But, with respect, the law has never suggested that a jury must be representative. For hundreds of years, juries in this country were composed entirely of men. Are we to say that all these juries were for that reason partial and incompetent?⁸²

In short, it is not clear how the Supreme Court would rule in a case in which one side exercised its peremptory challenges to systematically eliminate jurors on the basis of gender.⁸³

IV. THE ORGANIZATION AND STRUCTURE OF TRIAL

The Canadian trial is somewhat more formal than in the United States. Although judges no longer wear wigs, their robes have a broad scarlet sash running from their right shoulder to their waist.⁸⁴ The Crown attorneys prosecuting the case and the defense lawyers also wear black gowns.⁸⁵ Moreover, upon entering and leaving the bar separating the court officials from the public gallery, the lawyers execute a slight bow to the judge. Typically the defendant does not sit at the table with legal counsel but instead sits in a “prisoner’s box.”⁸⁶

The Crown presents its case first and begins with an opening statement explaining its theory of the case, ordinarily forecasting the witnesses

80. *Id.* at para. 53.

81. *Id.*

82. *Id.*

83. A review of a series of cases in which either motions or appeals on the grounds that the attorneys, both prosecution and defense, had been using preemptory challenges to eliminate jurors on the basis of race suggests “judicial reluctance” to weigh in on the issue. See David M. Tanovich, *The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System*, 40 S.C.L.R. 2d 655, 667–70, (2008).

84. *Handout: Traditions of the Court*, ONTARIO JUSTICE EDUCATION NETWORK, <http://www.ojen.ca/sites/ojen.ca/files/sites/default/files/resources/Traditions%20of%20the%20Courts.pdf> (last visited Jan. 30, 2011).

85. *Handouts for Students, THE COURTS OF B.C.*, http://courtsofbc.ca/documents/Courts_of_BC_Students_Handouts.pdf (last visited Jan. 30, 2011).

86. The judge does have discretion as to where the accused may sit and may direct a different seating. See STEPHEN COUGLAN, *CRIMINAL PROCEDURE* 316 (2008).

and other evidence that will be called.⁸⁷ In traditional practice, the defense was not entitled to address the jury until the Crown had presented its case; although the defense lawyer did have the opportunity to cross-examine the witnesses.⁸⁸ After the Crown's case was finished, the defense could then argue that the Crown's evidence was insufficient to prove guilt and request a dismissal, or, in the alternative, present its rebuttal case.⁸⁹ However, in recent years judges have sometimes permitted the defense opening statements following the Crown's opening statement.⁹⁰ In contrast to United States practice, Canadian judges are permitted more discretion to ask questions of a witness in order to clarify testimony, although generally they do this with considerable restraint.⁹¹ But in marked contrast to United States practice and more consistent with English practice, the judge engages in a "summing up" of the trial evidence as part of his or her charge to the jury.⁹² The summing up is intended to educate the jury about matters they should consider in evaluating the witnesses and other evidence but does not infringe upon the jury's discretion.⁹³

The form of the verdict is ordinarily a general verdict of guilty or not guilty. The *Criminal Code* provides two exceptions.⁹⁴ The first involves cases of defamatory libel where the judge may provide the jury a special verdict.⁹⁵ The second involves instances of what used to be called the insanity defense but is now called a "Defence of Mental Disorder."⁹⁶ If a jury decides that the accused committed the act but was suffering from a mental disorder that exempts her from criminal responsibility, it may render such a verdict.⁹⁷ In many cases, the jury also has the option of returning a verdict finding the accused guilty of a lesser-included offense.⁹⁸

87. *Id.*

88. *Id.* at 319.

89. *Id.* at 319–20.

90. *Id.* at 317.

91. *Id.* at 316.

92. *Id.* at 327.

93. *Id.* at 330.

94. See Canada Criminal Code, R.S.C. 1985, c. C-46 §§ 16, 317. There appears to be no rule against special verdicts, but they are only used in cases that fall within these two exceptions.

95. *Id.* at § 317.

96. *Id.* at § 16. In 1991, in the case of *R. v. Swain*, [1991] 1 S.C.R. 933 (Can.), the insanity defense was successfully challenged; and in 1992, Bill c-30 was enacted, altering the name of the defense and the wording of the standard revised, Marilyn Pilon, *Mental Disorder and Canadian Criminal Law*, GOVERNMENT OF CANADA DEPOSITORY SERVICES PROGRAM, available at <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/prb9922-e.htm>.

97. Canada Criminal Code, R.S.C. 1985, c. C-46, § 16.

98. See GRANGER, *supra* note 16, at 322.

Sentencing the accused is the responsibility of the judge.⁹⁹ In 1976 Canada abolished the death penalty and substituted a mandatory life sentence with no eligibility for parole for twenty-five years upon conviction of first-degree murder,¹⁰⁰ so jury recommendations are moot on this matter. However, in instances where an accused who is under the age of eighteen has been found guilty of first- or second-degree murder, or an accused who is over the age of eighteen at the time of the offense is found guilty of second-degree murder, the judge must then tell the jury about the possible statutory range of the sentence and ask if it wishes to make a recommendation.¹⁰¹ In the instance of an adult found guilty of second-degree murder, for example, the judge must then tell the jury that the accused would ordinarily be eligible for parole after a mandatory ten-year imprisonment and ask the jury if it wants to offer a recommendation, although the recommendation is not binding.¹⁰² Case law has established that it is legal error to inform the jury about possible punishment prior to its verdict on guilty for any charge, including second-degree murder.¹⁰³ “Several provincial courts have [ruled] that the . . . recommendation does not have to be unanimous.”¹⁰⁴ Finally, the jury’s power to decide guilt can be removed if, at the end of the prosecution’s case, the judge decides that the Crown has not produced a *prima facie* case for guilt.¹⁰⁵ In such an instance, the judge will enter a directed verdict of not guilty.¹⁰⁶

V. BALANCING OF FREE PRESS AND FAIR TRIAL

In February 2002 a joint task force of the Royal Canadian Mounted Police and the Vancouver police executed a search warrant on the farm of Robert Pickton and his siblings outside of Vancouver as part of a British

99. *See id.* at 331.

100. *See* Canada Criminal Code, R.S.C. 1985, c. C-46, § 745. However, until Section 745.6–745.64, known colloquially as the “Faint Hope Clause,” was repealed by Parliament in 2011, after fifteen years of a life sentence had been served a convicted person could apply for judicial review of the sentence. *See id.* at § 745.6–745.64. If the Chief Justice of the province in which the conviction took place decided a review was merited, a jury could be empanelled to hear the application and consider a reduction in the sentence. *Id.* Two-thirds of the jury had to agree for the sentence to be reduced. *Id.; see also* David WATT & MICHELLE K. FUERST, TREMEER’S CRIMINAL CODE 1195–1201 (commenting on these code sections).

101. *See Criminal Code*, R.S.C. 1985, c. C-46, §§ 745.1–745.2; *see also* GRANGER, *supra* note 16, at 331–32 (commenting on this section); WATT & FUERST, *supra* note 100, at 1189–95 (same).

102. Canada Criminal Code, R.S.C. 1985, c. C-46, § 745.2.

103. *See* Watt & Fuerst, *supra* note 100, at 1189–95 (same).

104. *See* GRANGER, *supra* note 16, at 332.

105. *Id.* at 319.

106. *See id.*

Columbia task force on missing women.¹⁰⁷ Shortly after, the farm was sealed off.¹⁰⁸ Mass media, from a distance, showed scenes of backhoes on the property.¹⁰⁹ Eventually, Pickton was charged with twenty-seven counts of first degree murder, most of which involved female sex workers and drug addicts that he had invited to his farm, killed, and dismembered.¹¹⁰ Some of the remains were allegedly fed to his pigs, while other remains were shipped to a waste processing plant, and still other parts buried on the farm.¹¹¹ In jail, Pickton confessed to killing a total of forty-nine women, making him one of the most notorious mass murderers in modern North American history.¹¹² A preliminary inquiry was held in 2003, but there was a court-ordered ban on publication of the testimony that was not lifted until August 2010.¹¹³

Pickton's trial began in January 2006, and he pleaded not guilty to twenty-seven counts of murder.¹¹⁴ Most of the rest of the year was spent in legal hearings about what evidence the jury would be permitted to hear.¹¹⁵ Media reporters were allowed to attend the hearings but were forbidden from publishing any details.¹¹⁶ Jury selection began in December 2006 with approximately six hundred prospective jurors (already whittled down from an initial pool of three thousand five hundred) appearing at the courthouse to begin the process of selecting twelve jurors and two alternates¹¹⁷.

107. Jane Anderson, *Farm Owners Known for Parties*, GLOBE & MAIL, Feb. 9, 2002 at A4.

108. *Update on Vancouver's 69 Missing Women: Murdered by Men, Remembered by Women—Pickton Found Guilty of Second Degree Murder*, WOMEN'S SPACE, <http://womensspace.wordpress.com/2007/12/09/vancouvers-69-missing-women-murdered-by-men-remembered-by-women/>, (last visited Jan. 30, 2011).

109. Clifford Kraus, *Mounties Dig Up Body Parts in Serial Killer Case*, N.Y. TIMES, Nov. 23, 2002, available at http://www.missingpeople.net/mounties_dig_up_body_parts_in_se.htm.

110. Greg Joyce, *Pickton Pleads Not Guilty to 27 Charges*, CANADIAN PRESS, Jan. 30, 2006, available at <http://www.theglobeandmail.com/news/national/pickton-pleads-not-guilty-to-27-charges/article810016/>; *Bodies of Prostitutes Fed to Pigs by Drug Crazy Canadian Serial Killer*, PATTAYA DAILY NEWS, July 17, 2007, available at <http://www.pattayadailynews.com/en/2007/07/17/bodies-of-prostitutes-fed-to-pigs-by-drug-crazed-canadian-serial-killer/print/>.

111. *Bodies of Prostitutes Fed to Pigs*, *supra* note 110.

112. Chad Skelton, *Video of Pickton's "Jailhouse Confession" to Be Made Public Today*, VANCOUVER SUN, Aug. 8, 2010, available at http://www.vancouver.sun.com/story_print.html?id=3369443&sponsor=..

113. CTV.ca News Staff, *Tapes Offer Glimpse into the Mind of a Killer*, CTV NEWS, Aug. 6, 2010, available at <http://www.ctv.ca/CTVNews/TopStories/20100806/pickton-tapes-made-public-100806/>.

114. Joyce, *supra* note 110.

115. Daniel W. Burnett, *The Trial of Robert William Pickton*, Jan. 26, 2006, available at <http://missingwomen.blogspot.com/2006/02/trial-of-robert-william-pickton.html>.

116. *Id.*

117. Alternates can replace vacancies in the jury that occur between the selection phase and the commencement of the trial but are dismissed once the trial begins. Canada Criminal Code, R.S.C. 1985, c. C-46 § 644; See Neal Hall, *Pickton Jury Candidates to Face Scrutiny*, VANCOUVER SUN, Dec. 5, 2006, available at http://www.missingpeople.net/pickton_jury_candidates.htm. As the judge noted, the

It lasted two days.¹¹⁸ The jury began hearing evidence in January 2007.¹¹⁹ During the trial, a number of charges were dropped for lack of sufficient evidence.¹²⁰ In December 2007, Pickton was found guilty of six counts of second degree murder that carried a “life sentence” of twenty-five years, the maximum sentence that he would have received if he had been found guilty of first degree murder.¹²¹ The guilty verdict resulted in appellate litigation, and not until a Canadian Supreme Court decision validated the jury verdict and judge’s sentence was the mass media able to publish materials about the trial evidence.¹²² Much of the evidence is now accessible on the internet.¹²³

The *Pickton* case helps to illustrate how the Canadian legal system attempts to maintain a balance between the values of a free press and a fair trial by controls that the judiciary may place on the mass media to prevent pretrial publicity. England, with its severe contempt of court laws for those reporting court proceedings, emphasizes the value of fair trial over free press.¹²⁴ The United States, with *Nebraska Press Association v. Stuart*¹²⁵ and related cases, emphasizes the value of free press over fair trial. In contrast, Canada attempts to balance the two competing values. Section 11(d)

panel would be too large to accommodate in any one room, and would be seated in locations throughout the building where they would be linked via audio and video. *Id.* The prospective jurors were then divided into groups of thirty and asked to return on Monday, the first day of jury selection, where they would be expected to be questioned by the judge about their ability to remain impartial. *Id.*

118. Lori Culbert, *Jury Selection Complete for Pickton Trial*, VANCOUVER SUN, Dec. 12, 2006, available at <http://missingwomen.blogspot.com/2006/12/jury-selection-complete-for-pickton.html>.

119. The Canadian Press, *Pickton Guilty of Six Murders*, THESTAR.COM, Dec. 10, 2007, available at <http://www.thestar.com/News/article/283961>

120. Chad Skelton, *Pickton Publication Bans Lifted, 20 Remaining Murder Charges Dropped*, VANCOUVER SUN, Aug. 4, 2010, available at <http://www.globaltvbc.com/world/story.html?id=3360372>.

121. Associated Press, *Canadian Pig Farmer Found Guilty of Multiple Killings*, KOMO NEWS, Dec. 9, 2007, available at <http://www.komonews.com/internal?st=print&id=12292796&path=/news/local>; Canada Criminal Code, R.S.C. 1985, c. C-46, § 745.

122. Jeremy Hansworth, *Canada Court Denies Serial Killer Robert Pickton’s Appeal*, SEATTLE TIMES, Jun. 25, 2009, available at http://seattletimes.nwsourc.com/html/localnews/2009384079_apcncanadaserialkiller.html; Lori Culbert, *Pickton Murders: Explosive Evidence the Jury Never Heard*, VANCOUVER SUN, AUG. 5, 2010, available at <http://www.vancouversun.com/news/Pickton+murders+Explosive+evidence+jury+never+heard/3360225/story.html>.

123. See e.g., CBC News, *Pickton Investigation to Be Reviewed by B.C.*, CBC NEWS (Aug. 20, 2010), available at <http://www.cbc.ca/canada/british-columbia/story/2010/08/20/bc-pickton-report-released.html>; Pickton Background, CBC NEWS, <http://www.cbc.ca/news/background/pickton>.

124. See JAMES COBERT, JUSTICE, DEMOCRACY, AND THE JURY 62 (1997); S.H. Bailey, *The Contempt of Court Act 1981*, 45 MOD. L. REV. 301, 313 (1982); Clive Walker et al., *The Reporting of Crown Court Proceedings and the Contempt of Court Act 1981*, 55 MOD. L. REV. 647 (1992).

125. 427 U.S. 539, 570 (1979).

of the Charter guarantees an accused the right “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal,” and section 2(b) provides for “freedom of the press and other media of communication.”¹²⁶ The *Criminal Code* also declares the right to a proceeding in open court.¹²⁷ Two sections of the *Code*, however, place limits on these rights. Section 537 provides the judge with the power to exclude everyone but the prosecutor, the accused, and his counsel from the preliminary inquiry that is ordinarily held for indictable offenses.¹²⁸ Section 486 of the *Code* confers the judge with authority to ban the public and press from all or part of criminal trial proceedings if it “is in the interest of public morals, the maintenance of order or the proper administration of justice.”¹²⁹ The apparent contradiction between these sections of the *Code* and the Charter guarantees are reconciled by section 1 of the Charter, which declares that the rights and freedoms are not absolute: “reasonable limits” may be “prescribed by law as can be demonstrably justified in a free and democratic society.”¹³⁰

In addition, section 539(1) of the *Criminal Code* provides that the accused person has the right to ask for an order banning publication of the content of the proceedings until the charges are dropped or the trial is ended.¹³¹ The motion must be granted; the judge has no discretion.¹³² The fact that the preliminary inquiry has been held may be reported, but information disclosed at the hearing cannot be reported. Defendants frequently invoke this right, particularly in cases that are likely to draw public interest. Consequently, the preliminary inquiry is seldom a source of prejudicial pretrial publicity.

Canadian trial practice does not allow sidebar conferences: the jury is removed from the courtroom for all legal arguments.¹³³ The *Code* proscribes publication of anything said in the absence of the jury until the jury retires to consider its verdict.¹³⁴ The jury is sequestered during delibera-

126. Charter, *supra* note 9, at 2(b), 11(d).

127. See Canada Criminal Code, R. S.C. 1985, c. C-46, § 486.

128. See *id.* at 537.

129. See *id.* at 486.

130. Charter, *supra* note 9, at 1.

131. See Canada Criminal Code, R. S.C. 1985, c. C-46, § 539(1).

132. *Id.*

133. See GRANGER, *supra* note 16, at 213.

134. *Id.*

tion.¹³⁵ The ban does not apply if the jury is sequestered during the whole trial, but total sequestration is extremely rare.¹³⁶

Two other matters bear on the control of trial prejudice. The first is that cameras are not permitted in Canadian courtrooms.¹³⁷ This inhibits inflammatory publicity in sensational cases like *Pickton*. The second is that section 649 of the *Criminal Code* prohibits jurors from ever disclosing anything about their deliberations under threat of a summary conviction that could result in a maximum sentence of six months imprisonment and a fine of up to \$5,000.¹³⁸ This law, passed in 1972, has the effect of curtailing improper juror motivation to serve on the jury in order to sell the story of how the jurors perceived the evidence in a high publicity case, as sometimes has occurred in the United States.

The attempt to balance competing values of fair trial and free press has also met some difficult challenges in the face of Royal commissions of inquiry. Canadian political culture often encourages the use of formal public inquiries in important matters that affect the public interest.¹³⁹ In 1995, the government of Nova Scotia ordered an inquiry into a fatal underground explosion in the Westray Coal Mine and granted its commissioner the power to compel testimony of witnesses, including persons who might face criminal charges.¹⁴⁰ The affected witnesses applied for a temporary stay of the public hearings on the ground that the publicity would jeopardize their right to a fair trial.¹⁴¹ Although the appeal was argued on the ground that the accused would elect a trial by jury, they subsequently elected trial by judge alone, thereby rendering the issue moot.¹⁴² Nevertheless, in *Phillips*

135. See Canada Criminal Code, R.S.C. 1985, c. C-46 645; see also WATT & FUERST, *supra* note 100, at 854–55 (commenting on this section).

136. See GRANGER, *supra* note 16, at 305–06.

137. Recent appeals by the Canadian Broadcasting Corporation to broadcast live coverage of a sensational Vancouver polygamy trial was refused by the by B.C. Chief Justice, declaring that it was “not the time to advance the debate” regarding television cameras in Canadian courtrooms. J.J. MCCULLOUGH, *Polygamy Trial Will Not be Televised*, METRO VANCOUVER, (Nov. 23, 2010); see also DANIEL J. HENRY, *Electronic Public Access to Court: A Proposal for Its Implementation Today* (1985), available at http://www.adidem.org/Electronic_Public_Access_to_Court:_A_Proposal_for_its_Implementation_Today; DANIEL J. HENRY, *Electronic Public Access To Court: An Idea Whose Time Has Come*, (1994) available at http://www.adidem.org/Electronic_Public_Access_To_Court_-_An_Idea_Whose_Time_Has_Come.

138. See Canada Criminal Code, R.S.C. 1985, c. C-46, s 649, s 787(1).

139. See e.g., W.R. Derrick Sewell & Timothy Oriordan, *The Culture of Participation in Envtl. Decision Making*, 16 NATURAL RESOURCES J. 1, 8 (1976).

140. *Phillips v. Nova Scotia*, [1995] 2 S.C.R. 97, para. 20 (Can.).

141. *Id.* at para. 173.

142. *Id.*

v. Nova Scotia,¹⁴³ the Supreme Court addressed the problem of pretrial publicity generated by public inquiries. The court conceded that publicizing evidence might “irreparably” prejudice jurors, but it emphasized the importance of public interest in the inquiry and placed the burden of proof on the accused to demonstrate the link between publicity and harm.¹⁴⁴ In the decision, the Court stated:

The objective of finding 12 jurors who know nothing of the facts of a highly-publicized case is today, patently unrealistic. . . [I]mpartiality cannot be equated with ignorance of all facts of the case. . . [I]n order to hold a fair trial it must be possible to find jurors who, although familiar with the case, are able to discard previously formed opinions and to embark upon their duties armed with both an assumption that the accused is innocent until proven otherwise, and a willingness to determine liability based solely on the evidence presented at trial.¹⁴⁵

Phillips asserted that any remedy must be weighed against existing procedural safeguards relating to jury prejudice (such as judicial instructions and challenges for cause).¹⁴⁶ Moreover, *Phillips* sanctioned temporary publication bans of harmful testimony or the conclusions of the inquiry until completion of the criminal proceedings.¹⁴⁷

*R. v. Kenny*¹⁴⁸ and *R. v. Burke*¹⁴⁹ involved a 1989 public inquiry involving charges of obstruction of justice in the investigation of rampant sexual assaults on boys in the Mt. Cashel Orphanage in St. John, Newfoundland by numerous members of the Christian Brothers, a Catholic religious order, who were in charge of the institution. Despite defense motions to delay the inquiry until after the trials of the accused or at least to place a ban on publication, the hearing took place and was covered live on television.¹⁵⁰ The testimony was very graphic, covering what occurred and who was involved.¹⁵¹ The problem was exacerbated by statements prejudicial to the accused by public officials. Additionally, the convictions of the first members to stand trial received extensive media coverage in New-

143. *Id.* at para. 20.

144. *Id.* at para. 108, 158.

145. *Id.* at 143.

146. *See id.* at 145.

147. *See id.*

148. *R. v. Kenny*, [1996] 445 A.P.R. 250, para.3 (Nfld. C.A.).

149. *R. v. Burke*, [1994] 1 S.C.R. 474, para. 11 (Can.).

150. *Kenny*, 445 A.P.R. at para. 3.

151. *See James R. P. Ogloff and Neil Vidmar, The Impact of Pretrial Publicity on Jurors: A Study to Compare the Relative Effects of Television and Print Media in a Child Sex Abuse Case*, 18 L. & HUM. BEHAV. 507, 509 (1994) (describing the testimony that appeared on television as well as a summary of other background material about the case).

foundland and across Canada. Kenny, one of the accused, moved for a permanent stay of proceedings on the ground of prejudicial pretrial publicity.¹⁵² The trial judge, while conceding that the publicity had prejudiced the community, nevertheless concluded that the risk of bias could be neutralized by jury selection procedures and judicial instructions, and denied the motion.¹⁵³ Kenny then elected trial by judge alone and was convicted.¹⁵⁴ His appeal of the denial of the motion to stay was affirmed by the Canadian Supreme Court.¹⁵⁵

Another case involving Christian Brothers resulted in *Dagenais v. Canadian Broadcasting Corp.*¹⁵⁶ In this instance, former and present members of the Christian Brothers who ran a Catholic training school in Ontario were also charged with multiple counts of sexual and physical abuse of young boys who were in their care.¹⁵⁷ As their trial date approached, their defense lawyers applied for an injunction preventing the Canadian Broadcasting Corporation ("CBC") from airing a television mini-series program, *The Boys of St. Vincent*, a fictional account based upon Newfoundland's Mt. Cashel Orphanage cases.¹⁵⁸ Relying on common law authority, the trial judge granted a nationwide injunction on the airing of the CBC series until after the Ontario trials were finished.¹⁵⁹ The Ontario court of Appeal upheld the injunction but limited its scope to Ontario and the city of Montreal.¹⁶⁰ Upon further appeal, the Supreme Court applied a balancing test under section 1 of the Charter and quashed the injunction.¹⁶¹

The *Dagenais* decision did not absolutely curb common law judicial authority on publication bans, but it enunciated guidelines limiting the scope of such bans and requiring the weighing of potential harms to free expression against some combination of alternative remedial measures, such as adjourning trials, changing venues, sequestering jurors, allowing challenges for cause, and providing strong judicial direction to the jury.¹⁶² The decision was based on a balancing of the salutary effects of publication ban on the fairness of the trial against the deleterious effects delaying free

152. R v. Kenny, [1996] 445 A.P.R. 250, para. 3 (Nfld. C.A.).

153. *Id.* at para. 9.

154. *See* R. v. Kenny, [1996] 445 A.P.R. 250, para. 1, (Can.).

155. *Id.* at para. 14.

156. *Dagenais v. Canadian Broad. Corp.*, [1994] 3 S.C.R. 835, para. 2 (Can.).

157. *Id.*

158. *Id.* at para. 6.

159. *Id.*

160. *Id.* at para. 1.

161. *Id.* at paras. 77, 83.

162. *See Dagenais v. Canadian Broad. Corp.*, [1994] 3 S.C.R. 835, para. 2 (Can.).

expression guaranteed by section 2 of the Charter.¹⁶³ In fact, *Dagenais* asserted that, unlike the American model of a clash between free press and fair trial, section 1 of the Charter requires a balancing of values.¹⁶⁴ It also noted that freedom of expression and the accused's right to a fair trial is not always in conflict, such as when public scrutiny of the court process may protect the fairness of trials.¹⁶⁵ Finally, *Dagenais* noted that publication bans can also protect the privacy of members affected by trial and other interests.¹⁶⁶ It is important to make clear that even in cases similar to the *Mt. Cashel* and *Pickton* cases, publication injunctions involve delay, not permanent bans, on the reporting of relevant court proceedings.

VI. EXCEPTIONAL CASES: CHALLENGES FOR CAUSE IN CASES INVOLVING EXTRAORDINARY PUBLICITY OR RACIAL PREJUDICE

In contrast to peremptory challenges, there is also a provision in Canadian law for what are termed "challenges for cause," and these challenges have evoked considerable controversy over the past few decades.¹⁶⁷ They occur with greater frequency in the province of Ontario, with judges in other provinces frequently ruling against challenges for cause.

As a first matter, however, attention needs to be drawn to the fact, alluded to earlier, that the Canadian judge does not have the power to dismiss individual jurors from the array on the grounds of partiality.¹⁶⁸ Although the judge is allowed to dismiss some persons if he or she determines in open court that the potential juror has a personal interest in the matter to be tried, has a relationship with the judge or any of the parties or witnesses to the suit, or would suffer personal hardship or suffers from a disability,¹⁶⁹ Canada presumes that jurors will be impartial. As articulated first in *Hubbert*,¹⁷⁰ but reiterated in cases that have followed:

163. *Id.* at para. 12.

164. *Id.* at para 12, 85.

165. *Id.* at para. 86.

166. *Id.* at para. 87.

167. See Austin M. Cooper, Q.C., *The ABCs of Challenge for Cause in Jury Trials: To Challenge or Not to Challenge and What to Ask if You Get It*, 37 CRIM. L. Q. 62, 62 (1994); DAVID M. TANOVICH, RETHINKING JURY SELECTION: CHALLENGES FOR CAUSE AND PEREMPTORY CHALLENGES, 30 CRIMINAL REPORTS 4th 310 (1994); David Paciocco, *Challenges for Cause: Cameron and Sexual Offence Cases* (Apr. 1995) (unpublished manuscript) (on file with author); Steven Skura, *Challenge for Cause: Questions Allowed Since R. v. Parks* (Nov. 11. 1994) (unpublished manuscript) (on file with author).

168. TANOVICH ET AL., *supra* note 34, at 81-83, 161.

169. See TANOVICH ET AL., *supra* note 34, at 77-83.

170. *R. v. Hubbert*, [1975] 11 O.R. 2d 464, para. 56 (Can. Ont. C.A.).

[Canada's] criminal law is premised on the ability of 12 jurors to do their job with "indifference" as between the Crown and the accused. . . . Our procedures in this respect differ from the American approach. In this country, people called for jury duty benefit from a presumption that they will do their duty without bias and prejudice.¹⁷¹

Since the legal presumption is that a juror is impartial, the burden of proof for overcoming the presumption lies with the party requesting the challenge. Overwhelmingly, challenges for cause are brought by the accused. The standard of proof is an "air of reality" or a "realistic potential"¹⁷² that (1) a widespread bias exists in the community; and (2) that some jurors may be incapable of setting aside this bias, despite trial safeguards, to render an impartial decision.¹⁷³ The evidence introduced to rebut the presumption of impartiality can take a variety of forms: newspaper articles, testimony by persons knowledgeable of the community, and expert opinion by social scientists, sometimes buttressed with a public opinion survey designed specifically for the case.¹⁷⁴ Although the standard of proof is relatively low, judicial resistance to motions for such challenges plus the cost of producing persuasive evidence serve to inhibit requests for challenges for cause in many cases.

Nevertheless, in recent years, a number of judges have taken judicial notice of the existence of various forms of prejudice in permitting challenges for cause,¹⁷⁵ but the judiciary has kept a tight rein on the form of the questions that may be asked of jurors. In response to concerns about "American-style" voir dire, *Hubbert* asserted that the "[c]hallenge for cause is not for the purpose of finding out what kind of juror the person called is

171. *R. v. Spence*, [2005] 3 S.C.R. 458, para. 21 (Can.). The court stated that "[o]ur collective experience is that when men and women are given a role in determining the outcome of a criminal prosecution, they take the responsibility seriously; they are impressed by the jurors' oath and the solemnity of the proceedings; they feel a responsibility to each other and to the court to do the best job they can; and they listen to the judge's instructions because they want to decide the case properly on the facts and the law." *Id.* at para. 22.

172. See *TANOVICH ET AL.*, *supra* note 34, at 95–100.

173. As articulated in *R. v. Find*, "The two components of the test involve distinct inquiries. . . . They are not watertight compartments, but rather guidelines for determining whether, on the record before the court, a realistic possibility exists that some jurors may decide the case on the basis of preconceived attitudes or beliefs, rather than the evidence placed before them." [2001] 1 S.C.R. 863, para. 33 (Can.).

174. See *TANOVICH ET AL.*, *supra* note 34, at 137–47; Neil Vidmar & Julius Melnitzer, *Juror Prejudice: An Empirical Study of a Challenge for Cause*, 22 *OSGOODE HALL L.J.* 487, 491–93 (1984).

175. When the race of the parties might be an issue, recent case law has asserted that the accused need only present a prima facie case to challenge on grounds of potential racial bias, *R. v. Wilson*, [1996] 107 C.C.C. 3d 86, para. 21 (Can. Ont. C.A.); see also *TANOVICH ET AL.*, *supra* note 34, at 110–113 (discussing jury selection in Ontario when the accused is Black).

likely to be—his personality, beliefs, prejudices, likes or dislikes.”¹⁷⁶ As a result, the challenge procedure involves a brief, structured questioning of the prospective juror by the lawyer invoking the challenge,¹⁷⁷ typically the defense lawyer, with the potential jury panel usually removed from the courtroom while prospective jurors are called in individually and questioned.¹⁷⁸ Ordinarily, the questions put to jurors are limited in number, frequently only one or two in number, and take a forced choice response format, requiring only yes or no answers.¹⁷⁹ Usually the questions are written out in advance and approved by the judge. Foremost, the questions must directly address the juror’s state of mind.¹⁸⁰

Also unique to Canada—and in contrast to the American voir dire procedure where the judge renders the decision on the prospective juror’s impartiality—this determination is made by persons from the jury panel who are called “triers.”¹⁸¹ Two individuals from the panel are randomly selected as triers to begin the process.¹⁸² A third person is randomly called from the assembled jury panel, put under oath and presented with the challenge questions that the judge has approved. The two triers then confer as a sort of mini-jury on whether the questioned juror is impartial.¹⁸³ If they decide that he or she is not impartial that person is excused and a fourth juror is called etc. After a first juror is deemed impartial (and has survived peremptory challenges by the prosecution or defense which is exercised after the judgment of impartiality) the sworn juror becomes the first member of the actual jury. One of the two original triers is then excused, and the second trier, along with Juror No.1 assesses the impartiality of prospective jurors until Juror No. 2 is selected, after which the other original trier is

176. *Hubbert v. R.*, [1975] 39 C.C.C. 2d 279, para. 24 (Ont. C.A.); see GRANGER, *supra* note 16, at 181–86; TANOVICH ET AL., *supra* note 34, at 147–50. In most cases, judges have held that it is inappropriate to ask jurors whether they are members of a particular race or class of society, about their personal experiences such as whether the juror or a member of the juror’s family has been the victim of an offense, and what the prospective juror’s beliefs are, including whether they belong to any groups, such as a victim support group, or fraternize with particular ethnic or racial groups.

177. In some jurisdictions, it is the judge who questions the jurors, for example, this common practice in the province of Alberta. See Alberta Rules of Court Project, *Criminal Jury Trials: Challenge for Cause Procedures*. Consultation Memorandum no. 12.20, para. 35 (April, 2007); P. J. Royal Q. C., *Jury Selection – Challenge for Cause: A Case Study*, presented at the Criminal Trial Lawyers’ Association Short Snappers Seminar, Edmonton, October 22, 2005.

178. See Neil Vidmar, *Generic Prejudice and the Presumption of Guilt in Sex Abuse Trials*, 21 LAW & HUM. BEHAV. 5, 9 (1997).

179. *Id.*

180. See *id.*

181. See *id.* at 8–9; Neil Vidmar & Regina Schuller, *The Jury: Selection Of Twelve Impartial Peers*, in INTRODUCTION TO L. AND PSYCHOL.: CANADIAN PERSPECTIVES 126, 146–148 (Regina A. Schuller and James R. P. Ogloff eds., 2001).

182. Vidmar, *supra* note 188, at 9.

183. Vidmar, *supra* note 188, at 9.

excused. This process then continues with Jurors 1 and 2 assessing impartiality for the selection of Juror No. 3.¹⁸⁴ Then, Jurors 2 and 3 assess impartiality to select Juror No. 4, and so on until 12 jurors are impaneled.¹⁸⁵ Thus through this rotating process the final jury is a jury composed of persons who have been deemed impartial by two of their fellow jurors. Ordinarily, as noted earlier, the jury panel is removed from the courtroom for the process on the theory that observing the questioning may affect how prospective jurors respond, but this decision is left to the judge and, on the grounds of efficiency, in some cases the panel remains in the courtroom for the selection procedure.¹⁸⁶

In the early 1990s, the potential for racial bias in trials involving Black defendants was explicitly acknowledged in *R. v. Parks*,¹⁸⁷ and since this time lawyers have been permitted to question prospective jurors in trials involving not only Black accused but also other visible minority defendants.¹⁸⁸ The format of this questioning has been very restrictive, however, with the focus solely on the potential for the *expression of bias* in jurors' decisions.

In *R. v. Parks*, the leading authority on the issue, the jurors were asked:

As the judge will tell you, in deciding whether or not the prosecution has proven the charge against an accused a juror must judge the evidence of the witnesses without bias, prejudice or partiality:

In spite of the judge's direction would your ability to judge witnesses without bias, prejudice or partiality be affected by the fact that there are people involved in cocaine and other drugs?¹⁸⁹

Would your ability to judge the evidence in the case without bias, prejudice or partiality be affected by the fact that the person charged is a black Jamaican immigrant and the deceased is a white man?¹⁹⁰

184. TANOVICH ET AL., *supra* note 35, at 164.

185. See TANOVICH ET AL., *supra*, note 34. The history of this procedure in Canada has not been explored, but it undoubtedly comes directly from English law. See JAMES KENNEDY, A TREATISE ON THE LAW AND PRACTICE OF JURIES 90 (1826); Nancy King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CH. I. REV. 433, 467–73 (1998) (documenting the existence of triers in colonial and post-colonial America).

186. For a description of challenge for cause in another case and an assessment of its effectiveness, see generally Vidmar & Melnitzer, *supra* note 174. The authors describe the challenge for cause process as carried out in a child killing trial in which the whole panel remained in the courtroom during the challenge process. *Id.* at 494–511.

187. *R. v. Parks*, [1993] 84 C.C.C. 3d 353, para 22 (Can. Ont. C.A.).

188. *R. v. Williams*, [1998] 1 S.C.R. 1128 at para. 1–2 (Can.).

189. *Parks*, 84 C.C.C. 3d 353 at para. 16.

190. *Id.* at para. 16. The judge was ruled in error for having refused this question. *Id.* at 16–18, 92–93.

In what has been referred to as an “Ontario Court of Appeal quartet” by the Supreme Court of Canada in *R. v. Spence*,¹⁹¹ Ontario courts have ruled that the *Parks* question should be permitted in any trial in Ontario where the accused is black (*R. v. Wilson*)¹⁹² or where the accused is a member of any visible non-Caucasian minority, without the formal proof of community prejudice required to do so (*R. v. Koh*).¹⁹³ In *R. v. Campbell*,¹⁹⁴ the fourth in the quartet, the accused, a black man, was charged with sexually assaulting a sixteen-year-old white woman. Although the trial court judge permitted the defense to ask the *Parks* question, he refused to include any reference in the question to the fact that the complainant was white.¹⁹⁵ On appeal, the Ontario Court of Appeal held that the trial judge had erred by failing to permit the defense “to inquire into the critical concern of partiality that may flow solely from the interracial nature of the offence.”¹⁹⁶

In a more recent case, the Supreme Court again considered the issue of the interracial mix of the accused/victim in the challenge question, in this case a Black man convicted of robbing an East Indian man.¹⁹⁷ Like *R. v. Campbell*, the trial court judge had permitted the defense to challenge jurors for cause on the grounds of a potential bias against a Black accused but refused to permit the challenge to include the race of the victim.¹⁹⁸ On appeal, the Ontario Court set aside the conviction, ruling that the accused was entitled to include the interracial nature of the crime in the question.¹⁹⁹ When the decision was appealed, however, the Supreme Court of Canada restored the conviction holding that it was within the trial judge’s discretion whether to permit the inclusion of the interracial nature of the crime and that the defense in this case had failed to show an “air of reality” to the assertion that the victim’s East Indian origin had the potential of aggravating jurors’ prejudice against a black accused.²⁰⁰

191. See *R. v. Spence*, [2005] 3 S.C.R. 458, para. 27 (Can.).

192. *R. v. Wilson*, [1996] 107 C.C.C. 3d 86, para. 21 (Can. Ont. C.A.).

193. *R. v. Koh*, [1998] 131 C.C.C. 3d 257, para. 30 (Can. Ont. C.A.). The court, in *R. v. Koh*, a case involving charges of narcotics trafficking, the Ontario Court of Appeal stated that racism was not unique or indigenous against blacks and extended the challenge to a person of Asian/Chinese origin. In its ruling it stated that “in spite of the absence of compelling evidence in support of *Sherratt* threshold test, it is not to be doubted that racist sentiment against persons of Chinese origin is present . . . and in sufficient numbers to raise serious concerns.” *Id.* at para. 25. The court went further ruling that “the same would apply to all visible non-Caucasian minorities.” *Id.* at para. 30.

194. *R. v. Campbell*, [1999] 139 C.C.C. 3d 258, para. 2.

195. *Id.* at para. 3.

196. *Id.* at para. 7.

197. *R. v. Spence*, [2005] 3 S.C.R. 458, para. 1 (Can.).

198. *Id.*

199. *Id.* at para. 17.

200. *Id.* at para. 72. In *R. v. Spence*, the accused, complainant, principal witnesses and jurors were not all of the same race. *Id.* at para. 1. The Supreme Court held that “it was within the discretion of the

The reasoning of the *Parks* decision was subsequently extended in British Columbia in the case of an aboriginal man facing charges of robbery of a white employee of a pizza store. In *R. v. Williams*, both the trial judge and the British Columbia Court of Appeal denied the motion for a challenge for cause.²⁰¹ While acknowledging that there was widespread prejudice against aboriginal people in the community, the judges asserted that there was no evidence of a nexus between prejudice and the ability of the jurors to decide the case impartially if the jurors were properly instructed by the trial judge.²⁰² The defense appealed, and in *R. v. Williams*, the Canadian Supreme Court, in a unanimous nine-zero decision, ruled that the challenge should have been allowed and directed a new trial.²⁰³ The Court recognized four basic types of potential prejudice, including racial prejudice,²⁰⁴ and their potential influences on jurors. Nevertheless, the decision still asserted the trial judge's discretion to decide the merits of challenges for cause on a case-by-case basis.²⁰⁵

Since its introduction to the courts, the challenge for cause procedure and question format has remained virtually unaltered. Most often the judge does not allow further exploration of the juror's reasoning behind the an-

trial judge to decline a challenge for cause targeting the "interracial element" of the crime. While the fact that the accused was black justified a challenge for cause on that basis, the additional fact that the [complainant] was of East Indian origin did not compound the prejudice and therefore did not need to be the subject of a separate inquiry to potential jurors." *Id.* at para. 41–42, 78.

201. *R. v. Williams*, [1998] 1 S.C.R. 1128, para. 5, 7 (Can.).

202. *Id.*

203. *Id.* at 59–60.

204. *Id.* at para. 10. In its decision, the court articulated 4 different forms of prejudice: 1) *Interest prejudice*, sometimes also called manifest or "obvious" prejudice, involves jurors who may have a direct stake in the trial outcome or at least whose presence would appear to be unfair to one of the parties, 2) *Specific prejudice*, exists when the juror holds attitudes or beliefs about the specific case at trial that would prevent him or her from deciding guilt or innocence with an impartial mind. These attitudes and beliefs could arise from personal knowledge about the case, pre-trial publicity through the media, or discussion and rumor about the case through social networks within the community (which now also includes online networks), 3) *generic*, or general, *prejudice* stems not from jurors' beliefs or knowledge about the specific case, but rather the application of preexisting attitudes or beliefs jurors may hold about the crime committed or its participants (e.g., accused, victim/complainant) that interfere with their ability to be fair and impartial. As contrasted to *specific prejudice*, knowledge about the case or the particular identities of the trial participants is immaterial. Rather, it is the perceived characteristics of the parties or the crime itself that may prevent the juror from deciding the case without bias (e.g., the accused is judged on the basis of his or her identity as a member of a group, rather than on the specific facts brought out in the trial evidence), and finally 4) *conformity prejudice* exists when the juror perceives that there is such strong community interest in a particular outcome of a trial that he or she is influenced in reaching a verdict consistent with perceived community feeling and sentiment rather than through an impartial evaluation of the trial evidence. The language and reasoning in *Williams* was taken directly from an amicus brief by the second author of this article, and that in turn was based on Neil Vidmar, *Case Studies of Pre-and Midtrial Prejudice in Criminal and Civil Litigation*, 26 LAW & HUM. BEHAV. 73, 76–82 (2002).

205. *Williams*, 1 S.C.R. at 1128, para. 30.

swer and the triers make their decision based on the prospective juror's yes or no response as to whether he or she can be fair and impartial. As Tanovich notes, "*R. v. Parks* stands out as one of the most significant Charter race cases," and the cases that followed it have clearly established that Aboriginal accused and other accused who may be stigmatized by forms of racial or ethnic prejudice are entitled to challenge prospective jurors for bias, but as the discussion that follows suggests, "the limited questioning allowed in challenge for cause renders it an imperfect device for ferreting out prejudice."²⁰⁶

Motions by defense lawyers to expand the scope of the standard *Parks* question format have been proffered but have been unsuccessful. In *R. v. Gayle*,²⁰⁷ the defense attempted to ask prospective jurors a series of questions that touched upon their general attitudes towards Blacks (e.g., "Would you agree or disagree that some races are, by their nature, more violent than others?"), as well as their assessments of the impact such attitudes would have on their behavior (e.g., "Would your ability to judge the evidence . . . without bias, prejudice or partiality, be affected by the fact that the person charged is a Black Jamaican immigrant and the victims are White police officers?"), arguing that the expansion of the questioning would better equip "the triers to determine both attitudinal and behavioural partiality."²⁰⁸ This separation was adopted for the questioning that occurred relating to the pretrial publicity and association with the police that surrounded the case.²⁰⁹ Drawing on *Parks* and *Williams*, however, the appellate court held that although "there are two discrete aspects of partiality to be addressed by the triers, I do not read them as *requiring* discrete questions on each aspect of partiality."²¹⁰ In short, the single rolled up question was deemed sufficient.²¹¹ It is worth noting, however, that in its decision the court stated,

206. Its utility hampered "by the failure of the courts to permit a more sophisticated manner of questioning. TANOVICH, *supra* note 34, at 683.

207. *R v. Gayle*, [2001] 54 O.R. 3d 36 (Can. Ont. C.A.).

208. *Gayle*, 54 O.R. 3d 36 at para. 11, 15. In a Québec case, *R. v. Mankwe*, similar questions were proposed (e.g., 'Do you believe that black persons commit more crimes in Canada than persons of other races? Do you believe that black persons have a greater tendency to lie than persons of other races?') but not permitted, with this decision upheld by the Québec Court of Appeal. [1997] 12 C.R. 5th 273. This latter decision was appealed to Supreme Court of Canada, and allowing the appeal, the Court ordered a new trial. *R v. Mankwe*, [2001] 3 S.C.R. 3, para. 1 (Can.).

209. *Gayle*, 54 O.R.3d at para 10.

210. *Id.* at para 18. Two defense expert witnesses argued the utility of the separation in the inquiry, while an opposing expert argued for the rolled up question format. *Id.* at para.24, 27.

211. *Id.* at para. 33.

It may well be that with the benefit of experience and the help of expert analysis on how best to uncover and assess racial bias, the challenge for cause process can be improved over time.²¹²

Most recently, in *R. v. Douse*, the defense once again attempted to augment the *Parks* procedure with additional questions and to separate the *Parks* question into two parts.²¹³ As in the *Gayle* decision, the trial judge was not persuaded that the question should be broken into two parts, reaching this conclusion on the grounds that it resulted in a “realistic potential to have challenges for cause determined on the basis of prejudice and not partiality.”²¹⁴

Some more limited alterations have now been accepted in Ontario. In *Douse*²¹⁵ and cases that have followed it (*R. v. Joseph & Parris*)²¹⁶ prospective jurors, once sworn in, were provided with a written copy of the question²¹⁷ and a response format that utilized a four choice response format:

Which answer most accurately reflects your answer to that question:

- (a) I would not be able to judge this case fairly
- (b) I might be able to judge this case fairly
- (c) I would be able to judge this case fairly
- (d) I do not know if I would be able to judge this case fairly.²¹⁸

Although the challenge procedure as it pertains to racial bias has been in place for some time, research assessing its efficacy has been sparse. Theorizing and research on prejudice and discrimination would suggest that the efficacy of the procedure in terms of weeding out prejudiced jurors may be questionable. As a number of psychological studies indicate, awareness of one’s general biases and their potential impact, even at the best of times, is no simple matter.²¹⁹ Recent affective forecasting studies demonstrate that in general people are often ignorant as to how they will respond to actual

212. *Id.* at para. 34.

213. *R. v. Douse*, [2009] 246 C.C.C.3d 227, para. 4 (Can. Ont.).

214. *Id.* at para. 224.

215. *Id.* at para. 281.

216. *Regina v. Joseph and Parris* [2009], Court file No. CR-08-00002909-0000.

217. “As the judge will tell you, in deciding whether or not the prosecution has proven the charge against an accused, a juror must judge the evidence of the witnesses without bias, prejudice, or partiality. Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the people charged are black?” *Regina v. Joseph and Parris*, Court file No. CR-08-00002909-0000, August 21, 2009.

218. *Id.*

219. Richard E. Nisbett & Timothy D. Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231, 233 (1977).

situations and are often woefully wrong in their beliefs about the impact of various cues and social categories on their emotional and behavioral responses.²²⁰ More specifically, research related to aversive racism suggests that people may be unaware of existing biases and often maintain that they are personally fair and egalitarian,²²¹ with research demonstrating that, while many people do not believe that they themselves are biased against Blacks, there is strong empirical evidence to suggest otherwise.²²² Furthermore, even if people are able to identify the possibility that they may be biased against Blacks, they may not fully understand how and to what extent biases can affect their decisions or may not correct for their partiality if they lack the motivation or cognitive capacity to counteract these attitudes.²²³

Schuller recently conducted an in-depth examination of the actual jury selection proceedings of seventeen Ontario criminal cases in which the challenge was invoked.²²⁴ Using trial records of the actual selection phase of the trial, it was found that, consistent with simulation research, a minority of prospective jurors responded in the affirmative to the challenge question (ranging from zero to fourteen percent across the seventeen cases).²²⁵ The percentage of prospective jurors who were deemed 'unacceptable' by the triers, however, far exceeded jurors' self reported disclosures of partiality (nine to thirty-four percent across the cases),²²⁶ suggesting that the triers appear to be basing their decisions on other factors than just potential racial bias. Just what those factors are remain unclear, but preliminary analyses suggest that general cues indicative of uncertainty or comprehension may play a role. For instance, any hesitation on the part of the prospective juror

220. See e.g., Kerry Kawakami et al., *Mispredicting Affective and Behavioral Responses to Racism*, 323 *SCIENCE* 276, 276 (2009) (although research participants predicted they would be upset by a racist act, they showed little emotional distress).

221. For instance, Johnson et al. found that although White mock jurors in a simulation study were more influenced by incriminating inadmissible evidence when a defendant was Black (as opposed to White), they reported feeling less affected by the inadmissible evidence than participants in a White defendant inadmissible condition. J. D. Johnson et al., *Justice is Still Not Colorblind: Differential Racial Effects of Exposure to Inadmissible Evidence*, 21 *PERSONALITY & SOC. PSYCHOL. BULL.* 893, 896 (1995).

222. *Id.*

223. See generally Duane T. Wegener & Richard E. Petty, *The Flexible Correction Model: The Role of Naïve Theories of Bias in Bias Correction*, in 29 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 141–208 (M. P. Zanna ed. 1997).

224. Regina A. Schuller, *The Canadian Criminal Jury: Issues of Partiality*, 4th Int'l Congress of Psychol. and L., Miami, Fla. Mar. 3–6 (2011).

225. *Id.*

226. *Id.*

in his/her response, or expressed difficulty with the language, typically resulted in the triers finding the juror “unacceptable.”²²⁷

In addition to the question of whether or not the current challenge for cause procedure can successfully identify individuals who would likely demonstrate bias, Schuller and her colleagues in a simulation study examined the impact of the procedure on the decisions of those who survived the screening of partiality.²²⁸ While some suggest that the procedure may enhance the jurors’ ability to remain impartial, a claim asserted in *Parks*²²⁹ and echoed in subsequent decisions,²³⁰ it was found that, consistent with some of the social psychological research and theorizing, participation in the challenge process did not reduce their expression of bias. A more reflective strategy that permitted the mock jurors to first consider *how* race might impact their assessments, however, did demonstrate a reduction in bias.²³¹ In short, while the yes or no format of the challenge question did little to ameliorate racial bias, a more reflective pre-trial questioning format appeared to hold considerable promise.²³²

It is reasonable to conclude that the challenge for cause is a procedural remedy that is in a state of change and development. Although the various appeal court decisions have stated that the law as defined in *Hubbert* has not changed, the empirical result in Ontario has been a substantial expansion of the right to challenge for cause, accompanied with a partial retrenchment regarding sexual offense-based challenges.²³³ The *Parks* case and

227. Schuller, *supra* note 224; *see also* R. v. Douse, [2009] 246 C.C.C.3d 227, para. 125–137 (Can. Ont. C.A.) (Jonathon Freedman, a social psychologist, reported on similar results when he provided testimony in *R. v. Douce*).

228. Regina A. Schuller, Veronica Kazoleas, & Kerry Kawakami, *The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom*, 33 LAW & HUM. BEHAV. 320, 324 (2009); Schuller, *supra* note 224.

229. R. v. Parks, [1993], 84 C.C.C. (3d) 353, para. 92 (Can. Ont. C.A.).

230. R. v. Koh, [1998], 131 C.C.C. (3d) 257, para. 44 (Can. Ont. C.A.).

231. Schuller, *supra* note 228.

232. Similar results have been found by Samuel R. Sommers, *On Racial Diversity and Group Decision-Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 609–10 (2006). In a juror simulation study conducted by Sommers, mock jurors who participated in a race relevant voir dire designed to induce participants to think about their racial attitudes and how these might affect their overall reactions to the trial, in comparison to participants who received race neutral pre-trial questioning, were less likely to find a Black accused guilty. *Id.* The court in the *Douse* decision also noted the potential merits of letting jurors know the question earlier, thus allowing the prospective jurors time to reflect upon how racial attitudes might influence their treatment of the evidence. R. v. Douse, [2009] 246 C.C.C.3d 227, para. 82 (Can. Ont. C.A.).

233. In *R. v. Find*, a case involving charges of sexual offences involving children, the Supreme Court established that demonstrating partiality on the basis of the nature of the crime will be difficult. Although not suggesting that “an accused can never be prejudiced by the mere fact of the nature and circumstances of the charges[,]” the court stated that in the case of offence-based bias, establishing “the

its progeny and the *Williams* decision are at once recognition of changing social conditions in Canada and an attempt to provide a remedy to foster the legal goal of a fair trial and public perceptions of fairness.

VII. CROWN APPEAL OF AN ACQUITTAL

It would be remiss to fail to mention a striking feature of Canadian law. While the Charter gives great weight to the presumption of innocence, the Crown does have a limited right to appeal a jury acquittal. The *Code* provides that the Attorney General has the right to appeal a verdict of acquittal or a verdict of not criminally responsible on account of mental disorder.²³⁴ The ground for an appeal must involve an issue of law,²³⁵ such as a claim that the jury was not properly instructed on the law. This limitation on double jeopardy requires a thorough review by appeal courts, but on occasion the Crown has been successful in obtaining a new trial. In 1986, in a highly publicized case, Guy Paul Morin was found not guilty of the murder of nine-year-old Christine Jessup.²³⁶ His primary defense was an alibi defense, but this was complicated by psychiatric testimony that Morin was suffering from severe schizophrenia such that if he did commit the crime, he would not have appreciated the nature and quality of the act.²³⁷ The Ontario Attorney General filed an appeal on the grounds that the judge misdirected the jury on reasonable doubt and that it had been improperly instructed about Morin's psychiatric condition.²³⁸ The Ontario Court of Appeal reversed the verdict and ordered a new trial.²³⁹ The Supreme Court of Canada upheld the reversal with respect to the reasonable doubt instruction.²⁴⁰ In his second trial, the issue of schizophrenia was abandoned but the alibi defense was expanded.²⁴¹ Despite new evidence of serious police misbehavior, unreliable witnesses, and demonstration of unreliable forensic conclusions regarding hair and fiber samples, after nine months of trial testimony, the jury found Morin guilty of first-degree murder following a

circumstances in which it is found to be both widespread in the community and resistant to the safeguards of trial may prove exceptional." [2001] 1 S.C.R. 863, at para. 108 (Can. Ont.).

234. See Canada Criminal Code, R. S. C. 1985, c. C-46, § 676.

235. *Id.*

236. See *R. v. Morin*, [1987] 36 C. C. C. 3d 50 (Ont. C.A.) For a synopsis of the Morin case from beginning to end, see Jack King, *The Ordeal of Guy Paul Morin: Canada Copes with Systemic Injustice*, CHAMPION, Aug. 1998, 8, available at www.nacdl.org/public.nsf/freeform/championmag?OpenDocument.

237. *Id.*

238. *Id.*

239. See *R. v. Morin*, [1988] 2 S.C.R. 345, para. 9 (Can.).

240. See *id.* at para. 84.

241. *R. v. Morin*, 1992 Carswell Ont. 1779 (WL Can) (Ont. Gen Div).

week of deliberations.²⁴² Morin appealed, but while the appeal was pending DNA evidence that had not been available during the first two trials eliminated Morin as the killer and his conviction was set aside.²⁴³ A subsequent public inquiry into justice system failures resulted in the lengthy 1998 Kaufman Report that made many recommendations regarding criminal procedure and the jury system.²⁴⁴

The Morin case followed by more than two decades a change in Canadian Law, known as the Morgentaler Amendment,²⁴⁵ that had allowed an appeals court to actually substitute a verdict of guilty despite a jury finding of not guilty. The *Code* now only allows ordering a new trial based on matters of law.²⁴⁶ The jury is the sole interpreter of the facts. Nevertheless, even with these restrictions, section 676, as Morin demonstrates, is another judicial constraint on the jury.

VIII. RECENT DEVELOPMENTS REGARDING SCIENTIFIC EVIDENCE

As in the United States, the Canadian courts continue to grapple with issues of reliability, utility, and admissibility of expert evidence.²⁴⁷ The concerns have focused around both forensic evidence from the natural sciences such as DNA tests, fiber samples, and explosive residue, as well as expert evidence that falls more squarely within the domain of the behavioral sciences (e.g., evidence such as Battered Woman Syndrome, Child Sexual Abuse Accommodation Syndrome,” reliability of eyewitness

242. *Id.* at 12.

243. *R v. Morin* 37 C.R. (4th) 395 (Ont C.A.).

244. HON. FRED KAUFMAN, REPORT OF THE KAUFMAN COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN (1998), available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/>. To date no formal legal response to this report has been made.

245. See generally F.L. MORTON, MORGENTALER V. BOROWSKI: ABORTION, THE CHARTER AND THE COURTS (1992). Morgentaler, a doctor crusading for abortion rights, was found not guilty of performing an abortion after admitting to all of the elements of the charge but arguing an affirmative defense of necessity. *Id.* at 50–51, 54. The Quebec Court of Appeal overturned the jury acquittal and substituted a conviction, based on the trial evidence. *Id.* at 59. However, the public outcry caused parliament to amend the *Criminal Code* in 1975 so that while an acquittal can still be appealed, the court can only order a new trial. *Id.* at 82. The details of the trial, appeal and change in law are described in F.L. MORTON, MORGENTALER V. BOROWSKI: ABORTION, THE CHARTER AND THE COURTS (1995).

246. See Canada Criminal Code, R.S.C. 1985, c. C-46, § 676.

247. See ALAN D. GOLD, EXPERT EVIDENCE IN CRIMINAL LAW: THE SCIENTIFIC APPROACH, 33–36 (Irwin Law Inc. 2003); P. Brad Limpert, *Beyond the Rule in Mohan: A New Model for Assessing the Reliability of Scientific Evidence*, 54 U. TORONTO FAC. L. REV. 65 (1996); David M. Paciocco, Expert Evidence: Where Are We Now? Where Are We Going? (June 31, 1998) (unpublished manuscript presented at Canadian Bar Association 1998 Institute of Continuing Legal Education) (on file with author).

identification, and other social science evidence).²⁴⁸ Issues have been raised about the validity and reliability of some of the expert evidence and upon its impact on the jury.²⁴⁹

Roughly similar to the U.S. cases of *Daubert v. Merrell Dow Pharmaceutical Inc.*²⁵⁰ and *General Electric Co. v. Joiner*,²⁵¹ in *R. v. Mohan*,²⁵² the “first major post-Daubert Canadian precedent on expert opinion evidence,” the Supreme Court of Canada “clearly restated and updated” a number of criteria for determining the “admissibility of expert evidence in at least the spirit of *Daubert*.”²⁵³ The court held that evidence offered by an expert not only must logically relate to a fact in issue, but also must meet a threshold of reliability beyond the qualification of the expert providing the testimony.²⁵⁴ Adopting a similar approach to *Daubert*, the court delineated a four-prong test for determining the admissibility of expert evidence: relevance, necessity (whether the expert will provide information that is likely to be outside the ordinary experience and knowledge of the trier of fact), absence of an exclusionary rule, and a qualified expert.²⁵⁵ Additionally, when the testimony engages a novel scientific theory or technique, it should be subject to special scrutiny.²⁵⁶

Chronicling the cases that followed the *Mohan* decision,²⁵⁷ Alan Young notes the Supreme Court’s explicit reference to *Daubert* as a relevant authority in *R. v. J-L.J.*,²⁵⁸ a case in which the courts explicitly articulated many of the same factors used in *Daubert* for assessing the admissibility of expert evidence.²⁵⁹ *Mohan*, as is evident in the cases that followed, was intended to draw the judge’s attention to his or her responsibility to screen expert evidence allowed in court. An important goal of the *Mohan* decision was to prevent juries from being influenced by unreliable expert evidence while still permitting new and novel evidence if deemed relevant.²⁶⁰ Exercising the role of “gate keeper,” the court ruled that expert

248. See Paciocco, *supra* note 167, at 14; GOLD, *supra* note 247.

249. *Id.*

250. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

251. *Gen. Electric Co. v. Joiner*, 522 U.S. 135 (1997).

252. *R. v. Mohan*, [1994] 2 S.C.R. 9 (Can.).

253. See GOLD, *supra* note 247, at 35, 45.

254. *Mohan*, 2 S.C.R. 9.

255. *Id.*

256. *Id.* at 21.

257. *Id.*

258. *R. v. J-L.J.*, [2000] 2 S.C.R. 600, para. 33 (Can.).

259. See Gold, *supra* note 247, at 23 (“[T]he U.S. Supreme Court expressly adopted the scientific method as the standard for all opinion evidence in U.S. federal courts, and this has now essentially been echoed by the Supreme Court of Canada in *R. v. J-L.J.*”).

260. See Paciocco, *supra* note 167, at 8–15.

opinion evidence about Child Sexual Abuse Accommodation Syndrome was inadmissible in *R. v. Olscamp*.²⁶¹ In other cases, expert testimony that failed to meet the criterion of necessity has been ruled inadmissible, for instance, in the case of expert evidence bearing on eyewitness reliability,²⁶² and in a sexual abuse case, on testimony bearing on the delay of a child's disclosure of the abuse.²⁶³ However, as commentators have pointed out, Canadian courts have been inconsistent in applying the *Mohan* criteria from case to case.²⁶⁴ Thus, *Mohan* set the stage for a control on what juries see and hear, but systematic application of these controls is still in its developmental stage.

In a recent decision, *R. v. Abbey*, the Ontario Court of Appeal overturned a jury acquittal on a first degree murder charge on the grounds that the trial judge had erred in excluding expert opinion testimony from a sociologist with expertise in youth gang culture that was to be proffered on behalf of the prosecution.²⁶⁵ Specifically, based on his knowledge of street gang membership and culture, the expert was to testify regarding the meaning of a 'teardrop' tattoo inscribed on the face of young gang members (the defendant also had such a tattoo), with one of the possibilities being that the individual had killed a rival gang member.²⁶⁶ Questioning the reliability of the expert testimony, however, the trial court judge excluded the testimony.²⁶⁷ The Crown appealed the decision.²⁶⁸ Broadening the scope of expert evidence in its decision, Appellate court Justice David Doherty opined that

Scientific validity is not a condition precedent to the admissibility of expert opinion evidence. Most expert evidence routinely heard and acted upon in the courts cannot be scientifically validated. For example, psychiatrists testify to the existence of various mental states, doctors testify as to the cause of an injury or death . . . these experts do not support their opinions by reference to error rates, random sampling or the replication of test results. Rather, they refer to specialized knowledge gained

261. *R. v. Olscamp*, [1994] 35 C.R. 4th 37, para. 34 (Can. Ont. Gen. Div.).

262. *R. v. McIntosh*, [1997] 35 O. R.3d 97, para. 14 (Can. Ont. C.A.).

263. *R. v. D.D.*, [2000] 2 S.C.R. 275, para. 70 (Can.) (A ten-year old complainant delayed two and a half years before disclosing the abuse. The expert witness, a child psychologist was to testify that the delay in disclosure was not indicative of truth. The court ruled that "the content of the expert evidence . . . was not unique or scientifically puzzling but was rather the proper subject for a simple jury instruction.").

264. See Limpert, *supra* note 247, at 83; David E. Bernstein, *Junk Science in the United States and the Commonwealth*, 21 YALE J. INT'L L. 123, 148 (1996).

265. *R. v. Abbey*, [2009] 97 O.R. 3d 330, at para. 174 (Ont. C.A.).

266. *Id.* at para. 29.

267. *Id.* at para. 55.

268. *Id.* at para. 1.

through experience and specialized training in the relevant field. To test the reliability of the opinion of these experts . . . using reliability factors referable to scientific validity is to attempt to place the proverbial square peg into the round hole.²⁶⁹

As the defendant has the right to now appeal the reversal of his acquittal, the Supreme Court may soon step in to further delineate the proper scope of expert opinion evidence.

Questions are also being raised about evidence derived from the natural sciences. These issues came to a head with a series of tragic wrongful convictions in which the most compelling piece of evidence supporting the prosecution's case involved seriously flawed testimony of a Dr. Charles Smith, a now discredited Ontario Pathologist.²⁷⁰ Throughout the late 80s and 90s, Dr. Smith was viewed as one of Canada's leading experts in pediatric forensic pathology and the leading expert in Ontario.²⁷¹ In 2005, however, the Chief Coroner of Ontario called for a full review of Dr. Smith's work in "criminally suspicious cases and homicides in the 1990s."²⁷² The results of the review found that in "20 of the 45 cases, the reviewers took issue with Dr. Smith's opinion in either his report or his testimony, or both" (12 of these cases had resulted in verdicts of guilt).²⁷³ This uncovered a string of wrongful convictions²⁷⁴ and culminated in the Goudge Inquiry, conducted by Justice Stephan Goudge of the Ontario Court of Appeal.²⁷⁵ Its mandate involved two tasks: (1) to determine "what went so badly wrong," and (2) to provide recommendations "to restore and

269. *Id.* at para. 109.

270. See STEPHEN T. GOUDGE, INQUIRY INTO PEDIATRIC PATHOLOGY IN ONTARIO: REPORT, VOL. 1: EXECUTIVE SUMMARY 5 (Toronto: Ontario Minister of the Attorney General, 2008), available at <http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report/index.html>.

271. *Id.* at 6.

272. *Id.* at 7.

273. *Id.*

274. Among these was the case of Williams Mullins-Johnson, an Ontario man who spent twelve years in prison for the rape and murder of his four year old niece, whose death was later attributed to natural causes. STEPHEN T. GOUDGE, INQUIRY INTO PEDIATRIC PATHOLOGY IN ONTARIO: REPORT, VOL. 2: SYSTEMIC REVIEW 27, 30-32 (Toronto: Ontario Minister of the Attorney General, 2008). In overturning Mullins-Johnson's conviction, the Court of Appeal found there was no evidence he was guilty of any crime. *Id.* at 120. Mullins-Johnson was awarded \$4.25 million in compensation. The Canadian Press, *Mullins-Johnson awarded \$4.25M for wrongful conviction*, CTV TORONTO (Oct. 21, 2010), available at <http://toronto.ctv.ca/servlet/an/local/CTVNews/20101021/wrongful-conviction-compensation-101021/20101021/?hub=TorontoNewHome> (last visited Feb. 18, 2011). He is but one of several people who were wrongly accused of killing children based on the flawed evidence from Dr. Charles Smith. See GOUDGE, *supra* note 270, at 5-7.

275. See GOUDGE, *supra* note 270, at 3-8; Hon. Justice Stephen T. Goudge—Biography, INQUIRY INTO PEDIATRIC FORENSIC PATHOLOGY IN ONTARIO, <http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/commissioner/index.html> (last visited Feb. 18, 2011).

enhance public confidence in pediatric forensic pathology” that will ensure such miscarriages of justice never happen again.²⁷⁶ In October 2008, the over 1000 page report was released, with sweeping recommendations made, and legislation passed to create more checks and balances in death investigations.²⁷⁷

IX. ABORIGINAL PEOPLES AND THE JURY SYSTEM.

The Inuit, or Eskimo people, as they were then known, were first introduced to the Canadian jury system in 1917 in what Edwin Keedy, who was present at the proceedings, aptly labeled a “remarkable murder trial.”²⁷⁸ Two priests working among the Inuit people, who were still largely isolated from Western culture, went missing.²⁷⁹ After a long hunt throughout the region, a party of the Northwest Mounted Police (later the Royal Canadian Mounted Police) uncovered the fact that two Inuit men, Sinisiak and Uluksak, had killed the priests near the Coppermine River.²⁸⁰ The two Inuit admitted the acts, and they were transported two thousand miles south to Edmonton, Alberta, along with two interpreters and an elderly Inuit who was to be a witness.²⁸¹

Sinisiak was appointed legal counsel, and the Chief Justice of the Supreme Court of Alberta conducted his trial for murder of one of the priests.²⁸² Although the trial took place in summer, in the first stage the two Inuit men were dressed in their native dress, with a tub full of water and ice provided to soak their feet and help them stay cool.²⁸³ Through translators the men admitted the act of which they were accused, but gave detailed testimony indicating that the priests had abused them and, moreover, created in their minds a belief that the priests were possessed by spirits and were planning to kill them.²⁸⁴ In fact, the Inuit subsequently ate pieces of the priests’ liver as a protection against their evil spirits.²⁸⁵

276. *Id.* at 6.

277. See GOUDGE, *supra* note 270; GOUDGE, *supra* note 274. This resulted in a forensic pathology service, an oversight council and complaints committee, and improvements for training of forensic pathologists.

278. Edwin R. Keedy, *A Remarkable Murder Trial: Rex v. Sinnisiak*, 100 U. PA. L. REV. 48, 48 (1951).

279. *Id.* at 48–49.

280. *Id.* at 49.

281. *Id.* at 50.

282. *Id.* at 51.

283. *Id.* at 51–52.

284. *Id.* at 59–61.

285. *Id.* at 61.

At the close of the trial, the prosecution contended that the accused killed the priests for their rifles.²⁸⁶ Defense counsel argued that the Inuit should be judged by the standards of their own culture.²⁸⁷ The judge instructed the jury that a cultural defense must be rejected.²⁸⁸ He also told the jury that if Sinisiak was found guilty of murder, he would have no choice, under Canadian law, but to sentence him to death.²⁸⁹ However, the judge also stated that he would recommend clemency, which he was confident would be granted.²⁹⁰ After an hour of deliberation, the jury returned a verdict of not guilty.²⁹¹

The story did not end in Edmonton. Within six days the accused were moved two hundred miles south to Calgary, and both Inuit were tried for the death of the second priest.²⁹² After forty-five minutes of deliberation, the jury returned a verdict of guilty but with the strongest recommendation of mercy.²⁹³ Both men were sentenced to death by hanging, as required by law, but the Inuit were told that the sentence was deferred until the "Big Chief far away" could review it.²⁹⁴ On August 19, 1916, the death sentence was commuted to life in prison, and they were returned to the Arctic under custody of the Mounted Police and held first at Herschel Island and then at Great Slave Lake.²⁹⁵ In 1919, the two were released from custody and returned to their people.²⁹⁶ However, the order of release contained the requirement that they make known to others that:

Eskimos live and are governed under a system of law . . . with equality as against both white man, Indian and Eskimo[.] . . . [W]hile . . . these prisoners have been visited by a dispensation of mercy whereby their lives have been spared . . . these reasons are not likely to [prevail] on another occasion, either for them or for any other Eskimo, seeing that the proceedings in the present case have served to inform them of their responsibilities, and that they are solemnly charged with their duty to serve God and honour the King and carefully to observe his laws.²⁹⁷

286. *Id.* at 62.

287. *Id.*

288. *Id.* at 63.

289. *Id.* at 64.

290. *Id.*

291. *Id.*

292. *Id.* at 64–65.

293. *Id.*

294. *Id.* at 66.

295. *Id.* at 67.

296. *Id.*

297. *Id.*

Rex v. Sinisiak served as a seminal event in attempts to establish the rule of law through jury trial for aboriginal peoples living in Canada's arctic region, but a trial involving a roughly similar scenario was played out again as late as 1966 in the case of *R. v. Aiyaoot*.²⁹⁸ In an isolated hunting camp a small band of Inuit became stranded due to unusual weather conditions.²⁹⁹ Both shelter and food were scarce when Soosee, an unusually large and strong Inuit woman and the mother of Aiyaoot, began acting strangely, reported hearing spirits and attempted to kill her sleeping husband with a rock.³⁰⁰ The rest of the hunting party, frightened by her behavior, retreated to a small island where they could still observe her and the camp.³⁰¹ Soosee began to destroy the tents and remaining supplies.³⁰² Frightened by her behavior and the threat she posed to survival, the group concluded that she was possessed by evil spirits.³⁰³ After talking the situation over, the others sent her son and a nephew, Shooyook, back to the camp with loaded rifles in an attempt to placate her, but with a consensus view that if the attempt failed she should be killed.³⁰⁴ When Soosee began to attack the two men, she was shot and killed.³⁰⁵ The others returned to the camp and buried her according to traditional Inuit custom, placing the body on the hard permafrost and piling stones around and over the body.³⁰⁶

Several months later when a Royal Canadian Mounted Police plane landed near the camp to check on the health of the Inuit, the community reported what they had done.³⁰⁷ Because the killing was in violation of Canadian law, a murder trial was arranged in Spence Bay, two hundred miles to the south.³⁰⁸ In contrast to the *Sinisiak* trial, an attempt was made to include Inuit on the jury because of the apparent clash of cultures.³⁰⁹ The trouble was that the Inuit at Spence Bay who were also fluent in English

298. JACK SISSONS, *JUDGE OF THE FAR NORTH: THE MEMOIRS OF JACK SISSONS*, 181–86 (1986); W.G. MORROW, *NORTHERN JUSTICE: THE MEMOIRS OF MR. JUSTICE WILLIAM G. MORROW 65–72* (W.H. Morrow, ed. 1995) [hereinafter Morrow, *Northern Justice*]; W.G. Morrow, *A Survey of Jury Verdicts in the Northwest Territories*, 8 ALTA L. REV. 50, 51–52 (1970) [hereinafter Morrow, *Jury Verdicts*].

299. Morrow, *Northern Justice*, *supra* note 298, at 65.

300. *Id.* at 66.

301. Sissons, *supra* note 298, at 184.

302. *Id.*

303. *Id.* at 185.

304. *Id.* at 184–185.

305. *Id.* at 185.

306. Morrow, *Northern Justice*, *supra* note 298, at 66.

307. *Id.* at 66–67.

308. See Sissons, *supra* note 298, at 183.

309. See *id.* at 182–183.

had been recruited as interpreters for the trial.³¹⁰ Consequently, a plane was sent to recruit potential jurors from communities in the sparsely settled area; and after logging fifteen hundred miles, the plane returned with two Inuit who served on the six-person jury, which also included the first woman juror in the arctic region.³¹¹ The trial was marked by an understanding of the harsh circumstances faced by Aiyaoot and the other members of the hunting camp as well as Inuit cultural beliefs.³¹² The jury acquitted Aiyaoot but found Shooyook guilty of manslaughter.³¹³ The judge sentenced Shooyook to two years in prison but suspended the sentence, and Shooyook was reunited with his wife and children that evening.³¹⁴

Sinisiak and *Aiyaoot* help to illustrate attempts to provide and legitimate law among the Inuit and Indian tribal peoples living in isolated areas and holding cultural perspectives that were, and to a lesser degree still are, different than the rest of Canada.

In 1999, the Northwest Territories, encompassing an area of 1.3 million square miles and ranging over four time zones was divided into The Northwest Territories, with a population of approximately 44,000 persons and Nunavut with a population of approximately 34,000 persons; roughly eighty-five percent of Nunavut's population is composed of Inuit.³¹⁵ Approximately fifty-five percent of the Northwest Territories are composed of aboriginal peoples representing five different Indian, or Dene, tribes (Cree, Chipewayan, Dogrib, Slavely and Gwich'in), two Inuit subgroups (Inuit and Inuvialuit) and persons who identify themselves as Metis (persons of mixed Indian and European heritage).³¹⁶ In the Northwest Territories today Canadian law recognizes, in addition to English and French, seven different Dene languages and two dialects of the Inuit language.³¹⁷ Many of the communities are small, consisting of 500 persons or less.³¹⁸

In the first half of the twentieth century, the problems of isolation and sparse population groupings resulted in few jury trials. Rather, cases tended

310. *Id.* at 182.

311. Morrow, *Northern Justice*, *supra* note 298, at 68; Sissons, *supra* note 298, at 183.

312. See Sissons, *supra* note 298, at 181–182; Morrow, *Jury Verdicts*, *supra* note 298, at 51.

313. Morrow, *Northern Justice*, *supra* note 298, at 70; Sissons, *supra* note 298, at 186.

314. *Id.*

315. See NUNAVUT BUREAU OF STATISTICS, *Census Data*, <http://www.eia.gov.nu.ca/stats/census.html> (follow hyperlink “Nunavut Census population by region, community and Inuit identity, 1996, 2001, 2006 (4 tables)”) (last visited Feb. 3, 2011).

316. See STATISTICS CANADA, *Population by Selected Ethnic Origins, by Province and Territory (2006 Census) (Northwest Territories)*, <http://www40.statcan.gc.ca/101/cst01/demo26m-eng.htm> (last modified July 28, 2009).

317. J. Vertes, 17 COMMONWEALTH JUDICIAL JOURNAL 14 (2007).

318. *Id.*

to be tried by a judge or magistrate. However, with the establishment of the Territorial Court of the Northwest Territories in 1955, accused persons have increasingly exercised the right to jury trial.³¹⁹ In the first fourteen years of the Court, there was an average of five trials per year.³²⁰ The *Criminal Code* provided for six-person juries in the Northwest Territories because of the sparseness of population, and until 1965, women were prohibited from serving.³²¹ Additionally, an eligibility requirement for jury service was the ability to speak and understand English.³²² In consequence, between 1955 and 1968, despite the fact that aboriginal peoples were the accused in fifty-five percent of the cases, aboriginals served on only twenty-seven of the sixty-eight jury trials typically as only one of the six-member jury.³²³

In 1965, women were declared eligible to serve on juries, and in 1985 the six-person jury was declared unconstitutional.³²⁴ In 1988, The Legislative Assembly of the Northwest Territories amended the Jury Act to provide that an aboriginal unilingual person could serve as a juror.³²⁵ Between 1987 and 1991, an average of forty-seven jury trials took place per year.³²⁶ In 1998, the last year before the Northwest Territory was divided, there were eighty-three trials and sixty-five were in communities outside Yellowknife, the largest city.³²⁷

Christopher Gora conducted formal interviews with judges, lawyers, and other persons connected to the court process that revealed a number of problems with the implementation of jury trials.³²⁸ While every effort is made to keep the trial in the community in which the offense occurred, major problems have arisen in this regard.³²⁹ Sometimes the community is too small to obtain a jury, particularly when many of its members are related to the victim or the accused.³³⁰ Linguistic problems continue to be a

319. See *Morrow, Jury Verdicts*, *supra* note 298, at 50, 54–58.

320. See *id.* at 54–58; see also *Sissons*, *supra* note 298 at 181–86 (discussing the legal system in the Northwest Territories).

321. See *Sissons*, *supra* note 298 at 182; *Morrow, Jury Verdicts*, *supra* note 298, at 50.

322. See *Sissons*, *supra* note 298 at 182.

323. See *Morrow, Jury Verdicts*, *supra* note 298, at 50, 54–58. There were two all-native juries. *Id.* at 50.

324. See *R. v. Punch*, [1985] 22 C.C.C. 3d 289, para. 58–84 (N.W.T.S.C.).

325. See Christopher Gora, *Jury Trials in the Small Communities of the Northwest Territories*, 13 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 156, 162 (1993).

326. See *id.* at 157.

327. *Vertes*, *supra* note 317.

328. Gora, *supra* note 325, at 170–174.

329. *Id.* at 171–72.

330. *Id.*

source of difficulty because of the lack of trained interpreters.³³¹ In addition, local political struggles between families and ruling cliques can prevent the formation of a jury in that location.³³² Thus, a change of venue is required, bringing additional problems regarding preparation of the case and accessibility of witnesses. Many of Gora's respondents also noted a substantial trend toward acquittals, especially in comparison to trials before a judge alone.³³³ Additionally, there appears to be a greater reluctance to serve on juries than elsewhere in Canada.³³⁴ Both the acquittal rates and the reluctance to serve may reflect unwillingness to pass judgment on one's neighbor. However, it also appears to reflect a preference for community values and traditional cultural ways of handling deviance that are in conflict with the legal values and processes of the broader Canadian society.

Gora discussed a number of potential reforms that might ease the difficulties of jury trial in the Canadian North.³³⁵ These include simplifying the charge to make the language more accessible to the jurors and altering the configuration of the court to make it more similar to traditional community forums, allowing the community to select the jury pool, and allowing community input into sentencing.³³⁶

Justice John Vertes has described the development of legal interpretation training programs to assist the court when the accused is a unilingual aboriginal person.³³⁷ Also, interpreters have been allowed in the jury room to assist unilingual jurors, and attempts have been made to have lawyers and judges convert legal terminology into plain language so that aboriginal interpreters can explain the concepts to the jurors as well as the accused. Justice Vertes has also drawn attention to the fact that nowhere else in the Western world have such broad allowances been made for jurors who do not speak one of the majority languages.³³⁸

331. *Id.* at 173.

332. *Id.* at 172.

333. *Id.* at 172. This problem was also raised during informal interviews that author Vidmar undertook in Baker Lake, an Inuit community of about 1,400 persons, in the summer of 1997.

334. *Id.* at 173.

335. *See* Gora, *supra* note 328 at 174–80.

336. *Id.* Having no formal courthouse, trials in smaller communities take place in hotels, community centers, or schools. The temporary spatial designs, however, are made similar to more traditional court settings.

337. Vertes, *supra* note 317.

338. *Id.* Justice Vertes also drew attention to the fact that other forms of alternative dispute resolution, such as sentencing circles, sentencing dispositions with restorative justice aims and local Justices of the Peace. *Id.* at 21.

CONCLUSION

The Canadian jury system exhibits conservative elements of an earlier age regarding judicial control over the trial process. On the other hand, there are trends in its continuing evolution that attempt to take into account the influence of modern mass media on the fairness of trial, and potential racism resulting from changes in Canada's demographic profile. The recognition that the presumption of impartiality may not always hold even when reinforced with strong judicial instructions involves an implicit recognition of twentieth century psychological understanding of human behavior. Concern about the legitimacy of the jury system in the eyes of minority groups has resulted and the small steps that have been taken to increase the actual and perceived fairness are other indications of these progressive trends. Over the past several decades, accommodations of Canada's jury law to cultural and linguistic issues associated with Canada's aboriginal peoples puts Canada in the forefront of countries attempting to deal with injustices of the past.

This is not to say that the system is ideal. The balancing between competing values and policies has required compromises of substance and process. Nevertheless, as a whole, the criminal jury remains a robust institution in the scheme of Canadian life and law.

