STEERING COMMITTEE ON JUSTICE EFFICIENCIES AND ACCESS TO THE JUSTICE SYSTEM

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REPORT ON JURY REFORM

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STEERING COMMITTEE ON JUSTICE EFFICIENCIES AND ACCESS TO THE JUSTICE SYSTEM

REPORT ON JURY REFORM

EXECUTIVE SUMMARY: LIST OF RECOMMENDATIONS

In light of the issues raised in this report, the Steering Committee on Justice Efficiencies and Access to the Justice System deems that it would be advisable to make the following recommendations for making jury trials more efficient.

1- Facilitate the election of trial by a superior court judge alone by an accused charged with an offence listed in s. 469 Cr.C.

2- Optimize pre-trial conferences and encourage a proactive role for the presiding judge by the enactment of a provision similar to the new s. 536.4 Cr.C. (Extend the application of Recommendation 5 of the Steering Committee's report on mega-trials to all jury trials.)

3- Encourage codification of the specific powers recognized by the case law on case management in rules of court under s. 482.1 Cr.C.

4- Amend s. 631 Cr.C. to provide for the systematic calling of prospective jurors by their number only and to restrict access by the parties to their personal information. In so doing, consider the orders that have been made to that effect under a judge's inherent powers, keeping in mind the original reasons for calling out the names of prospective jurors and allowing access by the parties to that information.

5- Facilitate the obtaining of orders banning publication and broadcast of information that could serve to identify a juror by an amendment to the *Criminal Code*.

6- Examine the advisability of codifying the judge's power to order other more exceptional measures to protect the anonymity and safety of jurors, while preserving the accused's right to a fair trial.

7- In their compensation scheme for jurors and in the conditions under which they must fulfil their functions, provincial and territorial jurisdictions should consider:

   a) expenses for supervision or care of dependents that a juror would not otherwise incur;

   b) in the case of long trials, the jury's non-sitting days, at least for jurors who are not paid for those days under a collective agreement and cannot go into work on those

days, either because of the structure of the juror's employer or the human investment required for the trial;

c) the importance of the quality of infrastructures and accommodations at their disposal (deliberation rooms, resting rooms, etc.);

d) the possibility of compensating prospective jurors who are not selected;

e) rates paid to public service employees for payment of meal and travel expenses.

8- Provincial and territorial jurisdictions should consult the judiciary when establishing juror fees and expenses.

9- Jurors should be sufficiently informed about all compensation to which they are entitled and how to submit requests.

10- Consideration should be given to making legislative amendments to encourage dejudicialization of the exemption process to a judicial officer in view of the existing provincial and territorial legislative provisions on jury panels setting out grounds for exemption.

11- Section 640 Cr.C. should be amended to have challenges for cause decided by the judge rather than the two jurors who were last sworn.

12- The Canadian Judicial Council should be encouraged to continue its work on the development of model jury instructions and to give consideration to determining the best process for promoting the use of and compliance with model instructions (training, more formal judicial guidelines, regulations, etc.).

13- The Canadian Judicial Council should be encouraged to develop judicial guidelines on issues that arise in judge-jury relations, more specifically in relation to:

- requests for re-hearing of testimony or statements;
- allegations of misconduct or partiality within the jury during the trial or deliberations;
- re-hearing arguments and/or obtaining a transcript of the parties' arguments to the jury or written arguments explaining their respective theories;
- providing the jury with a transcript or a copy of the jury instructions;
- processing questions by the jury.

14- Examine more thoroughly the advisability and feasibility of legislative amendments

a) to make it possible for jurors to be separated during deliberation when appropriate and, if so, to continue the publication ban prescribed in section 648 Cr.C. until the verdict is returned;

b) to confirm the discretion of the trial judge to extend a media ban on publication of information related to a portion of the trial at which the jury is not present until the verdict is returned, based on the implications arising from the rights protected by paragraph 2(*b*) of the Charter;

c) to amend the rule of secrecy of jury deliberations to permit studies of how juries work by providing the necessary framework without compromising the principles underlying the rule.

I- CONTEXT

From the early stages of the creation of the Steering Committee on Justice Efficiencies and Access to the Justice System (the Steering Committee), the assessment of the advisability of reforming jury trials in Canada was identified as a priority issue.

That is why the Steering Committee created a smaller working group with a mandate to identify the difficulties associated with criminal jury trial procedure, examine the issues, and make recommendations to the Steering Committee for making jury trials more efficient. The Deputy Minister of Justice of Québec was appointed chair of the working group.

II- METHODOLOGY

2.1 Consultation

The members of the Working Group carried out a broad consultation of their respective colleagues, asking them to identify the difficulties they have encountered in their practice and submit proposals for reform. The Working Group's initiative brought responses from stakeholders in all areas consulted: the judiciary, Crown prosecutors and defence counsel. Most respondents submitted concrete proposals or suggested avenues for reflection on the problems they identified.

2.2 Selection of themes for examination

The Working Group noted at the outset that a number of the comments and proposals received during the consultation process had already been discussed, or were to be discussed, in a separate review by the Steering Committee. That was the case for issues and proposals raised during its work on mega-trials and self-represented accused.

Certain issues identified by the respondents also are, or have been, the subject of extensive work in other forums, such as the complexity of various defences (e.g., self-defence) which is being examined by an ad hoc working group of the Coordinating Committee of Senior Officials (CCSO), and jury representativeness (e.g., choice of source list and minority representation), which was the subject of an earlier study by a committee of the Uniform Law Conference (UCC).

The Working Group also noted that some of the difficulties reported could be solved locally by changing relevant administrative practices or amending provincial legislation relating to the qualification of prospective jurors, the summoning of juries, and jury panels (for example, improving criminal record check procedures). Issues of this type could be solved through discussions, between provincial governments or within the judiciary, on the adoption of best practices.

Other issues where provincial governments are frontline actors warranted consideration in view of their prevalence and their impact on the functioning and integrity of the jury system, more specifically the conditions in which jurors perform their duties and the economic burden of jury duty.

The Working Group also received innovative proposals for amending criminal procedure that are more of a technical nature and beyond the framework of jury trials (for example, facilitating the joinder of indictments). In view of its mandate, however, the Working Group focused on the issues more directly related to the efficiency of jury trials.

After considering the consensus likely to be reached in the light of the results of its consultation, the progress of ongoing work in other forums and the discussions within the Steering Committee following Working Group status reports or draft reports, the following issues were selected for this report:

- the right to jury trial;
- the conditions in which jurors perform their duties;
- jury selection;
- jury instructions;
- the jury sequestration rule during deliberations;
- the publication of information by the media during jury deliberations;
- the jury deliberations confidentiality rule in relation to the possibility of conducting research on jurors.

III- OPTIONS, DISCUSSIONS AND RECOMMENDATIONS

3.1 The right to jury trial

Many respondents to the consultation expressed concerns about the inefficiencies in the jury system, particularly in lengthy and complex cases. Some believe that the efficiency of jury trials is primarily the result of good case management by judges and counsel: anticipation of issues that have to be argued in the absence of the jury for disposition before jury selection, the length of jury instructions, counsel's focus on deciding issues, etc. Some respondents question the institution itself. Others think that the resources involved in jury trials and the investment required of jurors argue for restricting jury trials to the most serious offences.

Bearing in mind the constitutional right to a jury trial for offences punishable by imprisonment for 5 years or more, and the jury's deep roots in our justice system and its role as an expression of democracy, the Working Group did not submit proposals for the outright abolition of jury trials for examination within the Steering Committee. Nor did the Working Group retain proposals to replace the jury with a panel of judges or a mixed panel of judges and assessors. Section 11(*f*) of the *Charter* as construed would restrict any change affecting the fundamental characteristics of the institution as it existed in Canada before the enactment of the *Charter*,[1] one of those characteristics being representativeness.

England's recent experience, which gave rise to uncertainties about the jury system, should be considered. In 1986, the Roskill Report[2] seriously questioned the ability of jurors to follow and understand complex serious fraud cases. The report recommended replacing the jury with a court composed of a judge to decide questions of law and expert assessors to decide questions of fact. The recommendation remained a dead letter until 2001 when it was reaffirmed, with some variation, by the Honourable Lord Justice Auld in his report *Review of the Criminal Courts of England and Wales*[3] (the Auld Report).

In the wake of the Auld Report, the *Criminal Justice Act 2003*[4] was enacted to limit the right to jury trial where there is a substantial risk of jury intimidation or tampering and to long and complex fraud cases:

> 5. The Act is designed to ensure that criminal trials are run more efficiently and to reduce the scope for abuse of the system. It […] will allow for judge-alone trial in cases involving threats and intimidation of juries, and paves the way for judge-alone trial in exceptionally long, complex serious fraud cases.

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[1] *R. v. Genest*, (1990) 61 C.C.C. (3d) 251 (QAC).
[2] *Fraud Trial Committee Report* (Roskill Committee), London, H.M.S.O., 1986.
[3] *Review of the Criminal Courts of England and Wales*, The Right Honourable Lord Justice Auld, September 2001, accessible at http://www.criminal-courts-review.org.uk/.
[4] *Criminal Justice Act 2003*, Part 7, accessible at http://www.opsi.gov.uk/acts/acts2003/ukpga_20030044_en_1.

> […]
>
> 30. This Part makes provision for the prosecution to apply for a trial of a serious or complex fraud case to proceed in the absence of a jury. The judge may order the case to be conducted without a jury if he is satisfied that the length or complexity of the case (having regard to steps which might reasonably be taken to reduce it) is likely to make the trial so burdensome upon the jury that the interests of justice require serious consideration to be given to conducting the trial without a jury.
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> 31. This Part provides for a trial to be conducted without a jury where there is a real and present danger of jury tampering, or continued without a jury where the jury has been discharged because of jury tampering. The court must be satisfied that the risk of jury tampering would be so substantial (notwithstanding any steps, including police protection, that could reasonably be taken to prevent it) as to make it necessary in the interests of justice for the trial to be conducted without a jury.[5]
>
> [Emphasis added]

The restriction placed on fraud trials unleashed fierce controversy. The Bill could not be passed without an amendment making its coming into force dependent on a resolution of both Houses of Parliament. After an epic parliamentary battle, the government remained unable to obtain passage of the resolution by the House of Lords.[6] In November 2006, the Government introduced a bill in the House of Commons intended to remove the requirement of the resolution.[7] In March 2007, the debate on its second reading in the House of Lords was postponed by an unusual motion. The Bill does not appear to have progressed since then.

The grounds for that legislative initiative were severely undermined by the findings of a review by the Crown Prosecution Service Inspectorate (CPSI) into the collapse of the

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[5] *Explanatory Notes to the Criminal Justice Act 2003*, 2003 Chapter 44, accessible at http://www.opsi.gov.uk/acts/acts2003/en/ukpgaen_20030044_en_1. For a comprehensive paper on the origin of these measures and the debates preceding their enactment, see also *The Criminal Justice Bill: Juries and Mode of Trial*, House of Commons Library, Research Paper 02/73, 2 December 2002, accessible at http://www.parliament.uk/commons/lib/research/rp2002/rp02-073.pdf.

[6] For a comprehensive paper on this saga, see *The Fraud (Trials without a Jury) Bill 2006-07*, House of Commons Library, Research Paper 06/57, 23 November 2006, accessible at http://www.parliament.uk/commons/lib/research/rp2006/rp06-057.pdf.

[7] *Fraud (Trial Without a Jury) Bill*, Bill 6, 2006/07, accessible at http://www.publications.parliament.uk/pa/cm200607/cmbills/006/2007006.pdf. For a summary of the Bill, see also the Explanatory Notes accessible at http://www.publications.parliament.uk/pa/cm200607/cmbills/006/en/2007006en.pdf.

trial in the *Jubilee Line case*.[8] The case concerned fraud charges against five individuals in connection with the granting of government contracts for the extension of the London Underground's Jubilee Line. Twenty-one months into the trial, defence counsel made a motion for a mistrial[9] on the ground that the evidence was so complex that it had become unintelligible to the jury; the Crown did not oppose the application. The judge then declared a mistrial.

The CPSI report made a thorough review of that mega-fraud case, from the police investigation to the discharge of the jury, and identified the causes of the collapse. One aspect of the investigation involved voluntary interviews with members of the jury; 11 of the 12 jurors agreed to be interviewed. Against all expectations, the interviews revealed that the jurors had a good understanding of the evidence presented despite its length and complexity.[10]

Brief reference should also be made to the status of the Diplock Court system in Northern Ireland, which was instituted for the purpose of trying scheduled terrorism offences by judge alone. A changed political environment and the government's commitment to re-introduce jury trials resulted in the *Terrorism (Northern Ireland) Act 2006*, which received royal sanction on February 16, 2006.[11] Trials may now be held before a judge alone only if the Director of Public Prosecutions (DPP) is satisfied that the administration of justice could be impaired in view of the risk presented by holding a jury trial.

In the light of the British experience, it can be expected that outright abolition of the jury, or a fundamental change in its constitution, would represent an enormous challenge, even if there were no constitutional constraints. Some could suggest that the British experience is not relevant since Canadians may be less attached to the institution. Nevertheless, neither British constitutional law nor the European Convention on Human Rights appear

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[8] *Review of the Investigation and Criminal Proceedings Relating to the Jubilee Line Case*, Crown Prosecution Service Inspectorate, by Stephen Wooler, HM Chief Inspector, accessible at http://www.hmcpsi.gov.uk/reports/JubileeLineReponly.pdf.

[9] More specifically, an application to discharge the jury.

[10] *Report On Interviews With Jurors in the Jubilee Line Case*, Professor Sally Lloyd-Bostock, Birmingham University, 12 October 2005, accessible at http://www.hmcpsi.gov.uk/reports/JLJuryIntsRep.pdf. For a brief summary of results regarding understanding of the case, impacts of the trial on the jurors and the jurors' perception of the system see *The Jubilee Line Jurors: Does their Experience Strengthen the Argument for Judge-only Trial in Long and Complex Fraud Cases?* Lloyd-Bostock, S., [2007] Crim.L.R. 255.

[11] *Terrorism (Northen Ireland) Act 2006*, 2006 chapter 4, accessible with the Explanatory Notes at http://www.opsi.gov.uk/acts/acts2006/ukpga_20060004_en_1.htm.

to grant the right to jury trial the supralegislative status conferred by the *Canadian Charter of Rights and Freedoms*.[12]

The British experience could also present other options for discussion calling for less drastic changes. In the search for improved use of resources, the creation of hybrid offences has been greatly encouraged since the birth at the end of the 19th century of the first *either-way offences*, prosecutable in Crown Court with a jury or in Magistrate's Court without a jury.[13] Extending the maximum sentence from 6 months to 12 months has also favoured prosecution of hybrid offences in Magistrate's Court, which should result in a decrease in the number of jury trials in Crown Court.[14] One of the procedures they have established appeared attractive: on the application of the prosecutor, a judge may order a judge-only trial if he or she considers it is in the public's interest due to a risk of jury tampering. The Working Group considered whether Britain's experience could serve as a model for similar measures adapted to the Canadian context in view of the requirements of s. 11(*f*) of the *Charter*.

The Canadian experience itself could also provide options that merited discussion within the Steering Committee. Included in the Canadian experience are the creation of hybrid offences, election and re-election procedures, the expertise developed by provincial court judges in the exercise of their absolute jurisdiction, and the development of the jurisdiction of judges or justices of the peace who act as "summary courts".

DISCUSSION

Five options were submitted for discussion to the Steering Committee (see 3.1.1 to 3.1.5 below). The options that may be perceived as limiting access to a jury trial were met with much reservation, in particular from law society and defence counsel representatives who considered that the Canadian experience with jury trials did not justify an enquiry into the role and place of that lay institution in the Canadian criminal justice system.

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[12] The constitutional status of the right to jury trial in England remains controversial among commentators: Auld Report, *supra* paras. 7-10; *The Fraud (Trials without a Jury) Bill 2006-07*, Research Paper 06/57, *supra*, pp. 39-44. It is interesting to note however a legislative initiative similar to England's has recently been adopted in New Zealand, where the right to jury trial is also enshrined in a constitutional charter subject to limits justified in a free and democratic society (akin to the Canadian Charter's section 1). On the application of the prosecutor, a judge may replace the jury trial by a judge-alone trial where the judge is convinced that the risk of juror intimidation may not otherwise be avoided; the same applies to a trial relating to an offence punishable by imprisonment for less than 14 years likely to require more than 20 jury hearing days if the judge is convinced that a jury would not be able to carry out its duties efficiently because of the complexity of the case: *Crimes Amendment Act (No. 2) 2008*, accessible at http://www.legislation.govt.nz/act/public/2008/0037/latest/versions.aspx. This initiative stems in part from a recommendation of the New Zealand Law Commission (*Juries In Criminal Trials*, No. 69, 2001, pp. 33 to 64, accessible at http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_76_161_R69.pdf.

[13] For a summary of the evolution of *either-way offences*, see the Auld Report, *supra*, paras. 123-132.

[14] See *The Criminal Justice Bill: Juries and Mode of Trial*, Research Paper 02/73, *supra*, p. 7.

Even though some were of the opinion that these innovative options merit further study, discussions showed that it would have been difficult to reach consensus in this regard, with the exception of Option 3.1.2. The British experience indeed confirms that building consensus in this area is quite a challenge.

The Steering Committee considers that tighter case management, based on the evolving case law on the trial judge's powers in this area,[15] encouraging in particular the final resolution of pre-trial and incidental issues before the start of the hearing of evidence before the jury, could certainly contribute to the efficiency of jury trials[16]. In that regard, the Steering Committee would refer to its recommendations for legislative amendments to that effect made in its report on mega-trials, more specifically Recommendation 5 the scope of which should be extended to all jury trials:

> The Steering Committee recommends, as regards the exceptional trial procedure, the enactment of a provision similar to the new section 536.4 of the *Criminal Code*.[17]

Unlike s. 625.1 Cr.C. on the role of pre-trial conferences, s. 536.4 specifically provides that the justice before whom the preliminary inquiry is to be held may "encourage the parties to consider any other matters that would promote a fair and expeditious inquiry", including admissions of fact agreed to (as reflected in subsection 2). This provision appears to give the judge a more pro-active role.

Also meriting mention is the work that has been carried out by the Superior Court of Justice of Ontario Advisory Committee on Criminal Trials with a view to maximizing the benefits of pre-trial conferences and the court's management powers[18] to encourage resolution of incidental issues before summoning the jury, to examine in advance the evidentiary basis of applications and determine the manner in which the evidence in support of an application is to be presented (where it appears appropriate, by way of an agreed statement of facts, affidavits, "will say" statements or by filing transcripts rather than presenting *viva voce* evidence). The committee's recommendations led to major

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[15] See, among others, *R. v. Felderhof*, (2003) 180 C.C.C. (3d) 498 (CAO), on inherent powers relating to the conduct of proceedings in general, *R. v. Snow*, (2004), 190 C.C.C. (3d) 317 (CAO), on controlling abusive cross-examination and *R. v. Pires & Lising*, [2005] 3 S.C.R 343, at paras. 34-35, on the discretion to hear evidence at the request of one of the parties when the requesting party is unable to establish a reasonable likelihood that the hearing would assist in determining the issues before the court.

[16] This observation is in keeping with recommendation 13 of the *Report of the Review of Large and Complex Criminal Case Procedures* submitted to the Attorney General of Ontario by Professor Michael Code and the Honourable Patrick J. LeSage in November 2008.

[17] The Steering Committee also recommended the creation of a "management judge" and codification of the management judge's powers and issues over which that judge has authority (Recommendations 1 and 3) and codification of the substantive or procedural rules governing preliminary motions (Recommendation 13).

[18] *New Approaches to Criminal Trials – The Report of the Chief Justice's Advisory Committee on Criminal Trials in the Superior Court of Justice*, Ontario, May 2006, Chapter VII (see in particular the recommendations at Paragraphs 269 and 328).

amendments to the *Criminal Proceeding Rules* in effect in the Ontario Superior Court of Justice since October 2006, regarding in particular:

- the content of pre-trial conferences;
- the powers of the judge presiding at the pre-trial conference;
- the designation of a case management judge and his or her powers;
- applications for admission or exclusion of evidence under a common law or other rule of admissibility, including s. 24(2) of the *Charter*;
- preliminary assessment of the merits of an application;
- dismissal of an application for non-compliance with the Rules.

Maximizing case management powers may offer a less radical alternative to initiatives aimed at limiting the right to a jury trial. The Steering Committee considers that codification of the powers recognized by the case law on case management in rules of court must be encouraged. It would be useful to examine the results of the Ontario experience.

3.1.1 Encourage the creation of hybrid offences and review the time limitation for prosecuting summary conviction offences

The advisability of imposing on jurors the burden of a trial that might lead to a sentence comparable to a summary conviction sentence may be questioned. It is difficult to imagine prosecuting before a jury the offence of participating in a riot (an indictable offence), which is punishable by a maximum sentence of 2 years.

Hybrid (or dual procedure) offences allow the prosecutor to choose the mode of prosecution better adapted to the subjective seriousness of the offence, the characteristics of the offender (age, previous convictions, etc.), the needs of the complainant and witnesses (inconvenience of having to testify at the preliminary inquiry and again at the trial), as well as the rational use of judicial resources.

However, the 6-month time limitation for prosecution often forces a prosecutor to proceed by indictment, with the chance that a jury will hear the trial when the offence should clearly be prosecuted by summary conviction, a situation which could also lead to allegations of abuse of process.[19]

A wide consultation carried out by Justice Canada shows that there existed no consensus on the reclassification of offences. Among concerns expressed, defence counsel representatives see it as further limiting the availability of a preliminary inquiry and

[19] *R. v. Walden*, [2006] S.J. No. 630 (SAC); *R. v. Bridgeman*, [2004] J.Q. No. 2319 (CAQ); *R.* v. *Kelly* (1998), 128 C.C.C. (3d) 206 (OAC); *R. v. Quinn*, [1989] A.Q. No. 1632 (CAQ).

diminishing appeal rights. They also believe that extending the time limitation would be detrimental to the interest of the accused and contrary to the public interest in having less serious offences dealt with as quickly as possible. The possible increase in the workload of provincial court judges could be a problem for some jurisdictions, while other jurisdictions are concerned that the initiative may appear to diminish the seriousness of offences that may be reclassified. However, since examination of the advisability and impact of the initiative by the Working Group on Criminal Procedure is still in progress, the Steering Committee considered that it would be premature to recommend this option on which, in any event, consensus would have been difficult to achieve.

3.1.2 At the initial election, allow trial by superior court judge alone for s. 469 Cr.C. offences and provide for the three choices at the initial election on direct indictments

Section 469 Cr.C. offences within the exclusive jurisdiction of the superior courts: As the law now stands, the trial will be automatically held before a judge and jury unless the accused and the Attorney General subsequently agree to a trial by judge alone (s. 473 Cr.C.). The Steering Committee considered whether the election to be tried by judge alone should be allowed at the outset, with the Crown given the option of requiring a jury trial by means of a provision similar to s. 568 Cr.C.[20]

Prosecution by direct indictment. As the law now stands, an accused prosecuted by direct indictment is deemed to have elected to be tried by a judge and jury and must appear before a superior court judge. The accused may subsequently ask to be tried by judge alone (s. 565(2) Cr.C.). [21] Yet an indictment will often include offences for which the accused would otherwise have all options and have elected at the outset to be tried by a provincial court judge or judge alone. The Steering Committee considered whether the accused should be allowed to appear before a justice of the peace to make an initial election other than the deemed election for trial by judge and jury, to the extent that the offences to be tried give rise to the election.

This option did not elicit any opposition. The Steering Committee noted that the accused and the prosecution often consider prosecution before a superior court judge alone for an

[20] Section 568 allows the Attorney General to require a jury trial where the accused has elected to be tried by judge without a jury or a provincial court judge for an offence punishable by imprisonment for more than 5 years. Its constitutional validity has been confirmed (*R. v. Hanneson*, (1987) 31 C.C.C. (3d) 560) and since the decision is made in the exercise of the prosecutor's discretionary power (*R. v. Musitano*, [1982] O.J. No. 3573; *R. v. Paton*, [1985] M.J. No. 374), it is not subject to judicial review except in cases of "flagrant impropriety", analogous to the prosecutorial discretion to withhold consent under s. 473 Cr.C. to a trial by judge alone of a s. 469 offence (*R. v. Ng*, [2003] A.J. No. 489).

[21] In its initial draft report submitted to the Steering Committee in February 2008, the Working Group questioned the benefit of maintaining the requirement of the prosecutor's written consent to a re-election. That requirement has since been removed with the coming into force on May 29, 2008 of section 23 of the *Act to amend the Criminal Code (criminal procedure, language of the accused, sentencing and other amendments*.

offence under s. 469 Cr.C., particularly where the outcome of the trial rests essentially on expert evidence, more advisable. It will sometimes be the case, for example, in a defence of not responsible on account of mental disorder in response to an accusation of murder or attempted murder. The Steering Committee decided to make a recommendation.

However, in view of a recent amendment to the procedure for re-election after an indictment has been preferred,[22] only the first part of the option merited to be the subject of a recommendation.

3.1.3 Extend the absolute jurisdiction of provincial court judges to all offences punishable by less than 5 years' imprisonment or create a new absolute jurisdiction for superior court judges

In view of the expertise of provincial court judges, the Steering Committee considered whether their absolute discretion could be extended to all indictable offences punishable by less than 5 years' imprisonment. Provincial courts have absolute jurisdiction over some drug possession and trafficking offences punishable by imprisonment for 5 years less a day. Provincial courts also try some provincial offences, such as securities offences, that are punishable by 5 years less a day. The constitutional validity of a provincial court's jurisdiction over such offences punishable by 5 years less a day has not, to date, been impaired.

In addition to the difficulty of achieving consensus, bringing those offences within the absolute jurisdiction of provincial court judges would offer little gain in efficiency since they are not particularly frequent.[23]

Implementing this option would also require a reappraisal of the respective resources of provincial courts and superior courts, unless measures are introduced to lessen its impact on judicial resources. For instance, provinces could be allowed to transfer those offences to the jurisdiction of provincial court judges by order of the lieutenant-governor-in-council. Or a new absolute jurisdiction for superior court judges could be created. The Steering Committee considered that the advisability, feasibility and impact of these approaches should be the subject of a comprehensive study, which may not be justified by the expected efficiency gains.

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[22] See footnote 17.

[23] The gain in efficiency would be made mostly on offences punishable by imprisonment for 2 years that may not be prosecuted by summary conviction, for example: participating in a riot (s. 65 Cr.C.); disobeying a statute (s. 126 Cr.C.); offences relating to affidavits (s. 138 Cr.C.); compounding indictable offence (s. 141 Cr.C.); permitting or assisting escape (s. 146 Cr.C.); common nuisance (s. 180 Cr.C.); false messages (s. 372(1) Cr.C.).

3.1.4 Create a procedure that would remove the right to jury trial on the filing of a notice that the Crown will seek a sentence of less than 5 years' imprisonment

Whether an indictable offence is objectively punishable by imprisonment for 5, 10 or 14 years, or even life imprisonment, the subjective seriousness of the offence and the characteristics of the offender could be such that, at the commencement of proceedings, the prosecutor cannot reasonably anticipate a sentence of imprisonment for more than 5 years. The Steering Committee explored the possibility of creating a procedure that would remove the right to a jury trial on the filing of a notice that the prosecution intends to seek a sentence of less than 5 years' imprisonment. Various measures could be considered:

- require that the notice be filed before the initial election and thereby limit the choice of elections to trial by judge alone (within the meaning of s. 552 Cr.C.)[24] or trial by a provincial court judge;

- allow filing of the notice only after the accused has elected a jury trial, giving superior court judges the discretion to deny it where required in the interests of justice (statutory criteria could be established, including the burden on the jury, delays, risk of interference by intimidation or tampering, etc.).

In addition to, again, the difficulty of achieving consensus, this option raised concerns that led the Steering Committee to not retain it, namely: What if new facts arising during the trial increase the objective seriousness of the offence? Would the Crown's exercise of its discretion likely give rise to allegations of abuse of process?[25] Would a judge's removing the right to a jury trial at the request of the Crown give rise to new arguments on appeal likely to result in an order for a new jury trial?

Concerns were also expressed about the application of this measure in the context of the emergence of and increase in minimum prison sentences. Depriving an accused charged in an information that includes a number of offences carrying minimum sentences of the possibility of a jury trial appears at first glance to raise issues under both s. 11(*f*) and s. 7 of the *Charter*.

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[24] A provincial court judge in Québec and a superior court judge in the other provinces.

[25] By analogy, the courts have ruled that summary conviction proceedings do not violate the constitutional right to jury trial and that the Crown's election to proceed by summary conviction or by indictment, barring "flagrant impropriety", does not give rise to judicial review: see, among others, *R. v. Laws*, (1998) 128 C.C.C. (3d) 516 (OCA); *R. v. Leroux*, [2007] J.Q. No. 1222 (QAC).

3.1.5 Create an exception to the right to trial by jury for certain offences relating to threats, violence, intimidation or corruption of a justice system participant for the purpose of influencing the course of justice

This option was directly inspired by measures to that effect adopted by England and New Zealand. The Steering Committee noted however that the gains in efficiency of that measure would be limited by the small number of offences likely to be included (the first that come to mind are obstruction of justice under s. 139(3) Cr.C. and intimidation of a justice system participant under s. 423.1 Cr.C.). Defence counsel representatives expressed reservations about the creation a list of exceptions to the right to a jury trial which, with time, it may be tempting to attempt to expand rather than restrict. It would also require a section 1 *Charter* justification on the ground of the pressing and substantial nature of the objective.

The Steering Committee considers that improving jury protection measures, in particular the protection of jurors' anonymity, would be more appropriate than this option in that it would strike a balance between the right of the accused to a trial by jury and the interests of justice in protecting juries against tampering.

RECOMMENDATIONS

Three recommendations result from the preceding discussion.

1. Facilitate the election of trial by a superior court judge alone by an accused charged with an offence listed in s. 469 Cr.C.

2. Optimize pre-trial conferences and encourage a proactive role for the presiding judge by the enactment of a provision similar to the new s. 536.4 Cr.C. (Extend the application of Recommendation 5 of the Steering Committee's final report mega-trials to all jury trials.)

3. Encourage codification of the specific powers recognized by the case law on case management in rules of court under s. 482.1 Cr.C.

3.2 The conditions in which jurors perform their duties

Specific focus was placed on two areas of concern relating to jury duty: the safety of jurors and jury compensation.

3.2.1 The safety of jurors: anonymity

The proposals on the safety of jurors made during the consultation relate mainly to the protection of their anonymity.

In the current procedure, the cards used to form a panel bear the name, panel number and address of the prospective jurors (s. 631(1) Cr.C.). The cards are then drawn in open court and the rule requires the clerk to call out the name and number of each juror (s. 631(3) Cr.C.). Sections 631(3.1) and 631(6) of the *Criminal Code* set out exceptions for the purpose of preserving the anonymity of jurors:

> (3.1) On application by the prosecutor or on its own motion, the court, or a judge of the court, before which the jury trial is to be held, if it is satisfied that it is in the best interest of the administration of justice to do so, including in order to protect the privacy or safety of the members of the jury and alternate jurors, may order that, for the purposes of subsection (3), the clerk of the court shall only call out the number on each card.
>
> […]
>
> (6) On application by the prosecutor or on its own motion, the court or judge before which a jury trial is to be held may, if an order under subsection (3.1) has been made, make an order directing that the identity of a juror or any information that could disclose their identity shall not be published in any document or broadcast or transmitted in any way if the court or judge is satisfied that such an order is necessary for the proper administration of justice.
>
> [Emphasis added]

Some consultation respondents pointed out the inadequacy of those measures in that:

- ***the measures should be automatic, not exceptional:*** the case law, although scant, has admittedly at times given strict construction to the scope of the provision and the onus imposed.[26] Although safety and privacy are two separate grounds, they are considered by some to be cumulative. Jurors, however, may very well wish to have their privacy, in particular their address, protected from the public without there necessarily being grounds for fearing for their safety. Nevertheless, the state of the law on the application of s. 631(3.1) has not yet sufficiently developed to make necessary any legislative intervention regarding the burden of proof for obtaining the order;

- ***the name, address and occupation of jurors should not be accessible to the parties; since the cards are drawn in court they are part of the court file and nothing prevents the accused or accused's counsel from accessing the information in the***

[26] See, among others, *R. v. Vickerson*, [2006] O.J. No. 352 (OSCJ), in which the fact that the accused had been linked in the past to a criminal organization was not judged sufficient to justify an order under s. 631(3.1) in a case involving charges of attempted murder, drugs, and firearms.

court file or in the list that is given to the parties: access to the cards was commonly available prior to the passage of s. 631(3.1).[27] In the spirit of the objective of s. 631(3.1), the trial judge would appear to have the inherent power to restrict an accused's access to that information, whether it appears on the cards or the list.[28] Under the common law, a judge could also order that the cards and list be sealed once the jury has been selected. Failure to comply with such an order could be punished as provided in s. 127 Cr.C. (disobeying a court order);

- ***the s. 631(6) non-publication order is linked to the order under s. 631(3.1) although it may have a different objective***: some jurors may not mind if their identity is disclosed to justice system participants or the limited public attending the hearing but they may not want their face broadcast on the evening news with all the resultant inconveniences, such as having to answer the questions of curious bystanders. The inherent powers of the trial judge could be relied on to deal with situations that are not expressly covered by s. 631(6);

- ***current measures do not expressly provide for the possibility of ordering that the jury be screened off from the public***: although the power is recognized in the common law,[29] some believe it would be prudent to provide for it expressly because of its exceptional character; the use of the measure could also be circumscribed by criteria for its application;

- ***jurors should only be referred to by their number throughout the trial, whether or not an order is made under s. 631(3.1).***

Measures implemented to protect the privacy of jurors, although praiseworthy, must not interfere with the empanelling of an impartial jury. An accused who does not recognize the face of a prospective juror might remember having had dealings with that person upon seeing or hearing the prospective juror's name. Or a member of the public attending the selection process might be aware of a ground for a challenge (such as a relationship with the accused or Crown counsel) unknown to the parties. Defence counsel respondents to the consultation also argued that the security measures requirements must be assessed on a case-by-case basis and care must be taken not to prejudice the accused in the eyes of the jury and impair the presumption of innocence. The measures must attempt to strike a delicate balance between the interests of the jurors, the integrity of the justice system and the accused's right to a fair trial.

The Steering Committee considered whether the development of legislative amendments, substantive rules of court or best practices aimed at improving jury anonymity could benefit from an examination of special orders made by judges who in the exercise of their discretionary power had carefully weighed all the interests involved. An order made by

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[27] *R. v. Boucher*, [1998] A.Q. No. 3533 (QSC).
[28] *R. v. Jacobson*, [2004] O.J. No. 1434 (OSCJ).
[29] *R. v. Boucher*, [2002] J.Q. No. 214 (QSC).

the Honourable Justice Ferguson, which appears to provide maximum anonymity to the jury without compromising the empanelling of an impartial jury, is worth citing here for the purposes of our discussion:

> 1. The panel lists for the three groups of persons summoned to come for jury selection in this case or for any further persons summoned shall not be disclosed to anyone without my order.
>
> 2. The panel lists showing juror numbers, names, addresses and occupations shall be provided to each of the six counsel in this case if all six counsel give the court an undertaking that, unless the court orders otherwise:
>
>   i. they will not disclose to their client or any other person whatsoever the names or addresses or any identifying information about any person on the panel lists except the person's juror number and occupation; and
>
>   ii. they will not make copies of the panel lists.
>
> 3. The court staff will prepare **the jury cards** stating the juror's number, name, address and occupation. These will be accessible to no one but the Registrar and the trial judge.
>
> 4. On the day each panel or group arrives, defence counsel may before court convenes show their clients the list for that panel or group and discuss the contents but shall not permit their clients to make any notes about the contents. This is the only exception to the undertaking in para. 2.
>
> 5. Crown counsel may on the day each panel or group arrives show the content to the two instructing police officers, […] and discuss the content but shall not permit those officers to make any notes about the contents. This is the only exception to the undertaking in para. 2.
>
> 6. After the opportunities mentioned in paras. 3 and 4, counsel may not show or discuss the content of the lists with their respective clients except for the juror number and occupation. They may only disclose the juror number and occupation to their respective clients during jury selection.
>
> 7. **During jury selection**, the Registrar will read out only the juror number and occupation (s. 631(3.1)).
>
> 8. When a person's card is chosen from the box, that person will be asked to come to the front of the courtroom. The Registrar will show that person the juror card and ask the person, "Is the information on this card about

you and is it correct?". If the juror answers in the negative then the juror will be asked to write the correct information on the card.

9. Except as permitted in paras. 3 and 4, no one shall mention the name or residence of any person on the panel lists or any person chosen as a juror and all references to those persons shall be by juror number.

10. **At the conclusion of the jury selection**, the panel lists will be collected from counsel and shredded. The Registrar and judge's lists and all juror cards will be sealed in an envelope and placed in the court file which shall not be opened without a judge's order.

11. No information or image that could disclose the identity of the members of the jury shall be published in any document or broadcast in any way.

12. When jurors are called in for the challenge procedure, the Registrar shall ask the person:

    "Do you or any member of your family know either of the accused, Mr. Jacobson or Mr. Hall or any member of their families?"

    "Have you ever seen Mr. Jacobson or Mr. Hall anywhere outside the courtroom?"

    If they answer either question in the affirmative the judge shall make an enquiry.[30] [Emphasis added]

DISCUSSION

In view of the above, four options were examined by the Steering Committee. Since they elicited no opposition, the Steering Committee decided that they be the subject of recommendations.

3.2.1.1 Examine various orders made by judges under their inherent powers to complete the measures provided for in ss. 631(3.1) and 631(6) C.Cr., identify best practices and use them as a basis to make legislative amendments, to make rules of court or to develop model orders

For the sake of uniformity, these objectives would be best addressed by legislative amendment. It would not be desirable for the anonymity of jurors in one province to be better protected than that of jurors in other provinces.

[30] *R. v. Jacobson*, *supra*, par. 68. Refer also to the order made in *R. v. Lenti*, 2008 CanLII 6199 (ON S.C.) which considered the order made in *Jacobson*.

Of interest for comparative purposes are New Zealand's recent amendments to its *Juries Act*, whose effects are substantially similar to those sought by paragraphs 2, 4, 6 and 10 of the order cited above:

> 14A Restrictions on use of jury panel
>
> (1) The purpose of this section is to help to prevent names or other information disclosed in a copy of the panel from being used to facilitate actions (for example, actions prejudicing a juror's safety or security) to interfere with the performance of a juror's duties.
>
> (2) A barrister or solicitor to whom a copy of the panel is made available under section 14(1) because the barrister or solicitor is acting for a party to criminal proceedings, and any person acting on behalf of that barrister or solicitor,—
>
> (a) may show the copy (the **document**) to a defendant in proceedings that are due to be heard during the week for which the jurors on the panel are summoned to attend for jury service; but
>
> (b) must not leave the document in the defendant's possession; and
>
> (c) must not leave the document in the possession of any witness for either party; and
>
> (d) must not leave the document in the possession of any victim (within the meaning of section 4 of the Victims' Rights Act 2002); and
>
> (e) must take all reasonable steps to ensure that the defendant, any witness, or any victim, as the case requires, does not copy the document. […]
>
> (4) Every person who, in connection with proceedings that are due to be heard during the week for which the jurors on the panel are summoned to attend for jury service, receives, or makes a copy or copies of, a copy of the panel must return the copy or copies to the Registrar or a member of the Court registry staff as soon as practicable after the case is opened or the accused is given in charge.[31]

Rules of court could be adopted to take into account regional characteristics or the trial judge could make an order to respond to particular concerns relating to a matter of which the judge is seized. Nevertheless, it seems advisable that standards be established in the *Criminal Code*. In addition, current provisions may be interpreted as limiting the power to make certain specific orders (for example, restricting access to cards drawn in court).

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[31] *Juries Amendment Act 2008*, accessible at: http://www.legislation.govt.nz/act/public/2008/0040/latest/DLM1379203.html. The High Court of Justice in Northern Ireland decided that a legislative amendment enacted in 2007 providing for complete juror anonymity was compatible with the European Convention on Human Rights and Fundamental Freedoms: *Re McParland*, [2008] NIQB 1.

3.2.1.2 Assess the advisability of systematically restricting access to information about jurors in all trials by following best practices, which could necessitate new amendments to section 631

It would be advisable to research into the origin of the parties' access to the personal information of jurors during jury selection and at the same time examine the currency of its justification in view of the reliability of existing administrative checks (electronic voters' lists, data banks, means of disclosing information about individuals, etc.). Why does calling prospective jurors only by their number remain an exceptional measure? Are there reasons for believing that a jury constituted in that manner would be less reliable than one constituted with the usual procedure of calling out the names? Concerns that a prospective juror may have ties to one of the parties, not live in the judicial district of the offence, be biased because of his or her profession or occupation or not be the person whose name appears on the panel could surely be addressed by asking general questions rather than by requiring the disclosure of specific information to the parties (name, address, occupation, etc.).

3.2.1.3 Dissociate the publication ban under s. 631(6) from the order under s. 636(3.1) Cr.C.

Section 486.5(2) allows the judge to make a non-publication order regarding information that could identify jurors in circumstances that are not covered by s. 631(6). The provision however applies only to cases involving criminal organization offences (ss. 467.11, 467.12 and 467.13) or the offence of intimidation of a justice system participant (s. 423.1 C.Cr.). The power to make such orders should be extended. It could be argued that just as the interests of justice require protecting a victim's anonymity to encourage the reporting of certain offences, so do they require restricting freedom of the press to limit the inconveniences of sitting as a juror to encourage public participation in the jury system.

3.2.1.4 Assess the necessity and/or advisability of providing for other more exceptional measures that could be ordered by judges to protect jury anonymity, such as the use of a screen

Judges have already made innovations in this regard in the exercise of their inherent powers to ensure the peace of mind of jurors: layout of the courtroom to screen the jurors from public view; prohibiting visible tattoos, restricting traffic in the courtroom while jurors are present, prohibiting access by individuals whose presence may disturb the equanimity of participants, which include jurors, etc. It is important, however, that such measures not prejudice the accused in the eyes of the jury. The measures must be balanced against the right of the accused to a fair trial and must at times be the subject of a special instruction to limit their effect on the jury's perception of the accused.

RECOMMENDATIONS

4. Amend s. 631 Cr.C. to provide for the systematic calling of prospective jurors by their number only and to control access by the parties to their personal information. In so doing, consider the orders that have been made to that effect under a judge's inherent powers, keeping in mind the original reasons for calling out the names of prospective jurors and allowing access by the parties to that information.

5. Facilitate the obtaining of orders banning publication and broadcast of information that could serve to identify a juror by an amendment to the *Criminal Code*.

6. Examine the advisability of codifying the judge's power to order other more exceptional measures to protect the anonymity and safety of jurors, while preserving the accused's right to a fair trial.

3.2.2 Jury compensation and accommodations

There appears to be a consensus among all respondents to the consultation that the compensation paid to jurors is insufficient. Although the meagre compensation paid to jurors has historically contributed to the value of their commitment and of the jury system, it clashes with the realities of modern society. There are also wide variations among the provinces:

- ***in the amount of compensation paid to jurors and the payment scheme.*** In addition to the marked differences among the provinces, the rational basis for some payment schemes is difficult to understand: when it is known at the outset that the trial will last for weeks, why pay rate X for the first 10 days of jury sittings and higher rate Y (even up to double) for the following days? The contribution made by jurors during the first 10 days is not of any lesser value than that during subsequent days;

- ***in the payment of meal and travel expenses.*** In certain jurisdictions, payment of meal and travel expenses is similar to the rate paid to public service employees;

- ***in the payment of expenses for supervision or care of dependents.*** The expenses that may be incurred by the juror for such supervision or care, that would not have been incurred were it not for the trial, are likely to outweigh the compensation, even result in a financial deficit;

- ***in the payment of compensation for the jury's non-sitting days because of issues that must be argued in the absence of the jury to allow the parties to prepare or because of the absence of a player.*** A non-unionized employee replaced by the

employer for the duration of the trial will often not be able to work on the jury's non-sitting days and thus not receive any pay or compensation for those days, even though, technically, the jurors can be considered to be available to the court during proceedings in the absence of the jury. A juror's economic security should not be dependent on the uncertainties of a long trial;[32] where there is a greater likelihood of suspension of hearings in the presence of the jury (in particular for disposition of issues in the absence of the jury);

- ***in the allowance for psychological care***. Only one province appears to provide the allowance, on court order. Jurors may indeed be confronted with disturbing details (accounts of violence against vulnerable individuals, autopsy photographs, medical report findings, etc.) that can distress them long after the trial is over. Defence counsel respondents to the consultation nevertheless expressed concerns regarding such a measure;

- ***in the treatment of prospective jurors who travel for the selection process but who are not selected.*** Contrary to the case law on compensation for jurors, no power to order compensation for prospective jurors appears to have been conferred on the judge at the selection process.[33] There is consequently a legislative gap where compensation is not provided for by law.

Some members of the Steering Committee also pointed out the needs observed regarding the improvement of infrastructures and accommodations at the jurors' disposal (deliberation rooms, resting rooms, etc.), and the variations between regions.

DISCUSSION

Although jury duty remains above all a civic duty that should not be motivated by economic gain, the realities of modern society must also be considered.

The issue of jury compensation is of particular concern to the Steering Committee. It affects efficiency since inadequate compensation can lead to applications for exemption, which lengthen the selection process, or applications for discharge during the trial. It also

[32] See *R. v. Beauchamps et al.*, [2003] J.Q. No. 5266 (QSC), where the judge ordered that compensation be paid to jurors for the jury's non-sitting days as well. The Steering Committee refers also to recommendation 6 in its previous report on mega-trials: "The Steering Committee recognizes that jurors and witnesses in mega-trials have exceptional obligations and specific needs. The Steering Committee recommends that they receive enhanced compensation to reflect this reality."

[33] See *A.G. v. Morin-Cousineau*, [2006] J.Q. No. 4967, in which the Court of Appeal of Québec quashed the order of the trial judge directing the Attorney General to pay prospective jurors the same compensation as that granted to jurors for one day of sitting.

directly impacts the principle of jury representativeness. In fact, a number of observers,[34] in addition to respondents to the consultation, have noted that the situation contributes to excluding certain categories of individuals (the self-employed, single parents, non-unionized workers, etc.) to the advantage of others (the retired, unionized workers, childless persons, etc.).

Compensation also gave rise to judicial confrontations between judges who are inclined to grant "more" and attorneys general who defend the right to grant "less". The negative impact of such confrontations on citizens who one day could be called upon to serve on a jury should not be ignored. Insufficient infrastructures and accommodations at the jurors' disposal will not only cause undue stress but may also turn into a bitter experience for the jurors who may dissuade their fellow citizens from performing their civic duty.

Juror compensation is an issue that comes predominantly under provincial and territorial jurisdiction. Nevertheless, in view of its possible impact on representativeness or on the complexity of empanelling a jury, it is also an issue of national interest that could in the long term contribute to questioning the institution. The Steering Committee considers that its composition makes it an ideal forum for general recommendations in the form of guidelines which could be used by the different jurisdictions, taking into account their particular economic and social factors (cost of living, number of jury trials, average length of trials, etc.).

It is important that the information given to jurors on their role and duty sufficiently inform them about all compensations to which they are entitled and explain to them how and to whom they should send requests.

More specifically with respect to psychological care for jurors, it should be noted that a jury debriefing program was established in Manitoba:

> The jury debriefing commenced a few days after the trial ended behind the closed doors of a hotel room. The debriefing team, which consisted of a social worker and his female administrative assistant (it was felt that the debriefing team should be made up of individuals from both sexes) then met for four hours with all 12 jurors and the sheriff/jury monitor. The sheriff/jury monitor was not debriefed but he attended the session to show support and encouragement to the jurors. The various aspects of the debriefing consisted of introductions, an explanation of the purpose of the debriefing session, a cautionary note pertaining to non-disclosure of jury discussions, and information about post-trial trauma, signs and symptoms, and mental health resources for jurors. After this information was exchanged, the jurors were

[34] *Report on Jury Reform*, Uniform Law Conference of Canada, 1995; *New Approaches to Criminal Trials - The Report of the Chief Justice's Advisory Committee on Criminal Trials in the Superior Court of Justice*, Ontario, May 2006, para. 362; *R. v. Huard*, [2009] O.J. No. 1383, par. 26. In the latter case, the trial judge based his decision on the inherent powers of Superior Court judges to grant compensation that is greater than the compensation provided for in regulations.

> asked about their overall experience, the emotions that they were feeling right now, if they were stressed and, if so, how they were coping and what, if anything, they needed. An evaluation of the session was completed by the jurors immediately following the session and they were contacted three months later and asked specific questions on how they were managing. All of the jurors expressed that they felt that the debriefing session had a beneficial effect. Moreover, on the follow-up session involving 10 of the 12 jurors, none of the 10 jurors expressed experiencing any post-traumatic stress resulting from their role as jury members.
>
> […]
>
> All sheriffs/jury monitors in the province will take mandatory one-day workshops on recognizing stress symptoms in jurors.
>
> […]
> Ultimately however it is judges who must authorize the debriefing to commence. Manitoba's Justice Minister, Gord Mackintosh, has stated that the jury debriefing program will probably focus on murder trials at first but that it may possibly grow to include other types of cases.[35]

Very few studies have been conducted in Canada on the phenomenon of post-traumatic stress experienced by jurors.[36] Some studies have been conducted in the United States on the phenomenon, but the methodology of the American studies is often criticized. The characteristics of the American system of jury trials limit extrapolation of the results of those studies to Canada (the greater intrusiveness of the selection procedure into the private lives of jurors, the prevalence of jury sequestration, the possibility of the death penalty after a verdict of guilt, etc.).[37]

In any event, "jury debriefing" and "post-trial counselling" are still in their infancy and there appears to be much debate about the advantages and disadvantages of the different approaches (debriefing involving only the judge, the judge assisted by experts, experts only, attendance or non-attendance of the sheriff, as a group or each juror individually, etc.). There appear to be very few studies on the results of such initiatives.[38] The Steering Committee considers that it would be premature to submit recommendations regarding

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[35] Anand, S., Manweiller, H., *Stress and the Canadian Criminal Trial Jury: A Critical Review of the Literature and the Options for Dealing with Juror Stress*, (2005) 50 C.L.Q. 403, pp. 434-436.

[36] A recent study by the *Canadian Research Institute for Law and the Family*, carried out for the Yukon Justice Department by Bertrand, L.D., Paetsch, J.J. and Anand, S., *Juror Stress Debriefing: A Review of the Litterature and an Evaluation of a Yukon Program,* March 2008, accessible at www.ucalgary.ca/%7Ecrilf/sub/research.html should be noted.

[37] Bertrand, L.D., Paetsch, J.J. and Anand, S., *supra*, p. 6: Anand, S., Manweiler, H., *supra*, pp. 408-409.

[38] Anand, S., Manweiller, H., *supra*. The scope of the study by the *Canadian Research Institute for Law and the Family* is particularly limited by the small number of jurors who took part (21 jurors in 3 trials) and by the fact that it was impossible to have a comparative group to assess whether the decrease in stress was due to debriefing sessions or simply to the passage of time: see Bertrand L.D., Paetsch, J.J. and Anand, S., *supra*, p. 39.

psychological care for jurors. Provincial and territorial jurisdictions and representatives of the judiciary should observe the evolution and note the results of the Manitoba experience.

RECOMMENDATIONS

7. In their compensation scheme for jurors and in the conditions under which they must fulfil their functions, provincial and territorial jurisdictions should consider:

a) expenses for supervision or care of dependents that a juror would not otherwise incur;

b) in the case of long trials, the jury's non-sitting days, at least for jurors who are not paid for those days under a collective agreement and cannot go into work on those days, either because of the structure of the juror's employer or the human investment required for the trial;

c) the importance of the quality of infrastructures and accommodations at their disposal (deliberation rooms, resting rooms, etc.);

d) the possibility of compensating prospective jurors who are not selected;

e) rates paid to public service employees for payment of meal and travel expenses.

8. Provincial and territorial jurisdictions should consult the judiciary when establishing juror fees and expenses.

9. Jurors should be sufficiently informed about all compensation to which they are entitled and how to submit requests.

3.3 Jury selection

The Steering Committee's primay focus was the efficiency of the selection process as regards applications for exemption and the current procedure for deciding challenges for cause.

3.3.1 Procedure for exemptions

Both the *Criminal Code* and provincial jurisdiction over the administration of justice give the provinces authority to determine the qualifications for serving on a jury. They may also prescribe grounds for disqualification or grounds for applying to the sheriff to be excused. The measures contained in provincial laws apply to jury panels and not to the

safeguards necessary to guarantee the impartiality of juries, which is a matter within the federal jurisdiction over criminal law.[39]

Most provincial laws set out grounds for disqualifications or provide for the possibility of obtaining an exemption by reason of status or function (lawyer, peace officer, minister of religion, public servant employed in the administration of justice, military personnel, etc.). They also provide for the possibility of obtaining an exemption on personal grounds related to health, home responsibilities or a special hardship not specifically listed. The procedure in s. 632 Cr.C. also allows the trial judge to excuse for "personal hardship or any other reasonable cause that, in the opinion of the judge, warrants that the juror be excused." There seems to be duplication with the procedure for jury panels provided in provincial laws.

Furthermore, at this stage of the exemption procedure, the judge may adjudicate only cases of manifest partiality because of a close relationship with the judge, the prosecutor, the accused, counsel for the accused or a witness (s. 632(*b*)) Cr.C. Some observers point out that the involvement and role of counsel is rather narrow and suggest that applications for exemption should be an administrative process.

DISCUSSION

In light of the preceding observations, it would be advisable to examine the contribution that other judicial officers (justice of the peace, clerk or other judicial officer) could have on the exemption procedure. These initiatives could maximize the contribution of other competent judicial officers for the purpose of allowing the trial judge to focus on critical stages and more contentious issues in the empanelling of an impartial jury (such as deciding challenges for cause).

If applicable, the conditions for the administrative processing of grounds for exemption, such as the necessary authority and independence to dispose of the applications (justice of the peace, clerk or other judicial officer), the oath to be sworn, the involvement of counsel, etc., should be identified. The exemption procedure in the *Criminal Code* could conceivably be conducted jointly with the processing of applications for exemption under provincial laws before a justice of the peace providing the guarantees of independence and impartiality within the meaning of *Ell v. Alberta*.[40]

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[39] *R. v. Barrow*, [1987] S.C.R. 694.
[40] [2003] 1 S.C.R. 857.

RECOMMENDATION

10. Consideration should be given to making legislative amendments to encourage dejudicialization of the exemption process to a judicial officer in view of the existing provincial and territorial legislative provisions on jury panels setting out grounds for exemption.

3.3.2 The procedure for challenges for cause

A number of respondents to the consultation, both Crown prosecutors and the judiciary, unfailingly pointed out the formalism, arduousness and inconvenience of the current procedure under s. 640(2) Cr.C., as much as regards judges and counsel as regards the jurors themselves.

Under the current procedure, the last two jurors sworn must determine if a ground for a challenge is true. If no juror has been sworn, the court appoints for that purpose two persons present. This process is sometimes referred to the "triers process" or a "mini jury".

The case law teaches that:

- the judge must explain to the triers their role and the rules they must follow; they must be instructed on the meaning of partiality and on the balance of probabilities standard;

- decisions on the impartiality of a prospective juror must be unanimous; if triers do not agree, they must be replaced;

- triers have a reasonable time to deliberate and may even withdraw from the courtroom for that purpose;

- the triers' decision may be reversed by a peremptory challenge.

The courts have also decided that the process is mandatory and a judge may not depart from it, even with the consent of the parties, on penalty of having the verdict quashed on appeal:

> Logistics of the Process and Practical Considerations
>
> […]
>
> **19.** Unquestionably, the prospect of repeating over and over again the same instructions to each new trier is a daunting one. Trial judges can be forgiven for

> viewing the process as cumbersome, repetitive, and wasteful and it is understandable that they would look for ways to speed it up. Regrettably, in some instances, this can lead to impermissible corner-cutting.[41]

Unfortunately, non-compliance with that procedure remains a relatively frequent ground for ordering a new trial.[42] The confusion that may arise when a judge excuses jurors during challenges for cause, as expressly permitted by s. 632 ("The judge may […] order than any juror be excused from jury service whether or not […] any challenge has been made in relation to the juror."), also gives rise to grounds for an appeal.[43]

In addition, and without questioning jurors' capability to perform that task, some respondents to the consultation pointed out the inconvenience of the procedure for parties who must sometimes sacrifice a peremptory challenge to strike a prospective juror whom the judge and the parties would have found partial.

DISCUSSION

With a view to achieving a rational use of judicial resources, and considering the importance of the jurors' duties in the remainder of the trial, the Steering Committee examined the advisability of amending the procedure and, if applicable, the best way to do so.

One option would be to give the judge the power to review the triers' decision. However, that would address only a part of the previously mentioned concerns and likely just make the process even more cumbersome. The option was therefore excluded.

Another solution could be to reassign the triers' power to decide challenges for cause to the judge. Or make such a reassignment conditional on the consent of the parties.

The feasibility of amending the procedure raises a question in terms of its constitutional validity. The question must be asked whether the involvement of jurors in the empanelling of an impartial jury is a fundamental characteristic of the institution as enshrined in section 11(*f*) of the *Charter*. A more dogmatic approach to the institution could suggest that the jury would no longer be a fundamental bulwark against the abuses of the system if it were constituted by the system rather than by peers. The question can be asked in the following terms: to what extent is the participation of the jurors themselves in the constitution of the jury related to the right to be tried by an impartial jury? Is the procedure in its current form an essential part of the institution? It is

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[41] *R. v. Douglas*, [2002] O.J. No. 4734 (OCA).

[42] See in particular *R. v. Douglas*, *supra*, because of insufficient instructions to the triers; *R. v. Maherchand*, [2007] J.Q. No. 7460 (QAC), in which the judge exempted prospective jurors rather than use the triers process after securing the consent of the parties; *R. v. W.V.*, [2007] O.J. No. 3247 (OCA), in which the judge kept the first two selected jurors as triers to the end of the selection process.

[43] *R. v. Laroche*, [2004] J.Q. No. 9078, paras. 36-53 (QAC).

interesting to note that in England the power to challenge for cause was formerly exercised by the last two jurors to be sworn[44] but that it is now the judge's power, [45]as is the case in New Zealand[46] and most Australian states.

The abolition of the triers process in England over 50 years ago, as well as its abolition in other jurisdictions whose criminal justice system is modeled on the British system, is perhaps a sign of its obsolescence. It could serve to argue that the process is not an essential part of the jury trial as enshrined in the *Charter* and that abolishing it would not contravene s. 11(*f*).[47]

The argument that a jury selected from among one's peers offers a better guarantee of impartiality or contributes to the appearance of impartiality is questionable. Indeed, no one questions the reliability of the first two jurors because their impartiality was assessed by the judge and not their peers.

RECOMMENDATION

11. Section 640 Cr.C. should be amended to have challenges for cause decided by the judge rather than the two jurors who were last sworn.

3.4 Jury instructions

On the initiative of the Heads of Prosecution Conference, a Canada-wide analysis was made of 108 cases relating to murder, attempted murder and manslaughter giving rise to new trials between 2001 and 2005. The review revealed that 68% of the cases involved errors in the judge's instructions.[48]

A wide consensus has emerged on the excessive length and complexity of jury instructions and on a desire that model instructions be developed and formalized in order to reduce the numerous pitfalls that can lead to orders for a new trial.

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[44] Stephen, J.F., *A History of the Criminal Law of England*, Macmillan and Co., London, 1883, Vol. I, p. 303.
[45] *Juries Act 1974*, s. 12 accessible at : http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=juries+act+1974&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=225100&PageNumber=1&SortAlpha=0. According to our research, the change may have been made at the enactment of the *Criminal Justice Act 1948*; see Cross, R. & Jones, P.A, *An Introduction to Criminal Law*, Butterworths, London, 1966, 3rd ed., pp. 305-306.
[46] *Juries Act 1981*, s. 25, accessible at : http://www.legislation.govt.nz/act/public/1981/0023/latest/DLM44099.html?search=ts_act_juries&sr=1.
[47] *R. v. Genest*, *supra*.
[48] *Murder, Attempted Murder and Manslaughter Retrials*, Heads of Prosecution, February 10, 2006.

The Supreme Court of Canada recently restated the required elements of a trial judge's final charge to the jury in *Daley*,[49] in which the Supreme Court assessed the accuracy and adequacy of the trial judge's instructions on the defence of voluntary intoxication:

> (1) instruction on the relevant legal issues, including the charges faced by the accused;
>
> (2) an explanation of the theories of each side;
>
> (3) a review of the salient facts which support the theories and case of each side;
>
> (4) a review of the evidence relating to the law;
>
> (5) a direction informing the jury they are the masters of the facts and it is for them to make the factual determinations;
>
> (6) instruction about the burden of proof and presumption of innocence;
>
> (7) the possible verdicts open to the jury; and
>
> (8) the requirements of unanimity for reaching a verdict.

At the same time, the Court recalled the principles that should govern trial judges in the preparation of their instructions:

> - The trial judge must set out in plain and understandable terms the law the jury must apply when assessing the facts. This is what is meant when it is said that the trial judge has an obligation to instruct on the relevant legal issues. (para. 32)
>
> - […] does not stand for the proposition that *all* facts upon which the defence relies must be reviewed by the judge in the charge. (para. 55)
>
> - The pivotal question upon which the defence stands must be clearly presented to the jury's mind. (para. 55)
>
> - […] it is not the case that the trial judges must undertake an exhaustive review of the evidence. Such a review may in some cases serve to confuse a jury as to the central issue. (para. 56)
>
> - Brevity in the jury charge is desired. (para. 56)
>
> - The extent to which the evidence must be reviewed […] will depend on each particular case. (para. 57)

[49] *R. v. Daley*, 2007 CSC 53.

- [T]he task of the trial judge is to explain the critical evidence and the law and relate them to the essential issues in plain, understandable language (para. 57)

  [Emphasis added]

3.4.1 Model instructions

It is no longer necessary to demonstrate the merits of model instructions explaining the general legal principles relating to reasonable doubt, contradictory evidence or requirements for the application of a particular defence, etc. The Supreme Court of Canada itself recommends the use of model instructions, which it has had the opportunity to endorse.[50] Using those directives in the final charge to the jury will often remedy problems in other parts of the instructions where the judge reviews the evidence in relation to the law. The members of the Steering Committee promptly agreed that the work that has already been carried out in this respect, in particular by the Canadian Judicial Council, should be encouraged.

The question remaining is that of the advisability of formalizing the instructions by making them mandatory, which probably hinges on the feasibility of a procedure for doing so. The issue of the appropriate vehicle or mechanism for making model jury charges mandatory is indeed problematic.

The vehicle should be sufficiently flexible to allow the models to be amended quickly should there be a change in the state of the law. It becomes immediately apparent that it would not be advisable to have them prescribed directly by the *Criminal Code*.

Should they be prescribed in a regulation made under an enabling provision in the *Criminal Code*? Prepublication rules would then allow consideration of comments from bar societies and defence counsel associations. The enabling provision could distinguish instructions that have been endorsed by the Supreme Court of Canada from the others. A process involving the prior opinion of a committee of representatives from the judiciary, Crown prosecutors and defence counsel could also be contemplated for the latter instructions. Some have suggested providing for a process for endorsement of those instructions by the court of appeal, which would offer a forum for debating the content of the instructions. But that approach raises other issues. Should each provincial appeal court endorse the model instructions? Would that result in variances in the instructions in each province? Who would be invited to take part in the debate? Would it be preferable to have them endorsed by a reference to the Supreme Court of Canada?

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[50] See, among others, *R. v. Robinson*, [1996] 1 R.C.S. 683, paras. 49 and 54, in which the Court recommended the use of a "*Canute*-type" charge developed by the British Columbia Court of Appeal, (1993) 80 C.C.C. (3d) 403, with respect to the defence of voluntary intoxication. The recommendation was reaffirmed more recently in *R. v. Daley*, *supra*, at paras. 48 and 63.

Another option would be to leave it to the superior courts of the provinces to integrate them uniformly into their respective rules of court and, if necessary, amend sections 482 or 482.1 of the *Criminal Code* accordingly. Unlike the regulatory option, making rules of court does not involve a formal consultation of Crown prosecutors and defence lawyers. Then again, superior court judges could be required to decide the constitutional validity of instructions they have themselves established. Moreover, by what proceedings could a model instruction be contested when it is constitutionally valid but reverses a common law rule in favour of the Crown or the accused? The option of making rules of court under s. 482 or 482.1 Cr.C. should not be preferred. Such rules have not traditionally been intended to settle substantive issues of this kind.[51]

In view of the preceding, the following options were discussed within the Steering Committee as to the appropriate vehicle for implementing model instructions:

- Make a more thorough examination of the advisability and feasibility of formalizing model instructions in a regulation, providing for the possibility of a procedure for a prior reference to the Supreme Court of Canada as to instructions that have not yet been clearly endorsed by the Supreme Court. If applicable, a list should be compiled of instructions that may be considered as endorsed by the Supreme Court and be dealt with in the first stage of formalizing model instructions.

OR

- The Canadian Judicial Council should be encouraged to continue its work on the development of model jury instructions and to give consideration to determining the best process for promoting the use of and compliance with model instructions (training, more formal judicial guidelines, regulations, etc.).

DISCUSSION

The assessment of the advisability of formalizing the model instructions in a regulation must take into account the danger that non-conformity with the directives would be fatal since failure to follow a statutorily mandated procedure leaves little room for remedy by appeal courts. Unless it is expressly provided that non-compliance is not necessarily fatal. But formalizing model instructions serves no purpose if there is no consequence for non-compliance. A new debate on major and minor non-compliance issues should not be created. The drawback could be lessened, or even eliminated, by providing that the model directives must be given to the jurors in writing.[52]

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[51] *R. v. Duhamel*, 2006 QCCA 1081, para. 12: "rules of this sort do not create substantive law but merely address matters pertaining to practice, procedure, or administration."

[52] See, among others, *R. v. Ranwez*, [2007] J.Q. No. 6402, para. 22 (QAC), in which an error in the judge's instructions on reasonable doubt was able to be remedied by the delivery of a relevant extract from *Lifchus* to the jury.

More formal instructions by the Judicial Council of Canada, if that option were available, would definitely offer greater flexibility regarding the evolution of the law than the other two options.

In view of the relatively small number of model instructions that have been clearly endorsed by the Supreme Court in relation to the number of instructions a judge may use in the course of a trial, it is clear that many "new" model instructions would require a reference to the Supreme Court before they could be formalized. The process of referring a question to the Supreme Court, while available, does not play a major role in the Canadian legal tradition. This is mainly the result of the difficulty in arguing matters of law in the absence of an appropriate factual basis. As to the instructions that have been endorsed by the Supreme Court, their integration into routine practice is perhaps more a matter of training.

In light of the preceding, the members of the Steering Committee finally agreed to wait for the Canadian Judicial Council to complete its work on the development of model jury instructions and to give consideration to determining the best process for promoting the work to the judges.

RECOMMENDATION

12. The Canadian Judicial Council should be encouraged to continue its work on the development of model jury instructions and to give consideration to determining the best process for promoting the use of and compliance with model instructions (training, more formal judicial guidelines, regulations, etc.).

3.4.2 Other judge-jury relations

Apart from the judge's final charge to the jury, numerous other issues that frequently arise in the interactions between the judge and the jury during deliberations are the subject of appeal proceedings and give rise to orders for a new trial.

Among those issues are the conditions or the procedure to follow for:

- responding to requests to rehear the testimony of a witness or a statement: should such requests be met? Can the jury ask to rehear all the testimony? Can a part of the testimony of one witness or one statement be reheard or must it be reheard in its

entirety? If yes, must the judge remind the jury that it must consider the remainder of the evidence? Should the rehearing take place in the courtroom or in the jury room?[53]

- investigating allegations of misconduct or partiality within the jury during the trial or deliberations: should the juror concerned be questioned? If yes, in the presence of the other jurors or not? In private or in open court? In the presence of the parties or not? Can the parties question the juror directly? Should the judge give them the opportunity to make submissions? Distinction between matters that are intrinsic to jury deliberations, and therefore governed by deliberation secrecy (s. 649 Cr.C.), and those that extrinsic to the deliberations?[54]

- allowing rehearing of arguments, giving a transcript of the arguments to the jury or asking counsel to produce a written summary of their respective theories for handing to the jury: should such requests be met?[55] If yes, can the arguments of only one of the parties requested by the jury be provided or must the arguments of both parties be provided?[56]

- giving a transcript or written copy of the instructions to the jury: is the judge required to provide a transcript of the judge's jury instructions on the request of the jury?[57] Can the request be specific or can it be general?[58]

- giving the text of the offences to the jury: what precautions should the jury take when part of the provision has already been declared unconstitutional?[59]

- answering the questions of the jury: the steps to be followed by the judge and the distinction between a substantive question, which must be answered in open court in the presence of the accused, and an administrative question, which can be settled directly between the judge and the jurors.[60] Can questions be addressed to witnesses, and, if so, how (can the judge invite jurors to address questions to witnesses? Can the jurors ask questions during the examination of a party or only when the party has completed the examination? Should the questions be submitted to the judge

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[53] Case law abounds with these issues that regularly provide grounds for appeal in courts across the country.

[54] See, among others, *R. c. Ferguson*, [2006] A.J. No. 175, paras. 13 to 54 (ACA); *R. v. Giroux*, [2006] O.J. No. 1375 (OCA); *R. v. Samson*, [2005] J.Q. No. 17404, paras. 43-54 (QAC); *R. v. Forsyth*, [2003] B.C.J. No. 2484 (BCCA.).

[55] See, among others, *R. v. Pépin*, [2005] J.Q. No. 39, paras. 33-35 (QAC); *R. v. Robert*, [2004] J.Q. No. 8562 (QAC); *R. v. Haijan*, [1998] A.Q. No. 811 (QAC); *R. v. Khela*, (1991) 68 C.C.C. (3d) 81, p. 95 (QAC); *R. v. Tremblay*, [1997] A.Q. No. 2905 (QAC); *R. v. R.A.C.*, (1990) 57 C.C.C. (3d) 522 (BCCA).

[56] *R. v. Ferguson*, [2001] 1 R.C.S. 281, adopting the dissenting opinion of Laskin J. in (2001) 152 C.C.C. (3d) 95, paras. 84 and 86 (OCA).

[57] *R. v. Stuart*, [2007] Q.J. No. 6809, para. 117 (QAC).

[58] *R. v. Verreault*, [2005] J.Q. No. 158 (QAC).

[59] *R. v. Winmill*, [2008] N.B.J. No. 468 (CANB); *R. v. Salt*, [2007] O.J. No. 1344 (OCA).

[60] *R. v. Ferguson*, [2006] A.J. No. 175 paras. 18 to 41(ACA).

beforehand? Should the debate on the admissibility of a question be carried on in the absence of the jury?[61]

Since grounds for appeal relating to jury instructions are often accompanied or completed by grounds relating to the above issues, it could be advisable to address them in the same manner as instructions. Once these relatively confined issues would be identified, the Steering Committee considered whether they should be addressed by further technical additions to the criminal procedure or if they should rather be the subject of judicial guidelines from the Canadian Judicial Council.

DISCUSSION

Responding to all these issues through legislation in a manner that would fully address a multitude of special circumstances that can emerge in a trial appears difficult. And given the likelihood that the response to the issues will frequently affect the right of the accused to a fair trial, legislative action accordingly becomes substantially more complex.

Since some of these issues have not yet been the subject of Supreme Court guidelines, legislation is perhaps not the best response to changes or developments in the case law. Furthermore, with codification of procedural rules, there is a risk that non-compliance could become a deciding issue on appeal. In light of the preceding, the Steering Committee deems that it would be advisable to address those issues by means of judicial guidelines.

RECOMMENDATION

13. The Canadian Judicial Council should be encouraged to develop judicial guidelines on issues that arise in judge-jury relations, more specifically in relation to:

- requests for re-hearing of testimony or statements;
- allegations of misconduct or partiality within the jury during the trial or deliberations;
- re-hearing arguments and/or obtaining a transcript of the parties' arguments to the jury or written arguments explaining their respective theories;
- providing the jury with a transcript or a copy of the jury instructions;
- processing questions by the jury.

[61] Watt, D., *Ontario Specimen Jury Instructions (Criminal)*, Toronto, Carswell, 2002, pp. 28-29. Canadian Judicial Council, Preliminary, Mid-Trial and Final Instructions, 4.6 Questioning of Witnesses by Jurors (last revised February 2004). See in particular *R. v. Andrade*, [1985] O.J. No. 968 (OCA); *R. v. Druken*, [2002], N.J. No. 92 (C.A.N.L.); *R. v. Nordyne*, [1998] 17 C.R. (5th) 392 (QAC).

3.5 Issues related to jury deliberations

The Steering Committee examined three issues relating to the procedure for jury deliberations:

- the rule on sequestration of juries while they deliberate;
- publication of information by the media during deliberation;
- the rule on the confidentiality of deliberation relating to the possibility of doing research on the jury.

3.5.1 Mandatory sequestration of juries during deliberation

The current law (s. 647 Cr.C.) states: "The judge may, at any time before the jury retires to consider its verdict, permit the members of the jury to separate." The judge may have discretion to allow jurors to separate up to the start of deliberation, but the rule is that the jury be sequestered throughout the trial and until there is a verdict. While they deliberate, jurors must be sequestered.

It may be the rule in theory, but sequestration of juries prior to deliberation has for some time been more the exception, particularly because of the length of trials.[62] Some members of the Steering Committee suggested that the rule of mandatory sequestration during deliberation be reviewed because of the burden it places on jurors and the logistics and costs it creates for the administration of justice (hotels, transportation, security, etc.).

The original purpose of sequestering juries was to compel jurors to reach a verdict quickly by denying them water and food. Fortunately, that approach is a thing of the past! Today, juries are sequestered because of the real or perceived risk of outside influence.

However, as the New Zealand Law Commission noted in a comprehensive study of trial by jury:

- a person who truly wanted to influence the jury's verdict might not wait until the very end of the trial;

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[62] See in particular *R. v. Keegstra* (No. 2), [1992] A.J. No. 330: "When pressed for an alternative solution, Mr. Shea first suggested sequestration. We think that is a monstrous suggestion. No citizens presently offer a greater contribution to the enforcement of the right to a fair trial in this case than the jurors. Why should they suffer more? Why should the potential audience of the appellant's production not instead be patient for a month or two as their contribution to the protection of constitutional rights in our society? The answer seems obvious to us."; see also *Re Global Communications Ltd. and Attorney General of Canada*, (1984) 10 C.C.C. (3d) 97, at paragraph 37.

- sequestration during deliberations creates added inconvenience for jurors with family commitments;[63] a 1995 study in New York State showed that, before sequestration rules were relaxed, potential jurors who would otherwise have been excused on family or religious grounds could now serve;

- sequestration can put undue pressure on jury members who might want to reach a verdict in order to avoid spending another night with their fellow jurors.[64]

The New Zealand Law Commission recommended abolition of automatic sequestration at the deliberation stage, and the law was recently amended to give effect to that recommendation[65]. The new legislation states that a jury may be separated after one day of deliberation unless the judge orders otherwise if he or she deems such an order to be in the interest of justice. In addition, jurors are specifically prohibited from discussing the case with anyone except during deliberation. In England, mandatory sequestration at the deliberation stage was changed in 1994 to allow the judge to permit jurors to be separated during deliberation[66]. In Australia, six states allow judges to permit the separation of jurors while they deliberate[67].

The applicable law in these jurisdictions, where criminal law is rooted in the British system of justice, the formula can vary. The law may state that a jury can be separated *ex officio* during deliberation after a specified period of time unless the judge orders otherwise, or sequestration may apply unless the judge allows the jury to be separated.

If the rule of mandatory sequestration during deliberation is reviewed, it might be appropriate to also review the rule of sequestration prior to deliberation in order to bring it in line with current practice.

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[63] According to an American study by the *National Center for State Courts* in a number of judicial districts of judges and former jurors, sequestration constitutes the second most important cause of stress for jurors. *Through the Eyes of the Jurors: A Manual for Addressing Juror Stress.* National Center for State Courts, 1998, accessible at http://www.ncsconline.org/D_Research/publications.html#T.

[64] New Zealand Law Commission, *Juries In Criminal Trials*, No. 69, 2001, *supra*, pp. 154-156.

[65] *Juries Amendment Act 2008*, *supra*, s. 18.

[66] *Juries Act 1974*, *supra*, s. 13.

[67] New South Wales, *Jury Act 1977*, s. 54, accessible at http://www.austlii.edu.au/au/legis/nsw/consol_act/ja197791/; Western Australia, *Criminal Procedure Act 2004*, s. 111, accessible at http://www.austlii.edu.au/au/legis/wa/consol_act/cpa2004188/; Tasmania, *Juries Act 2003*, s. 46, accessible at http://www.austlii.edu.au/au/legis/tas/consol_act/ja200397/; Victoria, *Juries Act 2000*, s. 50, accessible at http://www.austlii.edu.au/au/legis/vic/consol_act/ja200097/; *South Australia*, *Juries Act 1927*, s. 55, accessible at http://www.austlii.edu.au/au/legis/sa/consol_act/ja192797/. Queensland, *Guardianship and administration and Other Acts A mendment Act 2008*, s. 23, accessible at http://www.legislation.qld.gov.au/LEGISLTN/ACTS/2008/08AC054.pdf.

3.5.2 Publication of information by the media during deliberation

Section 648 Cr.C. currently prohibits the publication of information regarding any portion of a trial at which the jury is not present before the jury retires to consider its verdict. Some members of the Committee suggested that this restriction be extended until the verdict is read even if the jurors were sequestered while they deliberated. Similar proposals were adopted by the Uniform Law Conference of Canada in 1999 and 2003.

Apparently, there have been incidents were jurors became privy to information adverse to the accused while the jury was deliberating. Owing to the proliferation and miniaturization of means of communication, it is increasingly difficult to control the information that jurors can access while they deliberate.

This issue obviously raises questions about the protection of freedom of the press and freedom of expression set out in paragraph 2(*b*) of the *Charter*. Section 648 Cr.C., as it currently stands, has already been challenged from that standpoint, and its full application has been restricted in some judgments based on the Dagenais/Mentuck test that applies generally to publication bans. Otherwise stated, by that reasoning, section 648 cannot prohibit outright the publication of information presented when the jury is absent and the media could obtain permission to publish information that cannot "reasonable be considered to give the jury a negative impression of the accused".[68]

In a more recent case, the Court of Appeal of Alberta was asked to determine the validity of section 517 Cr.C. in respect of paragraph 2(*b*) of the *Charter*. S. 517 Cr.C. states that a justice must, on application by the accused, make an order that evidence presented at the hearing on interim release not be published. The Court of Appeal ruled that while such mandatory prohibition is at odds with paragraph 2(*b*) of the *Charter*, it is a reasonable restriction in a free and democratic society given the temporary nature of the restriction:

> **46.** It is also relevant that the section does not impose a "publication ban", but merely defers publication until after the trial. While it is clear that a deferral of publication is itself an infringement of s. 2(*b*), it is nevertheless a lesser infringement than a total ban, which is a factor that can be taken into account in the analysis of minimal impairment.[69]

The fact that the proposed amendment to section 648 Cr.C. would simply delay the publication of information a few days – or even a few hours, in many cases – might actually work in favour of the constitutional validity. One of the factors that has to be

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[68] *R. c. Beauchamps & als*., [2003] J.Q. no 2340 (CSQ).

[69] *R.. v. White*, [2008] A.J. No. 956 (CAA), currently being appealed to the Supreme Court. See *R. v. Ahmad*, [2009] O.J. No. 288, pars. 231 and 242, the majority of the Court of Appeal of Ontario concluded that the restriction in s. 2(b) by the mandatory prohibiting provided for in s. 517 Cr.C. could be justified only in the case of accusations that may lead to a jury trial; application for leave to appeal under consideration by the Supreme Court.

taken into account, however, is that the risk of violating the right of the accused to a fair trial is diminished by sequestration, which should be considered in seeking a balance between opposing rights. It should also be noted that most case law recognizes the trial judge as having the inherent authority to ban publication at his or her discretion during deliberation if specific circumstances warrant[70]. The issue therefore demands more detailed analysis.

3.5.3 Confidentiality of deliberation

Section 649 Cr.C. as currently worded prohibits jurors from disclosing the content of their deliberation except for the purpose of examining the workings of a jury.

This restriction probably does not preclude general studies of former jurors on issues that would not lead them to make a determination on the deliberation process. In England, a prohibition similar to the one set out in section 649 did not stop studies on issues like their general understanding of evidence produced, their understanding of the legal concepts explained in the instructions, their assessment of compensation and accommodations, the impact of the trial on their personal lives and their families' personal lives and their perception of the legal system[71].

Section 649 Cr.C. did not prevent a similar study in Canada under the auspices of the Law Reform Commission of Canada.[72]Because of s. 649, the questions had to be very general and they were carefully prepared to prevent the jurors from talking about the deliberations in a specific case, namely: How did you find the presentation of evidence? Do you feel that juries generally are able to understand and evaluate the evidence? How did you find the instructions that were given to you by the judge? Do you feel that juries generally understand judges' instructions? Some general questions also dealt on the meaning of proof beyond a reasonable doubt. To diminish the risk of contravening the rule of deliberation secrecy and being placed in a situation of offence, the authors of the study had their questionnaire approved beforehand by the Justice Department of Canada in addition to obtaining the agreement of the chief judge of the courts involved.[73]

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[70] *Toronto Sun Publishing Corp. v. Alberta (Attorney General)*, [1985] A.J. No. 543 (CAA); *Re Global Communications Ltd. and Attorney-General for Canada*, [1984] O.J. No. 3066 (CAO).

[71] *Contempt of Court Act 1981*, s. 8, accessible at http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=contempt&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=1358414&PageNumber=1&SortAlpha=0. See, among others, *The Jubilee Line Jurors : Does their Experience Strengthen the Argument for Judge-only Trial in Long and Complex Fraud Cases ?* Lloyd-Bostock, S., *supra*; *Juror's perceptions, understanding, confidence and satisfaction in the jury system: a study in six courts*, Home Office Online Report 05/04, accessible at http://www.homeoffice.gov.uk/rds/pdfs2/rdsolr0504.pdf.

[72] Doob, A.N., *Canadian Jurors' View of the Criminal Jury Trial: A Report to the Law Reform Commission of Canada*, published in Studies on the Jury, Law Reform Commission of Canada, 1979.

[73] The feasibility of the study, at the judicial level, also required the adoption of a "lighter" interpretation of the scope of s. 649: Dood, A.N., *supra*, pp. 35-38.

As mentioned by the authors of the study, the scope of the results obtained in response to this type of question remains limited.[74] The amendment of section 649 Cr.C. to authorize studies on the deliberation process *per se* would certainly provide a better gauge of the appropriateness of changes to be made to the institution.

In New Zealand, where the common law rule has not been consolidated in the form of a formal ban, unlike in Canada and England, the New Zealand Law Commission conducted a study that was unique for a jurisdiction with a British-based criminal justice system. The study, in which 312 jurors out of a sample of 48 trials were interviewed, focused on the following issues:

> More specifically, the objectives of the research were:
>
> - to examine the extent to which, and the way in which, jurors individually and collectively assimilate and interpret the evidence and identify the issues in the case;
>
> - to identify the problems which jurors experience during the trial process;
>
> - to assess the extent to which jurors individually and collectively understand and apply the law, and to investigate how their perception of the 'law' modifies and influences their approach to the 'facts';
>
> - to explore the processes used by the jury to reach a decision, including their strategies for resolving disagreement and uncertainty;
>
> - to identify the impact and effects of pre-trial and trial publicity on the attitudes and responses of each individual juror to the case he or she is dealing with; and
>
> - to describe jurors' reactions to, and concerns about, their experience as a juror.[75]

The results of this study made it possible to make a significant number of concrete recommendations, justify a series of legislative amendments (concerning the confidentiality of jurors' identity, majority verdicts, separation during deliberation, the right to trial by jury for long trials) and correct misperceptions, particularly with regard to the impact of the media on the decision-making process.

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[74] Dood, A.N., supra, p. 59: Obviously, it should be kept in mind that although the juror might perceive that he understands the evidence and the instructions from the judge, this does not necessarily mean that he actually does understand everything that went on.

[75] New Zealand Law Commission, *Juries in Criminal Trials: Part 2, Vo. 2: Summary of the Research Findings*, Preliminary Paper 37, Vol. 2, November 1999, accessible at http://www.lawcom.govt.nz/ProjectPreliminaryPaper.aspx?ProjectID=76.

In Australia, six states specifically allow research involving the disclosure of aspects of the deliberation process[76]. In five of those states, research must be authorized by the Minister of Justice or the Attorney General. In the sixth, research must be authorized by a court on such conditions as court deems appropriate, subsequent to an application by the Attorney General.

Similar studies have been conducted in other jurisdictions, but they are very limited in scope in the context of Canada because of differences in culture, rules of evidence and procedure (in particular rules governing case management), the role and attitudes of judges and lawyers, etc.

The Supreme Court of Canada has often criticized the fact that this restriction makes it difficult to measure, for purposes of challenge with cause, the real impact of jurors' attitudes and bias on their judgment:

> The attempt of Vidmar and others to conduct scientific research on jury behaviour is commendable. Unfortunately, research into the effect of juror attitudes on deliberations and verdicts is constrained by the almost absolute prohibition in s. 649 of the *Criminal Code* against the disclosure by jury members of information relating to the jury's proceedings. More comprehensive and scientific assessment of this and other aspects of the criminal law and criminal process would be welcome. Should Parliament reconsider this prohibition, it may be that more helpful research into the Canadian experience would emerge. But for now, social science evidence appears to cast little light on the extent of any 'generic prejudice' relating to charges of sexual assault, or its relationship to jury verdicts.[77]

One of the recommendations in Honourable Justice MacCallum's report on the wrongful conviction of David Milgaard also provides an interesting illustration of the usefulness of such studies to a reform of rules of evidence and procedure:

> The Criminal Code should be amended to permit academic inquiry into jury deliberations with a view to gathering evidence of the extent to which jurors accept and apply instructions on the admissibility of evidence, particularly

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[76] New South Wales, *Jury Act 1977*, s. 68, accessible at http://www.austlii.edu.au/au/legis/nsw/consol_act/ja197791/; Western Australia, *Juries Act 1957*, s. 56B, accessible at http://www.austlii.edu.au/au/legis/wa/consol_act/ja195797/; Tasmania, *Juries Act 2003*, s. 58, accessible at http://www.austlii.edu.au/au/legis/tas/consol_act/ja200397/; Victoria, *Juries Act 2000*, s. 78, accessible at http://www.austlii.edu.au/au/legis/vic/consol_act/ja200097/; *South Australia, Criminal Law Consolidation Act 1935*, s. 246, accessible at http://www.austlii.edu.au/au/legis/sa/consol_act/ja192797/; Queensland, *Juries Act 1995*, s. 70, accessible at http://www.austlii.edu.au/au/legis/qld/consol_act/ja199591/.

[77] *R. v. Find*, 2001 S.C.R. 32, paragraph 87. See also *R. v. Williams*, [1998] 1 S.C.R. 1128, paragraph 36 and *R. v. Spence*, 2005 S.C.R. 71, paragraph 55.

> relating to inconsistent out of court statements. Amendments to s. 9 of the Canada Evidence Act should then be considered.[78] (Recommendation 5)

The principles underlying the traditional rule of the secrecy of jury deliberation (foster free and frank debate among jurors; protect jurors from harassment, censure or recrimination at the hands of convicted persons and their families; and ensure the finality of the verdict[79]) could be preserved by maintaining the confidentiality of the identity of respondents and depersonalizing answers and observations so that they cannot be linked to a particular trial.[80]

Also worth citing are Honourable Justice Lamer's findings on section 649 Cr.C. in his report on the wrongful convictions of Ronald Dalton, Gregory Parsons and Randy Druken:

> It is possible to isolate a number of specific factors and to draw some general conclusions. However, the picture will always be incomplete without at least some insight into what happened in the jury room. […] There have been some studies done in the United States on jury behaviour as well as some Canadian studies on "simulated" juries. But much of our knowledge of juries is based on assumptions. […] Here, the challenge is to maintain the benefits that section 649 affords while obtaining the benefits of better insight into jury deliberations. That would be especially valuable where a serious injustice has occurred.[81]

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[78] *Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard*, The Honourable Mr. Justice Edward P. MacCallum, accessible at http://www.milgaardinquiry.ca/DMfinal.shtml.

[79] *R. v. Pan*; *R. v. Sawyer*, [2001] 2 S.C.R. 344, paragraphs 47-53.

[80] See the analysis of Chopra, R.S. and Ogloff, J.R.P., *Evaluating Jury Secrecy: Implicationfor Academic Research and Juror stress*, (2000) 44 C.L.Q. 190, pp. 211-200. It should be noted, however, that England has not changed the rule of the secrecy of jury deliberation to permit research because of the reservations voiced by Lord Justice Auld in *Review of the Criminal Courts of England and Wales*, *supra*, pp. 164-168. Lord Auld cited the risk of such studies discrediting jury verdicts. He also pointed out that post-trial interviews do not convey the stress actually experienced during deliberation, which could call into question the real scope of the outcome.

[81] *The Lamer Commission of Inquiry pertaining to the Cases of: Ronald Dalton, Gregory Parson and Randy Druken*, Report and Annexes, pp. 165-166, accessible at http://www.justice.gov.nl.ca/just/lamer/. The Honourable Justice Lamer made the following recommendation: "The Minister of Justice [of Newfoundland and Labrador] should pursue with his Federal and provincial counterparts, an amendment to the Criminal Code to permit jurors to be interviewed, subject to stringent conditions, by commissioners conducting inquiries into wrongful convictions." (Recommendation 16)

RECOMMENDATIONS

14- Examine more thoroughly the advisability and feasibility of legislative amendments

(a) to make it possible for jurors to be separated during deliberation when appropriate and, if so, to continue the publication ban prescribed in section 648 Cr.C. until the verdict is returned;

(b) to confirm the discretion of the trial judge to extend a media ban on publication of information related to a portion of the trial at which the jury is not present until the verdict is returned, based on the implications arising from the rights protected by paragraph 2(*b*) of the *Charter*;

(c) to amend the rule of secrecy of jury deliberations to permit studies of how juries work by providing the necessary framework without compromising the principles underlying the rule.