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The Jury System in Canada

Introduction

This article provides a brief overview of Canada's jury system. The first part discusses the purpose of the jury, which has been unique to common law countries,[1] including when trial by judge and jury is available to the accused. The second part describes who is eligible to sit on a jury in Canada, the pre-trial selection of a jury panel and the selection of jury members at trial. The final part discusses how the Canadian jury renders a verdict.

Part I: an overview of the jury system in Canada

A. The definition of a "jury" in Canada and its availability in criminal trials

Canada's jury system derives most directly from the English common law,[2] which entitled accused persons, in certain cases, to be tried by judge and jury. However, both the purpose of the jury, and jury procedures, have evolved significantly through the centuries.

The historical role of the jury in England was very different from what it is today. Originally, jurors were chosen from the local community and were themselves the source of information –sworn under oath to disclose what they knew of the facts.[3] Prior to the Norman Conquest, "'rough justice' [was] administered by close neighbours in light of their knowledge of local affairs and the personalities of those involved in them."[4] Their use to determine facts became part of criminal proceedings during the reign of Henry II in the latter part of the 12th century.[5] The jury, in a sense, originally functioned as both witness and adjudicator. Through the centuries, however, jurors ceased to be witnesses; the jury came to function as a check on the power of the state, and to eventually represent the right to be tried in serious cases by a jury of one's peers, 12 ordinary citizens, who are both impartial and randomly chosen.[6]

The right to be tried by judge and jury in Canada for indictable offences was initially provided in the 19th century by the *Criminal*

1 *R. v. Bryant* (1984) 48 O.R. (2d) 732 (Ont. C.A.).

2 Although a link between 12 triers and criminal justice can be identified as far back as King Alfred the Great in 879 A.D., and assemblies of up to 1,001 persons judged cases in fifth-century Athens, the direct origin of the jury trial in Canada can be traced to the time of William the Conqueror in 1066 A.D. See *R. v. Bryant* , *ibid*., for a general discussion of the history of the jury trial in England, the United States and Canada. See also Sadakat Kadri, The Trial: A History, from Socrates to O.J. Simpson (New York: Random House, 2005), at 8 and 70.

3 *R. v. Bryant, supra* note 1.

4 Christopher Granger, *Canadian Criminal Jury Trials,* 2d ed. (Scarborough, Ont.: Carswell, 1997) at 13.

5 *R. v. Bryant*, *supra* note 1.

6 *Ibid.*

Code of 1892.[7] Although this right was codified in 1892, the right to trial by jury existed in the four original Canadian provinces before the provinces formed the Canadian Confederation in 1867.[8]

Since Confederation, the procedures regarding the functioning of the jury in Canada have evolved. Jury trial procedures are now set out in Part XX of the *Criminal Code.* Modern Canadian juries are composed of lay persons chosen at random, called upon to legally determine the guilt or innocence of an accused person charged with a serious crime.[9] A jury is usually composed of 12 persons,[10] male or female, who are to act as impartial triers of fact in assessing whether the Crown has proven its case against the accused beyond a reasonable doubt. The number of jury members can be increased to 13 or 14 persons if the judge considers it advisable in the interests of justice, however, only 12 jury members may deliberate in order to render a verdict.[11]

When a person is tried by judge and jury in Canada for an indictable offence, he or she can elect to have a "preliminary inquiry." A preliminary inquiry refers to the process by which a provincial court judge will "inquire into the charge to determine whether there is sufficient evidence to warrant placing the accused on his trial."[12]

It is important to understand that jury trials are not available in all cases;[13] their availability depends on the nature of the crime that a person is accused of committing. In some cases, such as murder, the accused is to be "automatically tried" by judge and jury unless a special application is made by the defence to be tried by judge alone with the consent of the Attorney General. In other cases, the accused can elect to be tried by judge and jury, while, in the case of less serious offences,[14] the accused must be tried by judge alone. Young persons[15] are also afforded the right to be tried by judge and jury in some cases, notably where they stand accused of serious offences such as murder.[16] In Canada, the *Youth Criminal Justice Act* generally governs the prosecutions of young persons who are charged with criminal offences. A young person is defined as a person who is at least 12 but under 18 at the time of the commission of the offence.[17]

B. Right to trial by judge and jury in Canada

The right to be tried by judge and jury is a constitutionally afforded right provided by subsection 11(f) of the *Canadian Charter of Rights and Freedoms*[18] *(*hereafter, *Canadian Charter*), when the accused is charged with an offence punishable by a maximum of five years or more of imprisonment.

7 S.C. 1892, c. 29. See also Granger, *supra note 4,* at 36.

8 Don Stuart, Ronald J. Delisle & Tim Quigley, *Learning Canadian Criminal Procedure,* 10 ed. (Toronto: Carswell, 2010) at 884.

9 *Ibid.*, at 6.

10 *Criminal Code* (R.S.C., 1985, c. C-46), s. 631(5). See also: *Fair and Efficient Criminal Trials Act* (S.C. 2011, c. 16), s. 7 which amended the *Criminal Code* to allow a judge to swear up to 14 jurors. This measure was introduced because the time required to hear criminal trials in Canada has steadily increased over the last decade, especially in large, complex cases. This can affect the jury's ability to render a verdict, since it is not uncommon for jurors to be discharged in the course of a trial for various reasons, such as ill health or due to some other unforeseen circumstance. This can result in the size of a jury being reduced to below the *Criminal Code* minimum requirement of 10 jurors to render a valid verdict. To address this concern, up to 14 jurors may be sworn, subject to a random selection process that determines, after the judge's charge to the jury, which jurors will deliberate.

11 *Ibid.*

12 *Supra* note 8, at 713.

13 In reality, the majority of criminal cases in Canada are not tried by jury; most are tried by judge alone. See David M. Paciocco, *Jury Selection in Criminal Trials: Skills, Science, and the Law,* (Concord, Ontario: Irwin Law, 1997) at p. 28.

14 These are referred to as "absolute jurisdiction offences," which are tried by provincial court judges. See s. 553 of the *Criminal Code.*

15 *Youth Criminal Justice Act* (S.C. 2002, c. 1), s. 2.

16 *Ibid.*, s. 67.

17 *Supra*, note 15.

18 *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being schedule B to the *Canada Act 1982* (UK), 1982, c 11.

i. Mandatory trial by judge and jury unless both attorney general and accused agree to trial by judge alone

The accused must, in some cases, be tried by judge and jury in Superior Court unless both the Attorney General and the accused consent to trial by judge alone. This is the case for indictable offences (the most severe criminal offences) mentioned in s. 469 of the *Criminal Code,*[19] which include murder, conspiracy to commit murder, treason, intimidating Parliament or a legislature, and other offences expressly mentioned within the section. Trial by judge and jury is mandatory for these crimes, unless both the Attorney General and the accused consent to the latter being tried by judge alone.[20] Furthermore, although the right to be tried by judge and jury is a constitutionally protected right when the maximum punishment is five years or more of imprisonment, trial by judge alone is not a constitutionally protected right.[21]

ii. Mandatory trial by judge alone

As mentioned above, some less serious offences must be tried by a judge alone in Provincial Court. Such offences include theft under $5,000 (other than theft of cattle), mischief where the value of the property is under $5,000 and other offences related to gambling.[22] In these cases, a jury trial is not possible even if the accused wishes to have one.

iii. Trial by judge and jury or by judge alone: Cases in which the accused can elect his method of being tried

In cases where a person is accused of an offence not specifically mentioned in sections 469 or 553 of the *Criminal Code,* the accused can elect to be tried by judge and jury in Superior Court, or by judge alone in either Superior Court or Provincial Court.[23] The majority of criminal offences provide the opportunity for accused persons to choose how they will be tried. Where the accused has an election but does not choose his mode of trial, he is deemed to be tried by judge and jury.[24] Furthermore, in some cases, even where the accused elects to be tried by judge alone, the Attorney General can require the accused to be tried by judge and jury where the crime is punishable by five or more years of imprisonment.[25]

PART II : Selection of jury members in Canada

A. Eligibility and initial selection of jury members

I. Pre-trial selection of potential jurors

Jury members in Canada must be selected at random from the local community where the trial is to be held.[26] They must be impartial between the state and the accused.[27] The selection of jury members is a two-tier process. The first part of the process involves selecting potential jury members from a list of eligible candidates prior to trial. Jury lists or "rolls" are compiled according to the particular process specified in the relevant provincial or territorial legislation, which varies across Canada. Generally, the list is comprised of names of persons residing in a particular judicial district drawn from voters' or electors' lists.

Each province and territory in Canada has its own legislation that determines who is

19 (R.S.C., 1985, c. C-46).
20 *Ibid.*, s. 473.
21 *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1321.
22 *Criminal Code,* s. 553.
23 *Ibid.*, s. 536 (2).
24 *Ibid.*, s. 565(1)(c).
25 *Ibid.*, s. 568. The Attorney General may direct that an accused be tried by a judge and jury when he or she believes it is in the public interest to do so.
26 See Granger, *supra* note 4, at 83.
27 *Ibid.*

eligible for jury duty.[28] In most Canadian provinces and territories a person must be 18 years of age and a Canadian citizen to sit on a jury.[29]

These statutes that provide eligibility criteria for potential jury members, automatically exclude police officers, lawyers, members of Parliament, and judges from being jurors. Provincial and territorial statutes also specify grounds upon which potential jurors may apply to be excused or exempted from jury duty, such as hardship or physical, mental or other infirmity that is incompatible with the discharge of the duties of a juror. These potential jurors compose what is referred to as the "array" or "the panel,"[30] which is eventually reduced to 12 to 14 jurors in the second part of the jury selection process: in-court selection.

II. At – trial selection of potential jurors

The second part of the process involves the in-court selection of jury members prior to the commencement of the trial. This selection process is governed exclusively by the *Criminal Code.* Firstly, the potential jury members who comprise the jury panel present themselves at court. The panel number, name, and address of each member of the panel are written separately on equal sized cards.[31] The cards are then delivered to the clerk of the court who places the cards into a box and shakes the box thoroughly.[32] The clerk then draws the cards from the box and calls out the number on each card, and confirms the number corresponds to the name of the person on the card[33] until the number of persons is sufficient to constitute a full jury in the opinion of the judge, in light of the fact that some potential jurors may be excused, challenged, or be directed to "stand by."[34] The jurors are then sworn in by the clerk of the court.[35]

B. Excusing and challenging jury members

i. Excusing jury members

The *Criminal Code* provides that the judge may, at any time before the commencement of the trial, excuse jury members from jury service regardless of whether a challenge has been made against a member of the panel. Firstly, jury members may be excused where the judge has concerns that the juror has a personal interest in the matter to be tried.[36] Secondly, a relationship between the juror and the judge presiding over the jury selection process, or between the juror and the trial judge, the prosecutor, the defence counsel, the accused, or a prospective witness, may also lead to the juror being excused.[37] Finally, personal hardship of a member of the panel can also lead to a panel member being excused.[38]

ii. Challenges of jury members by counsel

At trial, counsel for either the defence or the Crown can "challenge" potential jurors. The purpose of the challenge is "to eliminate or to reject undesirable jurors" [39] or those suspected of potential partiality. There are three methods of challenging potential jurors: (a) the entire panel can be challenged, (b) individual members of the panel can be challenged by a "peremptory challenge" (c) or by "challenge for cause."

28 See for example in the province of Ontario: *Juries Act* R.S.O. 1990, c. J.3; for the province of Quebec: *Jurors Act* R.S.Q. 2002, c. J-2.
29 Some jurisdictions (British Columbia, New Brunswick, Saskatchewan, the Northwest Territories and the Yukon) have an age requirement of 19 years.
30 See Granger, *supra* note 4, at 143.
31 *Criminal Code,* s. 631(1).
32 *Ibid.,* s. 631(2).
33 *Ibid.,* s. 631 (6) provides that measures to protect the identity of jury members is permissible if it is in the interest of the administration of justice. It is therefore not necessary that the name of the juror be called out.
34 *Ibid.,* s. 631(3).
35 *Ibid.,* s. 631(4).
36 *Ibid.,* s. 632 (a).
37 *Ibid,* s. 632(b).
38 *Ibid,* s. 632 (c).
39 See Granger, *supra* note 4, at 144.

a. Challenge to the "array": challenging the entire panel.

Firstly, counsel can challenge the entire jury panel referred to as a "challenge to the array."[40] The entire panel can only be challenged on three grounds: partiality, fraud or wilful misconduct on the part of the sheriff or other officer by whom the panel was returned.[41]

b. The peremptory challenge.

Both the prosecution and the defence have a limited number of peremptory challenges, which they can use without having to establish a reason.[42] The peremptory challenge is made by counsel prior to the jury member being sworn in at trial.[43] The number of peremptory challenges depends upon the gravity of the crime for which the accused is being tried. When the accused is charged with first degree murder or high treason, the prosecution and the defence each have 20 peremptory challenges.[44] Other situations provide for 12 or four peremptory challenges, depending on the maximum penalty for the offence being tried.[45] Even where accused persons are tried on multiple counts, they still benefit from the same number of challenges as if they were tried on one count alone, according to the count which permits the most peremptory challenges.[46]

c. The challenge for cause

Finally, both the prosecution and the defence may challenge an unlimited number of jurors for cause, on grounds that must be "specified and proven."[47] Members of the panel are not automatically excluded for cause, but rather, will be excluded if the grounds of the challenge are proven on a balance of probabilities (meaning that it is more likely than not that the grounds of the challenge are true.)[48] There are only six possible grounds for challenge for cause, which are exhaustively listed in the *Criminal Code*:

a. the name of a juror does not appear on the panel, but no misnomer or misdescription is a ground of challenge where it appears to the court that the description given on the panel sufficiently designates the person referred to;
b. a juror is not indifferent between the Queen and the accused;
c. a juror has been convicted of an offence for which he was sentenced to death[49] or to a term of imprisonment exceeding twelve months;
d. a juror is an alien;[50]
e. a juror, even with the aid of technical, personal, interpretative or other support services provided to the juror under section 627, is physically unable to perform properly the duties of a juror; or
f. a juror does not speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or both official languages of Canada, where the accused is required by reason of an order under section 530 to be tried before a judge and jury who speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or who speak both official languages of Canada, as the case may be.[51]

The purpose of making such challenges is to ensure a fair trial before an impartial jury rather than to over- or under-represent a certain class of society, or to go on a fishing

40 *Ibid.*
41 *Criminal Code,* s. 629(2)
42 See Granger, *supra* note 4, at 144.
43 *Ibid.,* at 189.
44 *Criminal Code,* s. 634 (2)(a).
45 *Ibid,* s. 634(2)(b) and (c).
46 *Ibid,* s. 634 (3).
47 See Granger, *supra* note 4 at 158.
48 *Ibid.*
49 The death penalty was abolished in Canada in 1976 but s. 638 of the *Criminal Code* has not been revised to reflect this fact.
50 Alien in this context means a non - Canadian citizen.
51 *Criminal Code*, s. 638.

expedition.[52] Common challenges for cause include cases where pre-trial publicity may destroy the juror's indifference between the Crown and the accused,[53] and admitted racial prejudice.[54]

PART III: Rendering a verdict by jury

The purpose of the modern-day Canadian jury is to render a decision in the criminal case presented before it by either acquitting or convicting the accused.[55] In order to render a general verdict of acquittal or conviction, the jury's verdict must be unanimous.[56] In Canada, a jury does not explain the reasons for its verdict. The jury can either convict the accused (by concluding that guilt has been proven beyond a reasonable doubt), or acquit the accused (where guilt is not proven beyond a reasonable doubt). The jury need not unanimously agree on the innocence of the accused; a unanimous agreement of reasonable doubt is sufficient to warrant an acquittal. In order to render their verdict, jury members deliberate in private so that their verdict is free from external influence, which is referred to as "sequestration."[57] Where jurors are unable to reach a unanimous verdict, (a situation referred to as a "hung jury,") the judge may declare a mistrial and direct that a new trial take place.[58]

For a jury to convict in a criminal trial, it must be satisfied that the prosecution has proven the guilt of the accused beyond a reasonable doubt. It is the trial judge's responsibility to properly explain to the jury this burden of proof. Errors in jury instruction are considered legal errors and are subject to appeal, which can ultimately result in a new trial being ordered.[59]

If the jury is left with a reasonable doubt, it must acquit the accused. A satisfactory jury instruction by the trial judge regarding reasonable doubt includes an explanation of what constitutes a reasonable doubt. A reasonable doubt must be based on reason and common sense.[60] It should not be based on sympathy or prejudice.[61] Furthermore, the concept of reasonable doubt must be logically connected to the evidence presented at trial.[62]

52 The term "fishing expedition" in this context means an investigation or inquiry undertaken in the "hope" of discovering information. See also Granger, *supra* note 4 at 158 and *R.* v. *Sherratt*, [1991] 1 S.C.R. 509 at 533.

53 *Supra* note 13 at 90. See also *R.* v. *Zundel* (1987), 58 O.R. (2d) 129 at 164 (C.A.)

54 See: *R.* v. *Williams,* [1998] 1 S.C.R. 1128. There is a presumption in Canada that a jury pool is composed of persons who can serve impartially. However, where an accused establishes that there is a realistic potential for partiality, defence counsel is permitted to question prospective jurors as to whether they harbour prejudices against people of the accused's race and, if so, whether they are able to set aside those prejudices and act as impartial jurors.

55 In a jury trial, the jurors become judges of the facts while the presiding justice remains the judge of the law. Accordingly, the presiding justice continues to have an active role in the proceedings and is called upon at many points during the jury trial to rule upon the admissibility of evidence and to determine other procedural issues, which arise in the course of the trial. Many of these rulings are done in the absence of the jury so their minds are not tainted by exposure to potentially inadmissible evidence such as, for example, involuntary statements made by an accused under duress.

56 During the course of the trial, the jury is prohibited from engaging directly in the examination of witnesses. Jury members may, however, provide written questions to the presiding judge at any time during the trial or during their deliberations, if they require assistance or if they need clarification concerning the judge's instructions or they wish to review particulars of the evidence.

57 See Granger, *supra* note 4 at 305.

58 *Criminal Code,* s. 653(1).

59 *R. v. Lifchus*, [1997] 3 S.C.R. 320, at para 40. Model Jury Instructions for judges, endorsed by the Canadian Judicial Council, are available at the following link: http://www.cjc-ccm.gc.ca/english/lawyers_en.asp?selMenu=lawyers_modeljuryinstruction_en.asp

60 *Ibid.,* at para 36.

61 *Ibid.*

62 *Ibid.*

CONCLUSION

Among the paramount objectives of Canada's jury system is to ensure that the guilt or innocence of an accused person in relation to a serious criminal matter is determined by an impartial jury of his or her peers, generally in the community where the alleged crime occurred. This goal is supported by juror eligibility requirements in provincial and territorial legislation, and by numerous procedural mechanisms in the *Criminal Code,* to ensure fairness, notably by challenging and excusing jury members, sequestering jurors, and requiring unanimous jury verdicts.

Although the roots of Canada's jury system derive most directly from the English common law, and can be traced to the 11th century, the Canadian jury system has evolved markedly through the centuries. The learning and experience of almost a millennia has led to the refinement of a hallowed institution. The fact that Canada has constitutionally entrenched the right of an accused to be tried by a jury of his or her peers in serious criminal matters demonstrates the sanctity of the jury as an integral part of the Canadian criminal justice system. ■

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