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Law Reform Commission
of Canada

Commission de réforme du droit
du Canada

REPORT

the jury

16

Canada

REPORT 16

THE JURY

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**REPORT
ON
THE JURY**

March, 1982

The Honourable Jean Chrétien, P.C., M.P.,
Minister of Justice,
and Attorney General of Canada,
Ottawa, Canada.

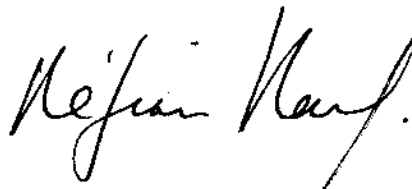
Dear Mr. Minister:

In accordance with the provisions of section 16 of the *Law Reform Commission Act*, we have the honour to submit herewith the report with our recommendations on the studies undertaken by the Commission on the jury.

Yours respectfully,



Francis C. Muldoon, Q.C.
President



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Preface

The Commission issued its Working Paper No. 27 in the spring of 1980, entitled *The Jury in Criminal Trials*. In that Working Paper we reviewed the law relating to most aspects of jury trials, explained the policy underlying the present law, set out alternative proposals, outlined the Commission's provisional views for reform of the law in most areas relating to jury trials, and invited comments.

Copies of the Working Paper were distributed to everyone the Commission considered might be interested in the issues raised in the paper. Also the recommendations contained in the Working Paper were published in the *National*, the monthly journal of the Canadian Bar Association, and in *Barreau*, the monthly newspaper of the Bar of the Province of Québec. In addition, we organized a more formal consultative process with a wide cross-section of the judiciary and the legal profession. Individuals and associations of judges, crown prosecutors and the defence bar gave generously of their time in preparing comments. In particular, we are grateful to have had the benefit of the advice of the Law Reform Commission of Saskatchewan, the Ontario County and District Court Judges' Special Committee on The Jury in Criminal Trials, the representatives of the Attorneys General of the federal and provincial governments, the Canadian Bar Association and the Ontario Crown Attorneys' Association.

Since publishing the Working Paper on The Jury, the Commission, in conjunction with various federal and provincial government departments, has embarked on a fundamental review of criminal law and procedure. Clearly, aspects of the jury trial will be embraced within that review. However, we considered that we should proceed with these major recommendations relating to jury trials at this time. In our consulta-

tions, several areas were identified where changes in the law are needed with respect to jury trials, where uniformity in the conduct of jury trials should be achieved throughout the country, and where present practices should be codified. Later, the legislation which is enacted as a result of these recommendations will be incorporated within a comprehensive code of criminal procedure. *But in the meantime, we recommend that Parliament implement the proposals made in this Report.* The recommendations have been prepared so that they can be incorporated within the present structure of the *Criminal Code*.

There are several matters relating to jury trials in criminal cases which we discussed in our Working Paper, but about which we make no recommendations here since reform or a federal legislative enactment did not seem urgent (or even appropriate) in these areas. These areas include: Qualification for Jury Service, Exemptions from Jury Service, and Aspects of Out-of-Court Selection of Jurors; Protection of Juror's Employment; Length of Jury Service; Compensation of Jurors; Use by the Jury of Written Instructions; and, Impeachment of the Verdict. Many of these areas are now dealt with by provincial legislation providing for the constitution, maintenance and organization of provincial courts of criminal jurisdiction which are composed of a judge and jury.

With respect to a number of other matters dealt with in the Working Paper, we are not making recommendations for legislative action. Instead, we are recommending that administrative changes be made to achieve uniformity in these areas. These areas include: Jury Orientation; Juror Note-taking, Pattern Jury Instruction; and, Instructing the Jury about Unanimity.

Following each of our recommendations in this Report, we briefly state how our recommendations would change the present law and the reasons for our recommendations. Those seeking a more comprehensive discussion of the subjects covered should refer to our Working Paper, *The Jury in Criminal Trials*.

The recommendations made in this Report express the views of the signed Commissioners. However, other Commissioners, as they then were, were involved in our discussions on the jury: The Honourable Mr. Justice Gerard V. La Forest, Mr. Jean-Louis Baudouin, Q.C., Judge Edward James Houston and The Honourable Mr. Justice Jacques Ducros.

Introduction

Our recommendations in this Report are based upon five basic premises.

The first basic premise underlying this Report is that the jury serves a number of vital functions in our criminal justice system and enjoys widespread support among the Canadian public. In our Working Paper we elaborated on the five following functions of the jury. First, because the jury is composed of a number of people with a wide diversity of experience and because it reaches a collective decision only after deliberating seriously and often robustly about the evidence, the jury is likely to be an excellent fact-finder. Second, because it represents a cross-section of the community, the jury is able to act as the conscience of the community, ensuring that individual criminal cases are justly resolved. Third, the jury can act as the citizen's ultimate protection against oppressive laws and the oppressive enforcement of the law. When a properly instructed jury acting judicially acquits an accused, no judge or state official can reverse its decision. Fourth, because the jury involves the public in the central task of the criminal justice system, it provides a means whereby the public can learn about, and critically examine, the functioning of the criminal justice system. For the public, it acts as a window on the criminal justice system. Finally, by involving the public in judicial decision-making, the jury undoubtedly increases the public's trust in the system.

In our Working Paper, we reviewed the evidence which led us to conclude that the jury performs a vital role in discharging these functions. We are pleased to report that among the many people we consulted on that Working Paper, there was almost unanimous support for the jury system in criminal cases. Indeed, among people who might agree on little

else about our criminal justice system, there was agreement on the vital functions performed by the jury.

No recommendation in this Report will result in a diminution in the proper role of the jury. The recommendations are designed to clarify the jury's role and to ensure that the jury system itself is not jeopardized by outmoded or misunderstood procedures relating to it.

A second basic premise which informs our recommendations is that no fundamental changes are needed in the jury system. Thus no radical changes are proposed in this Report. In particular, after reviewing all the evidence and considering the comments of those who responded to our Working Paper, we recommend that the jury continue to be comprised of twelve jurors and that they continue to be required to be unanimous in reaching their verdict.

From time to time suggestions are made, based usually on economy, that the jury be reduced in size to six members and that a less than unanimous verdict be permitted. We believe these would be false economies and we would oppose such changes in the strongest terms. Although a few of our respondents made these suggestions, the majority favoured retention of the basic characteristics of the jury trial. For the reasons given in our Working Paper and later in this Report, so do we.

A third premise underlying our recommendations is that the laws relating to jury trials ought to be as simple, rational, and understandable as possible. In no other aspect of the criminal justice system is the public so intimately involved as it is with respect to the jury. It is incongruous that much of the law and practice relating to jury trials is difficult to determine and understand. Also, certain aspects of jury trials are anachronistic, such as the summoning of *tales* and the practice of standing jurors aside. Therefore, an important premise upon which the sections presented in this Report are based is that the law and practice relating to jury trials should be simple, rational and understandable.

A fourth premise is that generally the law and practice relating to the conduct of jury trials in criminal cases should be uniform throughout Canada. The administration of the jury system will naturally vary from jurisdiction to jurisdiction depending upon local facilities and conditions. However, the essential elements of the jury trial are so much a matter of criminal procedure that, like other aspects of criminal procedure, they should be uniform across the country. Furthermore, important jury trials often receive considerable publicity and, given the importance of the institution to our criminal justice system, it might seem strange to the public if different standards were adopted in different jurisdictions.

A final general premise underlying our recommendations, related in part to the above premise, is that the law and practice in this area should be to some extent codified. Therefore, our recommendations are made in the form of legislation. The legislative enactments we are proposing could be adopted as a special division of the present *Criminal Code*. They are designed to replace most of the sections in the *Criminal Code* which deal with matters relating to the jury. In some instances the recommended legislative enactments represent new law; in others they are simply a codification of present practice; some are essentially the present sections of the *Code* with minor changes; and a few are simply a restatement of present *Code* provisions.

We considered it was necessary to draft a comprehensive legislative enactment so that the provisions could be arranged in the *Code* in a simple and understandable fashion. Our recommendations are organized sequentially beginning with the selection of the jury and ending with the law relating to jury verdicts.

If our recommendations were adopted as a comprehensive code relating to jury trials, and incorporated within the present structure of the *Criminal Code*, then, with the exception of the sections mentioned below, sections 554 to 581 and section 670 of the *Criminal Code* would be repealed.

Sections 574, 575 and 577 would not be repealed since these sections do not deal with matters relating exclusively to juries.

Subsection 554(2) and section 557 relate to the grand jury and thus would not be repealed. However, the only jurisdiction to which these sections presently relate is Nova Scotia, and legislation now pending before the House of Commons would repeal them altogether.

Sections 555, 556 and 564 deal with mixed juries in the provinces of Québec and Manitoba. Under certain conditions, juries in these provinces may be composed of persons who speak either the French or the English language. However, these sections are presently slated for repeal on the date on which Part XIV.1 is proclaimed in force in Québec and Manitoba.

Section 572 describes the procedures for avoiding the possibility that jurors might be called for another trial before being discharged from the first, but permits them to be called for a subsequent trial at the same sittings, with the consent of the prosecutor and the accused. This section is to be substantially retained in our recommendations.

There are other provisions in the *Criminal Code* which deal with certain aspects of jury trials that we have not considered. Sections 598 to 600 deal with motions and appeals based upon formal defects in the jury process. These sections will be considered later in our comprehensive review of criminal procedure.

1. Legislative Recommendations

Recommendation One: Proposed New Provisions

That the following provisions on the jury be enacted as part of the Criminal Code.

PART [. . .]

THE JURY

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DEFINITIONS

“Prospective juror”	“prospective juror” means a person who, in a Province or the Yukon Territory or the Northwest Territories, is qualified and summoned to serve as a juror pursuant to the laws in force in that province or territory.
“Juror”	“juror” means a prospective juror who has made oath to serve in a trial pursuant to this Part.
“Jury”	“jury” means, in a Province, a group of twelve jurors, and in the Yukon Territory and in the Northwest Territories, a group of six jurors.
“Oath” and “Sworn”	“oath” includes a solemn affirmation, and the expression “sworn” includes the expression “affirmed” in any proceedings pursuant to this Part.

SELECTING THE JURY

Summoning of panel	<ol style="list-style-type: none">1. The sheriff or other proper officer of the court shall summon a panel in accordance with the laws in force in that Province or Territory to provide for the selection of the jury.
Challenging the panel	<ol style="list-style-type: none">2. (1) The prosecutor or the accused may challenge the panel of prospective jurors on the ground of substantial failure to comply with the relevant Act in selecting the panel.

Stay of proceedings

(2) If the judge determines that in selecting the panel there has been a substantial failure to comply with the relevant Act, he shall stay the proceedings pending the selection of a new panel in conformity with the relevant Act.

Names of jurors on cards

3. (1) The name of each person on a panel of prospective jurors, his number on the panel, and the place of his abode, shall be written on a separate card, and all the cards shall be of equal size.

Cards delivered to clerk

(2) The sheriff or other proper officer of the court who returns the panel shall deliver the cards referred to in subsection (1) to the clerk of the court.

Address by judge to panel

(3) In the presence of the prosecutor and the accused the judge shall announce the name of the accused and the gist of the accusation, and then address the panel of prospective jurors as follows:

If, for any reason, any of you on this panel think you cannot conscientiously and impartially try the issues before the Court and give a true verdict according to the evidence, will you please stand.

Exclusion of panel

(4) The judge shall exclude from the courtroom all the prospective jurors other than those who stood up in response to the request in subsection (3).

Examination by judge

(5) The judge shall examine any prospective juror who stood up in response to the request in subsection (3), and if he is satisfied that the prospective

juror cannot conscientiously and impartially try the issues before the court and give a true verdict according to the evidence, he shall then excuse him and direct that the card with the name of that prospective juror be removed from the other cards.

Hearing
in camera

(6) The judge may, in his discretion, direct that the hearing of the issue take place *in camera*.

Cards placed
in a box

(7) The clerk of the court shall cause the remaining cards to be placed together in a box and to be shaken thoroughly together.

Drawing
of cards
by clerk

(8) Where the panel is not challenged, or the panel is challenged but the judge does not direct a new panel to be returned, the clerk of the court shall draw out the cards referred to in subsection (7) one after another, and shall call out the name and number upon each card as it is drawn, until the jury has been constituted.

Oath
or solemn
affirmation

(9) Subject to such challenge as may be made pursuant to section 4, the clerk of the court shall oblige the prospective jurors, in the order in which their names were drawn, to make oath in the following terms:

I swear by Almighty God [*or I solemnly affirm*] that I will conscientiously and impartially try the issues before the court and give a true verdict according to the evidence.

Segregating
jurors

(10) Upon being so sworn, each juror shall be removed from the courtroom and segregated from the panel until the jury has been constituted.

Omissions
not affecting
validity

(11) No omission to follow the directions of this section affects the validity of the proceedings.

Three types
of challenges

4. (1) The prosecutor and the accused are, subject to this Act, each entitled to assert in respect of prospective jurors challenges for lack of qualifications, challenges for cause on the grounds of partiality and peremptory challenges.

Order
of exercise
of challenges

(2) The prosecutor shall first exercise any challenge mentioned in subsection (1), followed by the accused and the co-accused, as the case may be.

Challenge
for lack of
qualifications

5. (1) The prosecutor and the accused are each entitled to any number of challenges for lack of qualifications on the ground that:

(a) the name of a prospective 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; or

(b) a prospective juror is disqualified from jury service under the relevant Act; or

(c) a prospective juror does not speak either or both of the official languages of Canada required by reason of an order under section 462.1 that the accused 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.

Decision
by judge

(2) Where a challenge is made under subsection (1), the judge shall determine the issue, and where he is satisfied that the challenge is valid, he shall excuse the prospective juror.

Hearing
in camera

(3) The judge may, in his discretion, direct that the hearing of the issue take place *in camera*.

Challenge
for cause of
partiality

6. (1) The prosecutor and the accused are each entitled to any number of challenges on the ground that a prospective juror is not impartial as between the Queen and the accused.

Oral
reasons

(2) In order to define the specific issue on a challenge under subsection (1), the party challenging may be required by the judge to state orally the reasons for the challenge, and if the party or counsel be unable or unwilling to do so, the judge may refuse to entertain the challenge.

Rules

(3) The following rules apply to the hearing on the issue of whether or not the prospective juror is not impartial as between the Queen and the accused:

(a) the judge shall decide the issue;

(b) where a prospective juror is challenged under this section, and the prosecutor and the accused agree that the prospective juror is not impartial as between the Queen and the accused, the prospective juror shall be excused without the intervention of the judge;

(c) the prospective juror challenged may be called as a witness on the hearing of the issue, in which case he shall be sworn in by the clerk of the court;

(d) the prosecutor and the accused may examine the prospective juror in order to assist the judge in determining whether or not the prospective juror challenged has a state of mind in reference to the alleged offence, the prosecutor, the police, the victim or the accused which would prevent him from acting impartially;

(e) the judge may direct that the hearing of the issue shall take place *in camera* and, in any case, he shall direct that the hearing of the issue not take place in the presence of the other prospective jurors.

Exercise
of peremptory
challenges

7. The prosecutor and the accused may exercise a peremptory challenge against a prospective juror, whether or not such prospective juror has been the subject of a challenge for lack of qualifications, or a challenge for cause on the ground of partiality, or both such challenges.

Peremptory
challenge by
prosecutor
and accused

8. (1) The prosecutor and the accused are each entitled to challenge twenty prospective jurors peremptorily where the accused is charged with an offence for which the minimum punishment is life imprisonment.

Idem

(2) The prosecutor and the accused are each entitled to challenge twelve prospective jurors peremptorily where the accused is charged with an offence not referred to in subsection (1).

Peremptory challenge by co-accused

9. (1) Where two accused persons are jointly charged in an indictment and it is proposed to try them together, each is entitled to challenge eight prospective jurors peremptorily, and where more than two accused persons are jointly charged in an indictment and it is proposed to try more than two of them together, each is entitled to challenge six prospective jurors peremptorily.

Idem

(2) Notwithstanding subsection (1), where an accused is charged with an offence for which the minimum punishment is life imprisonment, he is entitled to challenge twenty prospective jurors peremptorily.

Idem

(3) Where two or more accused persons are jointly charged in an indictment and it is proposed to try them together, the prosecutor is entitled to challenge the same number of prospective jurors peremptorily as are all the accused persons taken together.

Peremptory challenge when multiple counts

10. Where an accused person is charged in an indictment containing more than one count and it is proposed to try him on more than one count at the same trial, the prosecutor and the accused are entitled to challenge peremptorily that number of prospective jurors which they would be entitled to challenge if the accused were being tried only on the count for which he is entitled to the greatest number of challenges.

Peremptory challenge when six-member jury

11. Notwithstanding anything in this Act, in the Yukon Territory and in the Northwest Territories, the prosecutor and the accused are each entitled to half the number of peremptory challenges provided for in sections 8 and 9.

When panel exhausted

12. Where a jury cannot be provided, notwithstanding that the provisions of this Part and the relevant Act have been complied with, the court shall fix another time for trial and direct the sheriff or other proper officer of the court to cause a new panel of prospective jurors to be summoned.

Segregating jurors

13. (1) When a full jury has been selected, the names of the jurors shall be kept apart from those of the panel at large until the jury has been discharged, whereupon the names shall be returned to the box as often as occasion arises, as long as an issue remains to be tried before a jury.

Subsequent jury service

(2) Any or all of the jurors who try an issue may be selected to try a subsequent issue at the same sittings, but all such jurors are subject to challenge on the same grounds as any prospective juror, and all jurors so selected shall be obliged to repeat their oath.

No publication on jury selection until completion of trial

14. (1) No information in respect of any proceedings related to jury selection shall be published in any newspaper or broadcast until after the completion of the trial.

No publication of names, etc., during trial

(2) Neither prospective jurors nor jurors shall be identified by name, address or likeness in relation to the proceedings in which they were engaged in any newspaper or broadcast until after the completion of the trial.

No publication of names, etc., after trial except by consent

(3) After the completion of the trial, prospective jurors or jurors shall not be identified by name, address or likeness in relation to the proceedings in which they were engaged except with their consent.

Offence

(4) Every one who fails to comply with this section is guilty of an offence punishable on summary conviction.

PROCEDURE DURING TRIAL

Election
of president
of jury

15. When the selection of the jury is completed, the judge shall direct the jurors to elect at an early stage of the trial one juror among them to serve as president of the jury.

Requests
from jury

16. (1) The president may, on behalf of a juror, request in writing during the course of the trial, that:

(a) additional information or explanation be given in respect of the evidence, or

(b) particular arrangements be effected in respect of the well-being and protection of the jurors and their families.

Decision
by judge

(2) Where a request is made under subsection (1), the judge shall decide whether or not the request should be granted.

Judge's
discretion

(3) Before deciding, the judge may, in the absence of the jury, hear the prosecutor and the accused as to the appropriateness of granting the request and he may take the matter under advisement.

Jury may
separate

17. (1) The judge may, at any time before the jury retires to consider its verdict, permit the jurors to separate.

Refusal

(2) Where permission to separate is refused, the jury shall be kept under the charge of an officer of the court as the judge directs and that officer shall prevent the jurors from communicating with anyone other than himself or another juror, unless the judge otherwise directs.

Empanelling
new jury in
certain cases

(3) Where a failure to comply with this section is discovered before the verdict of the jury is returned, the judge may, if he considers that the failure to comply might lead to a miscarriage of justice, discharge the jury and

(a) direct that the accused be tried by a new jury during the same sittings of the court, or

(b) postpone the trial on such terms as justice may require.

Refreshment
and
accommodation

(4) The judge shall direct the sheriff or other proper officer of the court to provide the jurors with suitable and sufficient refreshment, food and lodging while they are together until they have given their verdict.

Publication
restricted
while jury
separated

18. (1) Where permission to separate is given to jurors under subsection 17(1), no information regarding any portion of the trial at which the jury is not present shall be published in any newspaper or broadcast at any time after the permission to separate is granted and before the verdict is returned.

Offence

(2) Every one who fails to comply with subsection (1) is guilty of an offence punishable on summary conviction.

Juror unable
to continue

19. (1) Where in the course of a trial a juror is, in the opinion of the judge, by reason of illness or some other cause, unable to continue to act, the judge may discharge him.

Trial may
continue

(2) Where in the course of a trial a juror dies or is discharged pursuant to subsection (1), the jury shall, unless the judge otherwise directs and if the number of jurors is not reduced below ten, or in the Yukon Territory and the Northwest Territories below five, be deemed to remain properly constituted for all purposes of the trial, and the trial shall proceed and a verdict may be given accordingly.

Taking
a view

20. (1) The judge may, where it appears to be in the interests of justice, at any time after the jurors have been sworn and before the jury returns its verdict, direct the jury to have a view of any place, thing or person, and shall give directions as to the manner in which the place, thing or person shall be seen by the jury, and may for that purpose adjourn the trial.

Directions
for viewing

(2) Where a view is ordered under subsection (1), the judge shall give any directions that he considers necessary for the purpose of preventing undue communication by any person with jurors, but failure to comply with any directions given under this subsection does not affect the validity of the proceedings.

Who shall
attend

(3) Where a view is ordered under subsection (1), the judge, the prosecutor, and the accused shall attend.

Opening address
by prosecutor

21. Before adducing any evidence, the prosecutor may, in an opening address to the jury, advise of the evidence he intends to place on the record.

Motion
for judgment
of acquittal

22. (1) At the conclusion of the case for the prosecution, the accused may make a motion for a judgment of acquittal on the ground that no sufficient case has been made out to put the accused to his defence because

(a) no evidence has been adduced to prove an essential element of the offence alleged; or

(b) the evidence adduced is so manifestly unreliable that no jury properly instructed and acting judicially could return a verdict of guilty.

In absence
of jury

(2) A motion under subsection (1) shall be made and determined in the absence of the jury.

Submissions
by parties

(3) Where a motion under subsection (1) has been made, the judge shall, before ruling on the matter, give the parties the opportunity of making submissions on the motion.

Decision
not to be
reserved

(4) The judge shall not reserve decision on a motion for a judgment of acquittal.

If motion
granted

(5) The judge who grants a motion under subsection (1) shall acquit the accused and discharge the jury.

If motion
denied

(6) The judge who denies a motion under subsection (1) shall call upon the accused for his defence.

Question
of law

(7) The question of whether a sufficient case within the meaning of subsection (1) has been made out to put the accused to his defence is a question of law.

Opening address
by accused

23. Before adducing any evidence, the accused may, in an opening address to the jury, advise of the evidence he intends to place on the record.

Arguments
addressed
to jury

24. (1) Arguments on the case may be addressed to the jury by the prosecutor and the accused at the close of the evidence.

Order
of arguments

(2) The prosecutor shall address his arguments on the case to the jury first, followed by the accused and the co-accused, as the case may be.

Submissions
by parties
on the law

25. At the close of the evidence or at a reasonable time prior thereto, the judge shall give the parties the opportunity of informing him of the instructions on the law which they think are relevant to the case. If written submissions are made, copies shall be given to the other parties in the case. Submissions, whether given in writing or orally, shall form part of the record.

Instructions
by judge

26. (1) Following arguments to the jury by the parties, the judge shall instruct the jury on the law and shall accurately and impartially summarize the evidence and the contentions of both the prosecutor and the accused. As part of his instructions on the law, the judge shall instruct the jury that, in the event of a verdict of guilty, the jury has no prerogative to make any recommendation either as to clemency or as to the severity of the sentence.

Jury is
exclusive judge
of the facts

(2) Either during or after summarizing the evidence, the judge may comment upon the weight of the evidence and the credibility of the witnesses. However, if he does so, he shall unequivocally instruct the jury that the jury is the exclusive judge of the facts and that it is not bound by any comments of the judge. In commenting on the evidence, the judge shall not directly express an opinion on the guilt or innocence of the accused or that certain testimony is worthy or unworthy of belief, but may draw to the jury's attention any discrepancies in the evidence which the jury ought to consider in finding its verdict.

Objection
to instructions

(3) Immediately following the judge's instructions, the judge shall give the parties the opportunity to object, in the absence of the jury, to aspects of his instructions. If the instructions were ambiguous, erroneous, or incomplete and any such misdirection might affect the jury's verdict, the judge shall recall the jury and give them additional instructions. Failure by any party to object to the judge's instructions to the jury in any particular aspect, shall not constitute a bar to appeal in that regard, where the taking of such an appeal is otherwise permissible.

JURY DELIBERATIONS

Deliberations

27. (1) The jury shall retire to deliberate after the judge has completed all instructions.

No separation

(2) The jury shall not separate during the course of its deliberations.

Material
the jury is
entitled to

28. The judge shall allow the jury to take with it into the deliberation room any exhibit entered in evidence in the trial which would not put at risk the safety of the jurors or the integrity of the exhibit; the jury may also take any other material placed on the record in the trial that the judge considers may assist the jury in reaching a verdict.

Additional
instructions

29. (1) The judge shall recall the jury and give it additional instructions

(a) if the original instructions were ambiguous, erroneous, or incomplete, or

(b) if the jury requests in writing additional instructions, unless the request concerns matters not in evidence, matters irrelevant to the issues, or matters which by law the jury is not entitled to consider in reaching its verdict.

No undue
prominence

(2) If the judge gives additional instructions to the jury he shall ensure that undue prominence is not given to the requested instruction and that related instructions are repeated.

Further
instruction
in presence
of prosecutor
and accused

(3) If the jury requests in writing further instruction it shall be conducted back into the courtroom where its request shall be given on the record, in the presence of the prosecutor and the accused. Before the judge instructs the jury further he shall, in the absence of the jury, advise the parties of what additional instructions he intends to give and afford the parties an opportunity to object.

Review of evidence

30. (1) The jury, during the course of its deliberations, may request in writing a review of certain testimony or other evidence about which it is in doubt or disagreement. The judge shall grant such a request unless it relates to a matter not in evidence or the answer is prohibited by law.

In presence of accused

(2) Upon receiving a written request to review the evidence, the judge shall, subject to subsection (1), direct that the jury be returned to the courtroom, and, after notice to the prosecutor and the accused and in their presence, he shall give such requested information.

Decision of judge

(3) The judge may permit the jury to hear the requested parts of the testimony and to examine the requested materials admitted into evidence, or if, in the opinion of the judge, it is reasonable to summarize the requested testimony, the judge may after hearing submissions from the parties, present a summary of the requested parts of the testimony.

Review of other related evidence

(4) As well as submitting to the jury for review the evidence specifically requested by the jury, the judge shall also review other evidence relating to the same factual issue and the credibility of the relevant witnesses if he thinks it is necessary to do so in order to avoid giving undue prominence to, or a misleading impression of, the evidence requested.

JURY VERDICTS

Unanimous

31. The verdict of the jury shall be unanimous.

If jury is unable to agree

32. (1) Where the jury returns and informs the court that it is unable to agree, the judge may repeat his instructions on unanimity and require the jury to continue its deliberations if there is a reasonable prospect of agreement.

Further instruction on unanimity

(2) If, after the jury has deliberated for a reasonable period of time, the judge thinks that it may be assisted by further instruction on unanimity, he may recall it and repeat his instructions in that respect.

Discharging a deadlocked jury

33. (1) Where the judge is satisfied that the jury is unable to agree upon a verdict and that further detention of the jury would be useless, he shall discharge the jury and direct that a new jury be empanelled.

No review

(2) A discretion that is exercised under subsection (1) by a judge is not reviewable.

Enquiry from president if verdict unanimous

34. (1) When the jury, after completion of its deliberations, returns to the courtroom, the judge shall enquire of the president if a unanimous verdict has been reached by the jury.

If affirmative, verdict is announced

(2) If the president advises that a unanimous verdict has been reached, the judge shall request the president to announce the verdict and the president shall do so.

Polling the jury

(3) Where a verdict has been returned and before the jury has been discharged, the jury shall be polled if so requested by the prosecutor or the accused or upon the court's own motion. The poll shall be conducted by the judge or clerk of the court asking each juror individually whether the verdict announced is his verdict.

If negative,
mistrial

(4) Where a juror answers the question mentioned in subsection (3) in the negative, the judge shall declare a mistrial and discharge the jury.

Proceedings
on Sunday, etc.
not invalid

35. The taking of the verdict of a jury and any proceedings incidental thereto are not invalid by reason only of their occurrence on a Sunday or holiday.

Comments
by judge
limited to
thanks

36. At the conclusion of the trial, the judge may thank the jury for its public service but he shall not address such thanks to any individual juror nor praise or criticize the verdict.

Disclosure
of information
by a juror
is an offence

37. Every juror who discloses any information relating to the proceedings of the jury when it was absent from the courtroom, which was not subsequently disclosed in open court, is guilty of an offence punishable on summary conviction, unless the information was disclosed for the purpose of:

(a) an investigation of an alleged offence under this Act in relation to a juror acting in his capacity as juror, or giving evidence in criminal proceedings in relation to such an offence, or

(b) assisting the furtherance of scientific research about juries which is approved by the Chief Justice of the Province.

Recommendation Two: Repeal and Transition

That, upon the enactment of the provisions proposed in Recommendation One, the following sections of the Criminal Code be repealed in whole or in part.

- s. 554 repeal, except as it relates to grand jurors.
- s. 555 repeal on the date on which Part XIV.1 is proclaimed in force in Québec.
- s. 556 repeal on the date on which Part XIV.1 is proclaimed in force in Manitoba.
- s. 557 repeal upon abolition of grand jury.
- s. 558 repeal.
- s. 559 repeal.
- s. 560 repeal.
- s. 561 repeal.
- s. 562 repeal.
- s. 563 repeal.
- s. 564 repeal on the date on which Part XIV.1 is proclaimed in force in Québec and in Manitoba.
- s. 565 repeal.
- s. 566 repeal.
- s. 567 repeal.
- s. 568 repeal.
- s. 569 repeal.
- s. 570 repeal.

- s. 571 repeal.
- s. 572 repeal.
- s. 573 repeal.
- s. 576 repeal.
- s. 576.1 repeal.
- s. 576.2 repeal.
- s. 578 repeal.
- s. 579 repeal.
- s. 580 repeal.
- s. 581 repeal.
- s. 670 repeal.
- s. 671 repeal, in so far as it relates to s. 670.

2. Proposed Legislation with Commentary

DEFINITIONS

“Prospective juror”	“prospective juror” means a person who, in a Province or the Yukon Territory or the Northwest Territories, is qualified and summoned to serve as a juror pursuant to the laws in force in that province or territory.
“Juror”	“juror” means a prospective juror who has made oath to serve in a trial pursuant to this Part.
“Jury”	“jury” means, in a Province, a group of twelve jurors, and in the Yukon Territory and in the Northwest Territories, a group of six jurors.
“Oath” and “Sworn”	“oath” includes a solemn affirmation, and the expression “sworn” includes the expression “affirmed” in any proceedings pursuant to this Part.

COMMENT

At present, these terms are not defined in the *Criminal Code* and, although their meaning is normally clear when they are used in the *Code*, we propose that they be defined to ensure a consistent usage throughout the *Code*. Moreover, these definitions embody two substantive judgments.

First, the definition of “prospective juror” makes it clear that the classes of persons who are qualified to serve on a jury in a criminal case are determined by provincial or territorial law. Since the present subsection 554(1) of the *Criminal Code* accomplishes the same result, we are merely restating the present law.

We have, however, taken the matter one step further by excluding from our legislative proposals all but one of the provisions relating to juror qualifications which presently appear in the *Criminal Code*. Subject to the exception of language qualifications, we accept that qualifications for jury service are matters for provincial or territorial legislation, as part of their jurisdiction over the constitution, maintenance and organization of provincial or territorial courts of criminal jurisdiction. As a consequence, our legislative proposals retain only the language qualifications provided for in the present paragraph 567(1)(f) of the *Criminal Code*. (See our definition of “prospective juror” and *infra*, our proposed section 5 dealing with challenges for lack of qualifications.)

In our Working Paper on *The Jury in Criminal Trials*, we made a number of recommendations relating to the qualifications for, and exemptions from, jury service and to the preparation of jury lists. In these recommendations we attempted to reconcile and select the preferred recommendations relating to this subject that have been made in a number of recent studies. For the reasons stated above and in the Preface to this Report, we are not recommending that Parliament enact laws relating to jury qualifications. However, in the interests of obtaining uniformity we hope that the recommendations we made in our Working Paper might serve as a model for those provinces who wish to re-examine their own laws.

The second substantive judgment embodied in these definitions is that a “jury” is comprised of twelve jurors except in the Territories where six persons can constitute a jury. From time to time the suggestion is made that the size of the jury should be reduced to six persons in all jurisdictions. A reduction in the size of the jury is seen by some as an essential step in reducing the costs of the criminal justice system. In our

Working Paper, we reviewed the evidence and arguments and concluded that smaller juries would not significantly reduce the cost or increase the administrative efficiency of the jury system. Moreover, we concluded that twelve-member juries were more likely to achieve the objectives of the jury system than six-member juries. Twelve-member juries permit more people to serve on juries and thus the public is better educated about the criminal justice system and their confidence in it is increased; verdicts of twelve-member juries are more likely to reflect the opinion of a representative cross-section of the community; and a twelve-member jury is more likely to lead to accurate fact-finding than a six-member jury. These considerations are reviewed in detail in our Working Paper. However, we might note here that in our consultations we found no widespread feeling among Canadian jurists or others that the jury should be reduced to fewer than twelve members.

Traditionally, a jury has had only six members in the Territories because of the sparseness of the population and the great distances between towns and cities. We recommend that in this regard the present law not be changed.

SELECTING THE JURY

Summoning
of panel

1. The sheriff or other proper officer of the court shall summon a panel in accordance with the laws in force in that Province or Territory to provide for the selection of the jury.

COMMENT

This section makes no change in the present law. It simply makes it clear that the jury panel shall be selected from lists prepared in accordance with the laws in force in the relevant province. This is at present provided for in subsection 554(1) of the *Criminal Code*.

Challenging
the panel

2. (1) The prosecutor or the accused may challenge the panel of prospective jurors on the ground of substantial failure to comply with the relevant Act in selecting the panel.

Stay of
proceedings

(2) If the judge determines that in selecting the panel there has been a substantial failure to comply with the relevant Act, he shall stay the proceedings pending the selection of a new panel in conformity with the relevant Act.

COMMENT

This section provides the parties with a remedy where the provincial rules for selecting the panel of prospective jurors have not been followed. A procedure for challenging the panel, or array as it is sometimes called, is at present provided in sections 558 and 559 of the *Criminal Code*. Although this proposed section is similar to those sections, it differs in two respects.

First, subsection 558(1) of the *Criminal Code* requires the accused or prosecutor to show partiality, fraud or wilful misconduct on the part of the sheriff or his deputies by whom the panel was returned in order to sustain a challenge to the panel. This is too high a standard for such a challenge. A panel might be improperly selected, even though it was selected in good faith. On the other hand, not every deviation from the proper procedure should provide the grounds for challenge. Therefore, the proposed section requires that the challenge to the panel allege a "substantial" failure to comply with the selection process.

A second difference between the proposed section and section 558 of the *Criminal Code* is that unlike subsections 558(2) and (3) of the *Criminal Code*, the proposed section does not require the challenge to the panel to be in any particular

form. Requiring the challenge to be in writing or in a particular form seems a needless formality.

Neither the proposed section nor the present section 558 of the *Criminal Code* expressly prevents details of a challenge to the panel from being published. Although there is some doubt under the present law whether the judge has the power to restrict the publication of such a motion, our proposed subsection 14(1) would preclude its publication until after the completion of the trial.

It has been suggested from time to time that counsel should be able to challenge the jury panel on the ground that it does not represent a cross-section of the community. We have not recommended such a ground for challenge. The challenge to the panel is restricted to the means by which it was selected. The provincial procedures for selecting the jury panel virtually guarantee that the panel will be randomly selected from among the community. Thus the ability to challenge the representativeness of the panel would add little to ensure that a representative jury panel was obtained.

Names of jurors
on cards

3. (1) The name of each person on a panel of prospective jurors, his number on the panel, and the place of his abode, shall be written on a separate card, and all the cards shall be of equal size.

Cards delivered
to clerk

(2) The sheriff or other proper officer of the court who returns the panel shall deliver the cards referred to in subsection (1) to the clerk of the court.

Address
by judge
to panel

(3) In the presence of the prosecutor and the accused the judge shall announce the name of the accused and the gist of the accusation, and then address the panel of prospective jurors as follows:

If, for any reason, any of you on this panel think you cannot conscientiously and impartially try the issues before the Court and give a true verdict according to the evidence, will you please stand.

Exclusion
of panel

(4) The judge shall exclude from the courtroom all the prospective jurors other than those who stood up in response to the request in subsection (3).

Examination
by judge

(5) The judge shall examine any prospective juror who stood up in response to the request in subsection (3), and if he is satisfied that the prospective juror cannot conscientiously and impartially try the issues before the court and give a true verdict according to the evidence, he shall then excuse him and direct that the card with the name of that prospective juror be removed from the other cards.

Hearing
in camera

(6) The judge may, in his discretion, direct that the hearing of the issue take place *in camera*.

Cards placed
in a box

(7) The clerk of the court shall cause the remaining cards to be placed together in a box and to be shaken thoroughly together.

Drawing
of cards
by clerk

(8) Where the panel is not challenged, or the panel is challenged but the judge does not direct a new panel to be returned, the clerk of the court shall draw out the cards referred to in subsection (7) one after another, and shall call out the name and number upon each card as it is drawn, until the jury has been constituted.

Oath
or solemn
affirmation

(9) Subject to such challenge as may be made pursuant to section 4, the clerk of the court shall oblige the prospective jurors, in the order in which their names were drawn, to make oath in the following terms:

I swear by Almighty God [or I solemnly affirm] that I will conscientiously and impartially try the issues before the court and give a true verdict according to the evidence.

Segregating
jurors

(10) Upon being so sworn, each juror shall be removed from the courtroom and segregated from the panel until the jury has been constituted.

Omissions
not affecting
validity

(11) No omission to follow the directions of this section affects the validity of the proceedings.

COMMENT

This section codifies the procedure for the in-court selection of jurors. This procedure is, in part, dealt with at present in section 560 of the *Criminal Code*; namely, that part of the procedure embodied in proposed subsections (1), (2), (7), (8) and (9). The proposed subsections (3), (4), (5), (6), (10) and (11) are new and embody for the most part what is the present practice in many courts; their inclusion in the *Criminal Code* is recommended so that the practice becomes uniform across Canada.

The proposed new subsections provide those jurors who might be related to a party or witness, or who for whatever reason cannot perform their obligations as jurors, a chance to declare their interest in the case. Subsection (3) requires the judge to ask the panel of prospective jurors if any of them cannot, for any reason, conscientiously and impartially try the

issues before the court and give a true verdict according to the evidence. Subsections (4), (5), and (6) simply provide for the details of the procedure for determining the merits of a prospective juror's declaration that he would be unable to perform his obligations as a juror.

Subsection (9) merely rectifies an apparent oversight in the present subsection 560(4) of the *Criminal Code*, namely, that there is no provision for a solemn affirmation in lieu of an oath for those persons who may object to, or be incompetent to, swear an oath. Neither the *Canada Evidence Act* nor the *Interpretation Act* expressly provides for a solemn affirmation in lieu of an oath for purposes of qualifying a prospective juror for jury service. Parenthetically, we would urge that the *Interpretation Act* (but not the *Canada Evidence Act*) be amended to provide, as of right, for a solemn affirmation in jury proceedings which would have the same force and effect as an oath.

Subsection (10) ensures that all such challenges as may be made pursuant to section 4 are presented and resolved out of the hearing of jurors already selected. A close inquiry into the qualifications or impartiality of a prospective juror could have a prejudicial effect upon those jurors already selected, and for that reason the Commission recommends that, immediately upon being sworn, jurors should be removed from the courtroom until the entire jury has been selected.

Since the same apprehension of prejudice applies also to prospective jurors, the Commission has recommended that the trial judge be given a discretion to hear challenges for lack of qualification and challenges for cause *in camera*. The Commission has also recommended that challenges for cause always take place outside the presence of prospective jurors. See subsection 5(3) and paragraph 6(3)(e), below.

Subsection (11) protects against the possibility that a departure from the directions of section 3 might be urged as a ground for mistrial or appeal. While a failure to comply with the substantive prescriptions of section 3 might constitute grounds for a mistrial or appeal, no omission to follow the directions of section 3 is to affect the validity of the proceedings.

Three types
of challenges

4. (1) The prosecutor and the accused are, subject to this Act, each entitled to assert in respect of prospective jurors challenges for lack of qualifications, challenges for cause on the grounds of partiality and peremptory challenges.

Order
of exercise
of challenges

(2) The prosecutor shall first exercise any challenge mentioned in subsection (1), followed by the accused and the co-accused, as the case may be.

COMMENT

Subsection (1) is simply declaratory of the types of challenges which the prosecutor or the accused may assert in respect of particular prospective jurors. Under proposed section 5, a prospective juror can be challenged because he lacks the qualifications of a juror as required by the relevant provincial Act. Under section 6, a prospective juror can be challenged on the grounds that he is not impartial as between the Queen and the accused. Under section 7, both the accused and the prosecutor are entitled to challenge a limited number of prospective jurors peremptorily.

Subsection (2) represents a change in the present law. Under subsection 563(3) of the *Criminal Code*, some judges are of the view that if the accused intends to challenge a prospective juror peremptorily or for cause he must declare his challenge before the prosecutor is called upon to declare whether he challenges the prospective juror. In our Working Paper, we suggested that the judge should have a discretion in directing the order in which the parties are called upon to exercise their peremptory challenges. Many of those who commented on our Working Paper were concerned that this proposal would require the trial judge to exercise a discretion with very little guidance. Following the advice we received from many commentators, we have decided to recommend that the prosecutor always be required to exercise first any challenges mentioned in subsection (1). This proposal would ensure

consistency with the accusatorial sequence for the presentation of evidence at trials.

Challenge
for lack of
qualifications

5. (1) The prosecutor and the accused are each entitled to any number of challenges for lack of qualifications on the ground that:

(a) the name of a prospective 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; or

(b) a prospective juror is disqualified from jury service under the relevant Act; or

(c) a prospective juror does not speak either or both of the official languages of Canada required by reason of an order under section 462.1 that the accused 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.

Decision
by judge

(2) Where a challenge is made under subsection (1), the judge shall determine the issue, and where he is satisfied that the challenge is valid, he shall excuse the prospective juror.

Hearing
in camera

(3) The judge may, in his discretion, direct that the hearing of the issue take place *in camera*.

COMMENT

The relevant provincial Acts establish the requirements under which a person is entitled to serve as a juror. Obviously, if a prospective juror does not satisfy these requirements the prosecutor or the accused ought to be entitled to challenge that person's right to sit as a juror. This proposed section provides the right and the procedure for such a challenge. Although the proposal incorporates much of sections 567, 568, and 569 of the *Criminal Code*, there are three substantive changes from the present law.

First, as was indicated above in our comments upon the definition of "prospective juror", we are recommending the removal from the *Criminal Code* of all juror qualifications except those relating to language. We make this recommendation because we believe that language qualifications should be excepted from the general proposition that juror qualifications are matters of provincial or territorial jurisdiction.

The official language in which the proceedings are conducted, including the testimony, the rulings of the judge, arguments of counsel, instructions to the jury and the accused's right to comprehend all of these is, in our view, a matter of procedure in criminal matters quite within the legislative jurisdiction of Parliament. One can hardly divorce the language of the proceedings from the "procedure". The language qualifications, in this context, evince a paramount jurisdiction of Parliament even if, in the absence of federal legislation, it might otherwise have been seen as an aspect of the administration of justice in the provinces. Hence, the substance of paragraph 567(1)(f) of the *Criminal Code* would be retained as a matter of overriding national interest, but the following juror qualifications for which the *Criminal Code* presently provides would be repealed:

- (a) subsection 554(3), as it relates to sexual discrimination against petit jurors (Although we subscribe to this prohibition against sexual discrimination, we do not believe that it requires an explicit statement in the

Criminal Code. No province or territory presently prohibits a person from serving on a jury on the grounds of his or her sex and provincial human rights legislation would in any event prevent such discrimination.);

- (b) paragraphs 567(1)(c), (d) and (e), which respectively disqualify as jurors those who have been convicted of an offence for which they were sentenced to death or to a term of imprisonment exceeding twelve months, aliens, and those who are physically unable to perform properly the duties of a juror (Instead of listing these specific grounds of disqualification, the proposed section simply provides that jurors may be challenged for lack of qualifications according to the grounds provided in the relevant provincial legislation.).

As previously mentioned, the substance of paragraph 567(1)(f) would be retained as paragraph 5(1)(c) of our legislative recommendations. Its enactment would remain contingent upon the proclamation of section 462.1 of the *Criminal Code* in those provinces in which it is not already in force.

A second difference between the proposed section and subsection 569(2) of the *Criminal Code* is that under the proposed section, where a prospective juror is challenged for lack of qualification, the judge will try the issue. Under subsection 569(2), two jurors who were last sworn generally try the issue. Since challenges for lack of qualifications are essentially technical grounds for challenge they are best left to the judge to determine. Indeed, in a subsequent proposed section, we recommend that the judge try all challenges, even challenges for cause.

Third, section 568 of the *Criminal Code* provides that the judge may require a party who challenges to put the challenge in writing. This discretion is not provided for in the proposed section. Since all challenges are recorded by the court reporter, it seems unnecessary to require that they be put in writing by the party who formulates the challenge.

In addition to dealing with challenges for lack of qualification, paragraph 567(1)(b) and sections 568 and 569 of the *Criminal Code* also deal with a challenge on the grounds that a juror is not indifferent between the Queen and the accused. This type of challenge is dealt with under proposed section 6, below.

Challenge
for cause of
partiality

6. (1) The prosecutor and the accused are each entitled to any number of challenges on the ground that a prospective juror is not impartial as between the Queen and the accused.

Oral
reasons

(2) In order to define the specific issue on a challenge under subsection (1), the party challenging may be required by the judge to state orally the reasons for the challenge, and if the party or counsel be unable or unwilling to do so, the judge may refuse to entertain the challenge.

Rules

(3) The following rules apply to the hearing on the issue of whether or not the prospective juror is not impartial as between the Queen and the accused:

(a) the judge shall decide the issue;

(b) where a prospective juror is challenged under this section, and the prosecutor and the accused agree that the prospective juror is not impartial as between the Queen and the accused, the prospective juror shall be excused without the intervention of the judge;

(c) the prospective juror challenged may be called as a witness on the hearing of the issue, in which case he shall be sworn in by the clerk of the court;

(d) the prosecutor and the accused may examine the prospective juror in order to assist the judge in determining whether or not the prospective juror challenged has a state of mind in reference to the alleged offence, the prosecutor, the police, the victim or the accused which would prevent him from acting impartially;

(e) the judge may direct that the hearing of the issue shall take place *in camera* and, in any case, he shall direct that the hearing of the issue not take place in the presence of the other prospective jurors.

COMMENT

Obviously, a prospective juror should not be able to serve on the jury if he is not impartial as between the Queen and the accused. This section provides a procedure whereby the prosecutor or the accused can challenge a prospective juror on the grounds that he is not impartial. The basic outline of the procedure is derived from paragraph 567(1)(b) and sections 568 and 569 of the *Criminal Code* and from the reasons for judgment in the leading case of *R. v. Hubbert* (1975), 29 C.C.C. (2d) 279, 31 C.R.N.S. 27 (Ont. C.A.). However, a number of changes from the present law and practice are recommended.

First, for a challenge to be sustained, paragraph 567(1)(b) of the *Criminal Code* requires that the prospective juror not be "indifferent" between the Queen and the accused. We recommend the use of the word "impartial". "Impartial" has a more settled meaning than the word "indifferent", and it is the word more commonly used to refer to the state of mind to which exception is here being taken.

Second, although this is now commonly the practice, the proposed subsection (2) provides that the judge can require the party challenging a prospective juror to state specifically the

reasons for the challenge. This will prevent counsel from launching on a fishing expedition when challenging a prospective juror, or using the occasion to predispose the prospective juror to his party.

Third, and this is a more significant change from the present law, when a prospective juror is challenged as not being impartial, the judge will determine the issue under proposed paragraph 6(3)(a). Under the present law, subsection 569(2) of the *Criminal Code* provides that the two jurors who were last sworn shall determine this issue. We proposed the retention of the present law in this regard in our Working Paper. However, on the basis of our consultations, we concluded that having two jurors decide this issue is often cumbersome and, more important, might result in jurors hearing evidence in the course of trying this issue which might influence their decision in the trial.

Fourth, in proposed paragraph 6(3)(d) the words “the alleged offence, the prosecutor, the police, the victim or the accused” are not intended to broaden the present scope for challenge on the grounds of partiality. Instead, they are included simply to refer to those matters in relation to which the prospective juror might have a state of mind that would render him not impartial.

Fifth, the provision in section 568 under which the judge may require the reasons for a challenge to be put in writing is not provided for in these proposed sections. As noted previously, since the challenge will be recorded by the court reporter, the requirement that it be put in writing is unnecessary. But, in addition, where the challenge is for cause, requiring it to be put in writing can unduly delay the proceedings.

Exercise
of peremptory
challenges

7. The prosecutor and the accused may exercise a peremptory challenge against a prospective juror, whether or not such prospective juror has been the subject of a challenge for lack of qualifications, or a challenge for cause on the ground of partiality, or both such challenges.

COMMENT

There is no section comparable to this proposed section in the *Criminal Code*. However, it merely codifies what is established practice. See *Cloutier v. The Queen* (1979), 48 C.C.C. (2d) 1, [1979] 2 S.C.R. 709, 12 C.R. (3d) 10. The rationale of the peremptory challenge is to ensure, to the extent possible, that the accused feels he is being tried by an impartial jury. Therefore, it should not matter whether a peremptory challenge is exercised before or after a challenge on the grounds of partiality. Furthermore, in the course of challenging a prospective juror on the grounds of partiality a party might antagonize him. Therefore, even though the judge finds the prospective juror to be impartial the party should be able to challenge him peremptorily.

Peremptory
challenge by
prosecutor
and accused

8. (1) The prosecutor and the accused are each entitled to challenge twenty prospective jurors peremptorily where the accused is charged with an offence for which the minimum punishment is life imprisonment.

Idem

(2) The prosecutor and the accused are each entitled to challenge twelve prospective jurors peremptorily where the accused is charged with an offence not referred to in subsection (1).

COMMENT

A peremptory challenge permits a party to prevent a prospective juror from being sworn without showing any cause. Generally, under the present law the accused is entitled to more peremptory challenges than the prosecutor. However, the exact number depends upon the severity of punishment for the offence charged. Under section 562 of the *Criminal Code*, the accused who is charged with high treason or first degree murder is entitled to challenge twenty jurors peremptorily; the

accused who is charged with an offence other than high treason or first degree murder but for which he may be sentenced to imprisonment for more than five years is entitled to challenge twelve prospective jurors peremptorily; finally an accused who is charged with any other offence is entitled to challenge four prospective jurors peremptorily.

Under section 563 of the *Criminal Code*, the prosecutor is only entitled, in all cases, to challenge four prospective jurors peremptorily. However, he may direct up to forty-eight prospective jurors to stand aside without showing cause. If the entire jury panel is exhausted and a full jury has not been sworn, under section 570 of the *Criminal Code* those prospective jurors directed by the prosecutor to stand aside must be called again in the order in which they were drawn.

The proposed section makes a number of changes in the present law. The prosecutor's right to have prospective jurors stand aside is abolished, but instead the prosecutor is given the same number of peremptory challenges as the accused. The doctrine of "standing prospective jurors aside" developed at a time when the Crown did not have the right to challenge prospective jurors peremptorily. If the prosecutor is given the same number of peremptory challenges as the accused there would appear to be no reason to continue to allow the prosecutor to stand aside prospective jurors. For the same reason, the prohibition in section 566 against stand-asides being directed by a prosecutor other than the Attorney General or counsel acting on his behalf on a trial for defamatory libel would become superfluous.

The number of peremptory challenges given to the accused and the prosecutor must necessarily be arbitrary. However, in view of the fact that stand-asides are abolished, the numbers suggested in the proposed section would appear to be reasonable. They would have the effect of increasing the number of peremptory challenges for all offences.

Peremptory
challenge
by co-accused

9. (1) Where two accused persons are jointly charged in an indictment and it is proposed to try them together, each is entitled to challenge eight prospective jurors peremptorily, and where more than two accused persons are jointly charged in an indictment and it is proposed to try more than two of them together, each is entitled to challenge six prospective jurors peremptorily.

Idem

(2) Notwithstanding subsection (1), where an accused is charged with an offence for which the minimum punishment is life imprisonment, he is entitled to challenge twenty prospective jurors peremptorily.

Idem

(3) Where two or more accused persons are jointly charged in an indictment and it is proposed to try them together, the prosecutor is entitled to challenge the same number of prospective jurors peremptorily as are all the accused persons taken together.

COMMENT

Under section 565 of the *Criminal Code*, where "two or more accused persons are jointly charged in an indictment and it is proposed to try them together, each may make his challenges in the same manner as if he were to be tried alone". Consequently, if our proposed section 8 were adopted and six accused persons were jointly charged and tried in a conspiracy case, for example, the defence would be able to exercise in total 72 peremptory challenges. If, in fairness, the prosecutor were given an equal number, a total of 144 peremptory challenges could be exercised. This number seems excessive. Therefore, except where an accused is charged with an offence for which the minimum punishment is life imprisonment, where two or more accused persons are jointly charged, the number

of peremptory challenges each can exercise is reduced to eight if two accused are jointly tried and to six if more than two accused are jointly charged.

Reducing the number of peremptory challenges which can be exercised when more than one accused is being tried can be justified in logic. An accused might wish to exercise his peremptory challenge to dismiss a prospective juror for either of at least two reasons: he may believe the prospective juror is prejudiced against him personally, or he may believe the prospective juror is prejudiced against him because of the facts of the case. Obviously, all co-accused have a common interest in discharging prospective jurors who harbour prejudice or bias arising from the facts of the case. Therefore, when two or more accused are being jointly tried, fewer peremptory challenges than the total each would be entitled to if tried separately are necessary to ensure a jury that appears impartial.

Peremptory
challenge when
multiple counts

10. Where an accused person is charged in an indictment containing more than one count and it is proposed to try him on more than one count at the same trial, the prosecutor and the accused are entitled to challenge peremptorily that number of prospective jurors which they would be entitled to challenge if the accused were being tried only on the count for which he is entitled to the greatest number of challenges.

COMMENT

The *Criminal Code* does not provide for the number of peremptory challenges to which the accused is entitled if he is charged in an indictment containing more than one count. The proposed section simply states the common-sense result.

Peremptory
challenge when
six-member jury

11. Notwithstanding anything in this Act, in the Yukon Territory and in the Northwest Territories, the prosecutor and the accused are each entitled to half the number of peremptory challenges provided for in sections 8 and 9.

COMMENT

In the Yukon Territory and the Northwest Territories, a jury is composed of only one-half the number of jurors provided for in the provinces. Therefore, the number of peremptory challenges should logically be reduced by one-half. In effect, this is simply a restatement of the present law as found in section 561 of the *Criminal Code*.

When panel
exhausted

12. Where a jury cannot be provided, notwithstanding that the provisions of this Part and the relevant Act have been complied with, the court shall fix another time for trial and direct the sheriff or other proper officer of the court to cause a new panel of prospective jurors to be summoned.

COMMENT

Under the present law, if so large a number of prospective jurors in a panel are successfully challenged that a full jury cannot be empanelled, section 571 of the *Criminal Code* permits the sheriff or other proper officer simply to summon any qualified person to act as a prospective juror in the case. The granting of a *tales*, as such a procedure is called, is in most cases a severe inconvenience to the persons summoned, who may simply have been going about their business in the street when encountered by the sheriff. Therefore, the proposed section provides that where an insufficient number of jurors is available to try a particular case, a new panel of prospective jurors should be summoned in the usual manner.

We considered, but ultimately rejected, an alternative to our present recommendation. According to the alternative, where half or more of the prospective jurors necessary to constitute a jury had been selected before the panel was exhausted, those already selected were to be retained; only the remainder of the jury was to be selected from the next-summoned panel. Although this alternative recognized the importance of each individual selected for jury duty, it did not, in our opinion, take sufficient account of the delay which might be entailed in summoning a new panel and the consequent inconvenience to those prospective jurors already selected. In the result, we recommend the abolition of the practice of granting a *tales* but make no recommendations for an alternative procedure. The fact that the practice of granting a *tales* has virtually disappeared suggests to us that we need neither retain the procedure nor propose an alternative to it. We believe the most important safeguard against exhausting the panel to lie in summoning a large enough panel to preclude the possibility of its being exhausted.

Segregating
jurors

13. (1) When a full jury has been selected, the names of the jurors shall be kept apart from those of the panel at large until the jury has been discharged, whereupon the names shall be returned to the box as often as occasion arises, as long as an issue remains to be tried before a jury.

Subsequent
jury service

(2) Any or all of the jurors who try an issue may be selected to try a subsequent issue at the same sittings, but all such jurors are subject to challenge on the same grounds as any prospective juror, and all jurors so selected shall be obliged to repeat their oath.

COMMENT

This section is largely a restatement of the present section 572, which is designed to permit jurors who have served on one trial to be called for a subsequent trial, while avoiding

the possibility that they might be called for a subsequent trial before being discharged from the first.

The proposed section differs from the present section 572 in four respects. First, it removes the qualification that jurors may try a subsequent issue only with the consent of the prosecution and the accused. Instead, the proposal puts all such jurors in the same position as they would have been if they were being called for the first time. Thus, a juror trying a subsequent issue becomes, for that purpose, a prospective juror and is therefore subject to challenge. Second, unlike the present section 572, a juror trying a subsequent issue is not exempted from the general requirement to make an oath or solemn affirmation. Third, the proposed section removes the surplusage found in the present section 572 concerning the procedures to be followed to bring the jury up to its full complement when some of its members have previously served on another issue. These are procedures of general application and need not be repeated. Fourth, the proposed section removes the direction that jurors who have been excused be ordered to withdraw. We believe the order to withdraw is unnecessary, since it is self-evident that, once excused, the juror is neither required nor available to serve on a trial for which he has been excused. We do not propose by this recommendation to limit the trial judge's discretion to excuse a juror who is called for a second trial. Rather, we treat the juror's having been excused as not requiring a specific order to withdraw.

No publication
on jury
selection
until completion
of trial

14. (1) No information in respect of any proceedings related to jury selection shall be published in any newspaper or broadcast until after the completion of the trial.

No publication
of names, etc.,
during trial

(2) Neither prospective jurors nor jurors shall be identified by name, address or likeness in relation to the proceedings in which they were engaged in any newspaper or broadcast until after the completion of the trial.

No publication
of names, etc.,
after trial
except
by consent

(3) After the completion of the trial, prospective jurors or jurors shall not be identified by name, address or likeness in relation to the proceedings in which they were engaged except with their consent.

Offence

(4) Every one who fails to comply with this section is guilty of an offence punishable on summary conviction.

COMMENT

Because the publication of information relating to jury selection proceedings might embarrass prospective jurors or prejudice the accused, the Commission recommends an absolute prohibition against publication of such information until after the trial has been completed. The Commission also believes that prospective jurors and jurors are entitled, both during and after their term of service, to be protected from interference with their privacy and from other forms of harassment to which they might be exposed because of their participation in a criminal trial. For that reason, the Commission recommends an absolute prohibition against publication of their names, addresses or likenesses until after the trial has been completed. Thereafter, prospective jurors and jurors may not be identified in connection with their service in any newspaper or broadcast except with their consent. We intend by this recommendation to ensure that persons called for jury service are protected from invasions upon their privacy during the term of their service, while remaining free thereafter to exercise their full civil rights.

PROCEDURE DURING TRIAL

Election
of president
of jury

15. When the selection of the jury is completed, the judge shall direct the jurors to elect at an early stage of the trial one juror among them to serve as president of the jury.

COMMENT

This section effects a change in nomenclature, altering “foreman” to “president”, but otherwise restates the present practice in most courts. However, in some courts the president is not elected until the jury retires to deliberate. If a president is elected at an early stage of the trial, the procedures in the deliberation room are likely to be more orderly. Furthermore, in proposed section 16 we recommend that to ensure an orderly procedure during the trial all requests by jurors to the judge should be conveyed through the president. Therefore, it is important that the president be elected early in the trial.

Requests
from jury

16. (1) The president may, on behalf of a juror, request in writing during the course of the trial, that:

(a) additional information or explanation be given in respect of the evidence, or

(b) particular arrangements be effected in respect of the well-being and protection of the jurors and their families.

Decision
by judge

(2) Where a request is made under subsection (1), the judge shall decide whether or not the request should be granted.

Judge's
discretion

(3) Before deciding, the judge may, in the absence of the jury, hear the prosecutor and the accused as to the appropriateness of granting the request and he may take the matter under advisement.

COMMENT

This proposed section, which is new, provides a procedure for dealing with requests from the jury during the trial. It provides that all requests from the jury during the trial are to be made through the president.

The proposed section contemplates two kinds of requests being made by a juror. First, a juror may request additional information or explanation in relation to the evidence. In our Working Paper on *The Jury in Criminal Trials*, we discussed at length the problems presented when a juror asks a question relating to the evidence. Second, a juror might make a request relating to his well-being. We have recommended that a formal procedure be adopted to accommodate both such requests.

Jury may
separate

17. (1) The judge may, at any time before the jury retires to consider its verdict, permit the jurors to separate.

Refusal

(2) Where permission to separate is refused, the jury shall be kept under the charge of an officer of the court as the judge directs and that officer shall prevent the jurors from communicating with anyone other than himself or another juror, unless the judge otherwise directs.

Empanelling
new jury in
certain cases

(3) Where a failure to comply with this section is discovered before the verdict of the jury is returned, the judge may, if he considers that the failure to comply might lead to a miscarriage of justice, discharge the jury and

(a) direct that the accused be tried by a new jury during the same sittings of the court, or

(b) postpone the trial on such terms as justice may require.

Refreshment
and
accommodation

(4) The judge shall direct the sheriff or other proper officer of the court to provide the jurors with suitable and sufficient refreshment, food and lodging while they are together until they have given their verdict.

COMMENT

This proposed section, with a few drafting changes intended to clarify and simplify the law, is a restatement of section 576 of the *Criminal Code*.

Publication
restricted
while jury
separated

18. (1) Where permission to separate is given to jurors under subsection 17(1), no information regarding any portion of the trial at which the jury is not present shall be published in any newspaper or broadcast at any time after the permission to separate is granted and before the verdict is returned.

Offence

(2) Every one who fails to comply with subsection (1) is guilty of an offence punishable on summary conviction.

COMMENT

This proposed section is a restatement of section 576.1 of the *Criminal Code*. It is a companion section to proposed section 17 above.

Juror unable
to continue

19. (1) Where in the course of a trial a juror is, in the opinion of the judge, by reason of illness or some other cause, unable to continue to act, the judge may discharge him.

Trial may
continue

(2) Where in the course of a trial a juror dies or is discharged pursuant to subsection (1), the jury shall, unless the judge otherwise directs and if the number of jurors is not reduced below ten, or in the Yukon Territory and the Northwest Territories below five, be deemed to remain properly constituted for all purposes of the trial, and the trial shall proceed and a verdict may be given accordingly.

COMMENT

It sometimes happens, particularly during a long trial, that one or more jurors might become ill or otherwise be unable to continue to act. There are basically two ways in which to deal with this problem. The trial may continue with fewer than twelve jurors (the present Canadian solution) or alternative jurors may be appointed in every case (the solution in some American jurisdictions). In our Working Paper we argued that the present Canadian law was the best solution to this problem. With respect to the system of alternate jurors, we were concerned with the burden of requiring extra jurors to sit through long trials and the possibility that alternate jurors, because they may not have to deliberate in the case, will not pay close attention to the evidence. Those who commented on our Working Paper agreed that the present Canadian law works satisfactorily.

Our proposed section is a restatement of section 573 of the *Criminal Code*.

Taking
a view

20. (1) The judge may, where it appears to be in the interests of justice, at any time after the jurors have been sworn and before the jury returns its verdict, direct the jury to have a view of any place, thing or person, and shall give directions as to the manner in which the place, thing or person shall be seen by the jury, and may for that purpose adjourn the trial.

Directions
for viewing

(2) Where a view is ordered under subsection (1), the judge shall give any directions that he considers necessary for the purpose of preventing undue communication by any person with jurors, but failure to comply with any directions given under this subsection does not affect the validity of the proceedings.

Who shall
attend

(3) Where a view is ordered under subsection (1), the judge, the prosecutor, and the accused shall attend.

COMMENT

This proposed section is a restatement of section 579 of the *Criminal Code*. We find the present procedures relating to the jury taking a view to be satisfactory.

Opening address
by prosecutor

21. Before adducing any evidence, the prosecutor may, in an opening address to the jury, advise of the evidence he intends to place on the record.

COMMENT

The present *Criminal Code* makes provision in subsection 578(2) for the accused or his counsel to make an opening statement before examining such witnesses as may be called for the defence. Although there is no corresponding authority for Crown counsel to make an opening statement to the jury, it is nevertheless the accepted practice in most courts. Clearly, both the prosecutor and the accused have an interest in assisting the jury to appreciate the relevance of the evidence to the issues in the case. The Commission therefore recommends that the present practices in this regard be codified so as to ensure that the opportunity to make an opening statement is available to both the prosecutor and the accused.

Motion
for judgment
of acquittal

22. (1) At the conclusion of the case for the prosecution, the accused may make a motion for a judgment of acquittal on the ground that no sufficient case has been made out to put the accused to his defence because

(a) no evidence has been adduced to prove an essential element of the offence alleged; or

(b) the evidence adduced is so manifestly unreliable that no jury properly instructed and acting judicially could return a verdict of guilty.

In absence
of jury

(2) A motion under subsection (1) shall be made and determined in the absence of the jury.

Submissions
by parties

(3) Where a motion under subsection (1) has been made, the judge shall, before ruling on the matter, give the parties the opportunity of making submissions on the motion.

Decision
not to be
reserved

(4) The judge shall not reserve decision on a motion for a judgment of acquittal.

If motion
granted

(5) The judge who grants a motion under subsection (1) shall acquit the accused and discharge the jury.

If motion
denied

(6) The judge who denies a motion under subsection (1) shall call upon the accused for his defence.

Question
of law

(7) The question of whether a sufficient case within the meaning of subsection (1) has been made out to put the accused to his defence is a question of law.

COMMENT

Of all the Commission's recommendations in this Report, none has proved so troubling as that proposed in section 22. Because of the contentiousness of this recommendation, we have elaborated at some length upon the reasons and arguments which have informed our decision.

Briefly put, what is at issue here is the question of precisely where the lines should be drawn between the respective prerogatives of the trial judge, the jury and the appellate court in relation to the evidence introduced at trial. As between the trial judge and the jury, it is something of a commonplace to

assert that matters of law are for the judge and matters of fact for the jury. Indeed, the jury is commonly described as being the exclusive trier of fact. However accurate that description may be as between trial judge and jury, it must be qualified by the fact that the appellate court exercises a statutory prerogative to review a jury's conclusions about the evidence. Subparagraph 613(1)(a)(i) of the *Criminal Code* permits the appellate court to quash a conviction where it is of the opinion that the jury's verdict is unreasonable or cannot be supported by the evidence. Clearly, then, the jury's role as trier of fact is not exclusive, since the appellate court may, within certain limits, re-evaluate the evidence adduced at trial and make its own conclusions about the guilt or innocence of the accused.

The description of the jury as having an exclusive jurisdiction as trier of fact must be further qualified by certain of the prerogatives of the trial judge. First, according to the present jurisprudence, the question of whether there has been *any* evidence adduced at trial to prove an essential element of the offence alleged is said to be a matter of law, and hence a ground for a trial judge to direct the jury to return a verdict of acquittal. Although the jurisprudence is in some conflict on this point, the better opinion would appear to be that any determination that no evidence has been proved as to a material element in the allegation clearly involves the trial judge in an evaluation of the evidence. Thus, even as between jury and trial judge, the jury's role as trier of fact is not exclusive.

Second, at least until the Supreme Court of Canada decision in *U.S.A. v. Sheppard*, [1977] 2 S.C.R. 1067, it was an arguable proposition that the trial judge had a prerogative to direct the jury to return a verdict of acquittal where the evidence was of such a dubious nature that it could not support a verdict of guilty by a jury properly instructed and acting judicially. Prior to *U.S.A. v. Sheppard*, evidence might be characterized as being of such a dubious nature that it would be unsafe and unjust for the jury to register a conviction if (a) the evidence was circumstantial and as consistent with the innocence of the accused as with his guilt; or (b) the evidence was tainted, discredited on cross-examination or otherwise manifestly unreliable.

The Supreme Court of Canada, by a majority of five to four, defined the trial judge's prerogatives on a motion for a directed verdict as being limited to determining whether there was any evidence upon which a reasonable jury properly instructed could return a verdict of guilty. In effect, the trial judge could determine, as a matter of law, that there was *no evidence* adduced to prove a material element in the allegation, but he could not determine that such direct and admissible evidence as had been adduced was *insufficient* to support a conviction. To permit the trial judge to direct a verdict of acquittal where he believed the evidence to be manifestly unreliable was, it was said, to permit the trial judge to evaluate the evidence and so to usurp the prerogatives of the jury. Rather curiously, the majority opinion reserved to the trial judge a prerogative to evaluate the evidence where the issue was one of circumstantial evidence, but denied any such prerogative where the issue was one of tainted, dubious or otherwise manifestly unreliable evidence.

While respectfully acknowledging the force of the majority opinion in *Sheppard*, the Commission is persuaded that, as a matter of policy, the jury should not exercise an exclusive prerogative as trier of fact. The Commission believes that the trial judge should have a prerogative and a duty in certain limited circumstances to evaluate the whole of the evidence adduced by the prosecutor. If, having evaluated that evidence, the trial judge is obliged to conclude that there was no evidence on an essential element of the offence alleged or that the evidence was so manifestly unreliable that no jury properly instructed and acting judicially could return a verdict of guilty, then in either of those events the judge should acquit the accused and discharge the jury.

The Commission's reasons for this recommendation are several. First, the Commission is anxious to accord a full measure of respect for the common-law right to silence. The Commission accepts that an accused should not be called upon for his defence until the prosecution has discharged its burden of proof. In the case of trial by judge and jury, that burden will be discharged when sufficient evidence has been tendered to

permit a jury properly instructed and acting judicially to return a verdict of guilty. Correspondingly, that burden will not have been discharged where (a) no evidence has been adduced to prove an essential element of the offence alleged, or (b) such evidence as has been adduced is so manifestly unreliable that it would be unsafe to found a conviction upon it. In such circumstances, respect for the right to silence dictates that, no sufficient case having been made out to justify putting the accused to his defence, the accused should not be called upon for his defence; further, it would follow that the judge should acquit the accused and discharge the jury.

Second, the Commission accepts, as a matter of principle, that there should be no difference between the question posed for the justice by subsection 475(1) of the *Criminal Code* upon committing the accused for trial and the question to be decided by the trial judge upon a motion for a judgment of acquittal. In both cases, the question is whether a jury properly instructed and acting judicially could convict the accused upon the evidence adduced. The Commission also accepts, as a matter of principle, that the appellate court should be governed by the same standard in deciding to allow an appeal from conviction on the ground that the verdict is unreasonable or cannot be supported by the evidence.

The Commission will be reporting at a later date its recommendations to Parliament concerning committal and appeal procedure. In the interim, the Commission has concluded that the standard governing its recommendation for a motion for a judgment of acquittal should not be materially different from that which governs the appellate court in deciding that a conviction was unreasonable or could not be supported by the evidence. Because it would be vexatious to subject the accused to the hardship of a conviction and appeal if that conviction were almost inevitably to be quashed on appeal, the trial judge, in ruling on a motion for a judgment of acquittal, should be able to put himself in the position of an appellate court hearing an appeal against conviction.

Thus, in arriving at its decision to recommend a motion for a judgment of acquittal in the terms of the proposed section 22, the Commission has placed a premium upon respect for the common-law right to silence. In this context, that right would be respected by ensuring that the accused could be called upon for his defence only after the prosecution had discharged its burden of adducing sufficient evidence that a jury properly instructed and acting judicially could return a verdict of guilty. In addition, there is the consideration that a conviction based upon manifestly unreliable evidence will be set aside by the appellate court where the verdict is unreasonable or cannot be supported by the evidence. As a matter of principle, therefore, the trial judge should have a prerogative to evaluate the evidence which is roughly equivalent to that of the appellate court, in order to ensure that the accused is spared the hardship — and the public, the expense — of appealing a manifestly unreasonable verdict.

A number of competing considerations, however, had to be addressed by the Commission in its consultations and deliberations on this issue. Foremost among them was the concern that permitting the trial judge even so limited a prerogative to evaluate the evidence as that provided in our proposed section 22 was to trespass upon the jury's traditional role as trier of fact. We believe this concern to be based upon a misconception of the traditional role of the jury. The jury has never exercised an unfettered jurisdiction as trier of fact; nor, in our opinion, should its jurisdiction be exclusive. There must be safeguards against the possibility of perverse verdicts. Hence the appellate court's prerogative to quash a conviction where the verdict is unreasonable or cannot be supported by the evidence. And hence also our proposed section 22, which permits the trial judge to enter a verdict of acquittal where the evidence adduced by the prosecution is so manifestly unreliable that no jury properly instructed and acting judicially could return a verdict of guilty.

Moreover, the Commission believes it a futile exercise to stipulate the respective prerogatives of trial judge and jury solely according to the precept that matters of law are for the

trial judge and matters of fact for the jury. There are other, and indeed overriding, considerations. As fundamental an institution as the jury is in our criminal justice system, more fundamental still is the common-law right to silence and its corollaries which oblige the prosecutor to carry the burden of proof and which save the accused from being put to his defence before a sufficient case has been made out against him.

The Commission also considered, but rejected, several other variations on its proposed section 22. Those variations, together with the Commission's reasons for rejecting them, are set out below.

Variation 1. The trial judge should be permitted, at the conclusion of the case for the prosecution, to enter a verdict of acquittal on his own motion.

This variation has been suggested as both logically necessary and as a safety net for the unrepresented or incompetently represented accused. Either (so the argument goes) the motion for a judgment of acquittal is to operate as one of the guarantees of Canadian criminal procedure or it is not. If the motion is conceived as essential to oblige the prosecution to prove its case without the benefit of evidence from the accused, it becomes the positive duty of the trial judge to ensure that this safeguard is not lost through the ignorance of the accused or the incompetence of his counsel.

The Commission decided against including this variation in its proposed section 22, first, because few accused are unrepresented on jury trials; second, because there can never be an absolute guarantee against incompetent counsel; and third, because there is nothing to prevent a trial judge, even in an adversarial system, from inviting such a motion from the accused or his counsel in the event that the prosecution has not produced sufficient evidence to be answered.

Variation 2. The motion for a judgment of acquittal should be available at the conclusion of the case for the accused, as well as at the conclusion of the case for the prosecution.

Arguably, the case for the prosecution might be thoroughly discredited or otherwise shown to be manifestly unreliable, not through cross-examination, but as a result of evidence adduced by the accused. For example, it might happen that an eyewitness identification could only be discredited by defence evidence from the witness's ophthalmologist. The result would be the same as that which, but for the obstinacy of the witness, might have been achieved on cross-examination — namely, the evidence will have been shown to be manifestly unreliable.

This variation was similarly rejected by the Commission. Although the result may be the same (i.e., the evidence has been shown to be manifestly unreliable), the circumstances are different. The accused has at this point elected to call evidence in his defence; hence, saving the accused from being put upon his defence before the prosecution's burden of proof has been discharged is no longer a matter of paramount importance. Either the accused has concluded or the trial judge has ruled (by dismissing or declining to invite a motion for a judgment of acquittal at the conclusion of the case for the prosecution) that there is a sufficient case to meet. In either event, the accused has elected to answer the case against him, and there is consequently no further reason for insisting upon a procedural safeguard which the accused has elected to waive. That being the case, the Commission has decided against permitting the accused to make successive motions for a judgment of acquittal as further defence evidence is called, and against permitting a second motion for a judgment of acquittal at the conclusion of the case for the accused.

A further consideration that weighed heavily against permitting such a motion at any time other than after the conclusion of the case for the prosecution was perhaps the most obvious one: it would be an affront to the role and status of the jury to permit a case to be withdrawn after the defence had commenced to call evidence. Once the prosecution has established a case to meet and the procedural safeguards implied by

the common-law right to silence have been satisfied, there should be no further occasion or need for the trial judge to evaluate the sufficiency of direct and admissible evidence.

Variation 3. As in Variation 2, except that if the motion for a judgment of acquittal is made at the conclusion of the case for the accused, the trial judge shall reserve his decision, submit the case to the jury, and deliver his ruling on the motion after the jury has announced its verdict. If the jury returns a verdict of guilty, the trial judge shall nevertheless enter a judgment of acquittal if, by his decision reserved, he has determined to grant the motion.

This variation was proposed as a complement to Variation 2. Since the Commission has rejected the second variation, it has similarly rejected the third. In its favour, Variation 3 was said to have the merit of obviating the need for a new trial in the event that the prosecutor successfully appealed the trial judge's decision to grant the motion for a judgment of acquittal in the face of the jury's verdict of guilty. If the trial judge's ruling were upset on appeal, the appellate court could simply restore the jury's verdict. As well, this variation was said to have the merit of placing the burden for initiating the appeal upon the prosecutor rather than the accused.

Whatever the proposal's merits, however, they would seem clearly to be outweighed by its disadvantages. First, there seems good reason to believe that the closer the motion is made in point of time to the conclusion of all the evidence, the greater the prospect for the trial judge intruding upon the jury's role as trier of fact. Second, it would be a manifest affront to the jury if the trial judge were to enter a judgment of acquittal immediately upon the jury's returning its verdict of guilty. Third, it is not obvious that there is a significant difference between the burden faced by the accused as appellant and that which he would face as respondent in the event of an appeal.

In the result, the Commission determined upon a motion for a judgment of acquittal which could be made only after the conclusion of the case for the prosecution. If granted, the

motion would result in an acquittal. If denied, the accused would be called upon for his defence. At that point, he would be obliged to elect whether to call evidence for the defence. If he declared his intention of calling no evidence, the case would be submitted to the jury. If convicted, he could appeal on the grounds that the verdict was unreasonable or could not be supported by the evidence, i.e., on more or less the same grounds as would govern the motion for a judgment of acquittal. If the accused elects to call evidence and is convicted, he will in effect have waived his right to appeal the trial judge's ruling on the motion. It would of course remain open to the accused to appeal on any of the grounds presently enumerated in section 613 of the *Criminal Code*. Correspondingly, by virtue of proposed subsection 22(7) and the present paragraph 605(1)(a) of the *Criminal Code*, it would be open to the prosecutor to appeal, as a question of law alone, against a judgment of acquittal entered pursuant to proposed subsection 22(4).

Since the Commission's proposal departs from the present practice, it seems a good opportunity to recommend a change of terminology. The phrase "non-suit" seems inappropriate in a criminal case, since a "suit" normally refers to civil cases. Nor does the phrase "motion for a directed verdict" seem quite apt, since we are proposing that the judge grant the acquittal directly, rather than direct the jury to render a verdict of acquittal. Hence the term, "motion for a judgment of acquittal".

Opening address
by accused

23. Before adducing any evidence, the accused may, in an opening address to the jury, advise of the evidence he intends to place on the record.

COMMENT

This proposed section simply codifies the present law.

Arguments
addressed
to jury

24. (1) Arguments on the case may be addressed to the jury by the prosecutor and the accused at the close of the evidence.

Order
of arguments

(2) The prosecutor shall address his arguments on the case to the jury first, followed by the accused and the co-accused, as the case may be.

COMMENT

Section 578 of the *Criminal Code* provides that the right to address the jury last falls to the prosecutor if witnesses are examined by the defence. We are unaware of any compelling reason why this should be so. Indeed, reason would seem to compel the opposite result if it is accepted that the party whose interests are most in jeopardy in a criminal trial should have the last word. Because the sequence of an accusatorial system requires that the prosecution prove its case before the accused is called upon to respond to the accusation against him, we believe that sequence should equally be respected in closing arguments. The Commission therefore recommends that the accused always have the right of last address.

Submissions
by parties
on the law

25. At the close of the evidence or at a reasonable time prior thereto, the judge shall give the parties the opportunity of informing him of the instructions on the law which they think are relevant to the case. If written submissions are made, copies shall be given to the other parties in the case. Submissions, whether given in writing or orally, shall form part of the record.

COMMENT

This proposed section simply codifies the present practice in many courts. However, since the practice is to be encouraged, it is embodied in this recommendation so that it will become uniform in all courts.

The practice is largely one of convenience. The judge will not be bound to give the instructions submitted to him by counsel; nor will this relieve him of the ultimate responsibility for correctly instructing the jury on the law. However, submissions by counsel of the instructions which they feel are relevant to the case should assist the judge in preparing the instructions to be delivered. Furthermore, since the submissions will form part of the record, they should assist appellate courts in determining the theory of the prosecutor and of the defence at trial.

Instructions
by judge

26. (1) Following arguments to the jury by the parties, the judge shall instruct the jury on the law and shall accurately and impartially summarize the evidence and the contentions of both the prosecutor and the accused. As part of his instructions on the law, the judge shall instruct the jury that, in the event of a verdict of guilty, the jury has no prerogative to make any recommendation either as to clemency or as to the severity of the sentence.

COMMENT

The first part of this proposed subsection largely codifies the existing law. In most cases the judge will be most effective in assisting the jury by his summary of the evidence if he delineates the essential issues and then relates the evidence to them. However, if in a particular case he feels that it will be more understandable to the jury if he adopts some other method of summarizing the evidence, the proposed section would permit him to use this method.

The second part of the proposed section would entail the repeal of the present section 670 of the *Criminal Code*, which provides that where a jury finds an accused guilty of second degree murder, the trial judge shall, before discharging the jury, invite them to make a recommendation regarding eligibility for

The practice is largely one of convenience. The judge will not be bound to give the instructions submitted to him by counsel; nor will this relieve him of the ultimate responsibility for correctly instructing the jury on the law. However, submissions by counsel of the instructions which they feel are relevant to the case should assist the judge in preparing the instructions to be delivered. Furthermore, since the submissions will form part of the record, they should assist appellate courts in determining the theory of the prosecutor and of the defence at trial.

Instructions
by judge

26. (1) Following arguments to the jury by the parties, the judge shall instruct the jury on the law and shall accurately and impartially summarize the evidence and the contentions of both the prosecutor and the accused. As part of his instructions on the law, the judge shall instruct the jury that, in the event of a verdict of guilty, the jury has no prerogative to make any recommendation either as to clemency or as to the severity of the sentence.

COMMENT

The first part of this proposed subsection largely codifies the existing law. In most cases the judge will be most effective in assisting the jury by his summary of the evidence if he delineates the essential issues and then relates the evidence to them. However, if in a particular case he feels that it will be more understandable to the jury if he adopts some other method of summarizing the evidence, the proposed section would permit him to use this method.

The second part of the proposed section would entail the repeal of the present section 670 of the *Criminal Code*, which provides that where a jury finds an accused guilty of second degree murder, the trial judge shall, before discharging the jury, invite them to make a recommendation regarding eligibility for

release on parole. In addition, the proposed section would altogether remove any prerogative, formal or informal, that the jury might previously have enjoyed to make recommendations regarding clemency or severity of sentence. This recommendation represents a departure from the present practice and, in the case of second degree murder, a departure from the present law.

The reasons for this departure are several. First, the jury's principal role is to arrive at a verdict of guilt or innocence by weighing the evidence placed before it at trial. It is no part of that role to determine what sentence is appropriate in the event of conviction. To permit the jury to make a recommendation as to clemency or severity of sentence is to confuse the proper role of the jury with the role of the trial judge, whose exclusive responsibility it is to pronounce sentence upon a finding of guilt. Second, the Commission believes that permitting the jury to recommend clemency may compromise the integrity of its verdict. The promise of a collective plea for clemency could well operate as an effective, but unconscionable, inducement to persuade a reluctant juror to vote with the majority. A recommendation for clemency which the trial judge is under no obligation to accept should play no part in a jury's deliberations about guilt or innocence. Third, because the jury will ordinarily be familiar with the facts of the particular case before them, they will not be cognizant of the several different considerations that bear on sentence — the accused's prior criminal record, if any; his reputation in the community; his antecedent and present circumstances, etc. Thus, the jury's recommendation regarding clemency or severity of sentence must necessarily be made in ignorance of many of the relevant considerations. It seems obviously preferable not to invite the jury to make an uninformed recommendation which the trial judge is under no obligation to accept.

Having recommended the removal of the jury's prerogative, formal and informal, to make a recommendation regarding clemency or severity of sentence, the Commission believes it prudent to require the trial judge to instruct the jury regarding its lack of capacity in matters of sentencing. Because this

recommendation departs from the present law and practice, it should be brought to the jury's attention as part of the judge's instructions on the law, lest there be any misapprehension as to the jury's prerogatives and responsibilities.

Jury is
exclusive judge
of the facts

(2) Either during or after summarizing the evidence, the judge may comment upon the weight of the evidence and the credibility of the witnesses. However, if he does so, he shall unequivocally instruct the jury that the jury is the exclusive judge of the facts and that it is not bound by any comments of the judge. In commenting on the evidence, the judge shall not directly express an opinion on the guilt or innocence of the accused or that certain testimony is worthy or unworthy of belief, but may draw to the jury's attention any discrepancies in the evidence which the jury ought to consider in finding its verdict.

COMMENT

Under the present law it is well established that the trial judge has the right to comment upon the credibility of witnesses and the strength of the evidence. In this way he is able to give the jury the benefit of his experience and expertise in evaluating evidence. The recommendation thus preserves this right.

The recommendation imposes two limitations upon the judge's right to comment on the evidence. The first is supported by present case authority; the second is supported at least by dicta in some cases. The first limitation on the judge's right to comment on the evidence is that he must make it unequivocally clear to the jury that fact-finding is their function and that they are free to accept or reject his opinion on the

evaluation of the evidence. This limitation is well recognized in the jurisprudence.

The second limitation imposed by the recommendation is that the judge may not directly express an opinion on the guilt or innocence of the accused or that certain testimony is worthy or unworthy of belief. There is a danger that a strong statement by the judge on the accused's guilt or innocence or a direct statement on the credibility of a witness might lead the jury to accept this position uncritically. Furthermore, it places the judge in the role of an advocate, a role inappropriate to the position, and is of little assistance to jurors in making their own independent assessment of the evidence.

Objection
to instructions

(3) Immediately following the judge's instructions, the judge shall give the parties the opportunity to object, in the absence of the jury, to aspects of his instructions. If the instructions were ambiguous, erroneous, or incomplete and any such misdirection might affect the jury's verdict, the judge shall recall the jury and give them additional instructions. Failure by any party to object to the judge's instructions to the jury in any particular aspect, shall not constitute a bar to appeal in that regard, where the taking of such an appeal is otherwise permissible.

COMMENT

This proposed subsection simply restates the present law. Its inclusion in the *Criminal Code* is recommended in the interests of completeness.

JURY DELIBERATIONS

- | | |
|---------------|---|
| Deliberations | 27. (1) The jury shall retire to deliberate after the judge has completed all instructions. |
| No separation | (2) The jury shall not separate during the course of its deliberations. |

COMMENT

This proposed section simply restates the present law and is included for completeness. During its deliberations the jury is prohibited from separating, in order to prevent jurors from discussing the case with others.

Material
the jury is
entitled to

28. The judge shall allow the jury to take with it into the deliberation room any exhibit entered in evidence in the trial which would not put at risk the safety of the jurors or the integrity of the exhibit; the jury may also take any other material placed on the record in the trial that the judge considers may assist the jury in reaching a verdict.

COMMENT

In our Working Paper we enumerated in detail the common kinds of materials the jury might take with them into the deliberation room and about which there has been litigation: annotated criminal codes, notes of the testimony, a copy of the judge's instructions, a copy of the charges against the accused, exhibits, written statements, and transcript portions of the testimony. For each of these matters, and others, we attempted to provide general rules of thumb as to when they should be allowed in the deliberation room. Many commentators on the Working Paper felt that these rules were inappropriate in a statute and were needlessly complex. Therefore, we are

proposing here that only the general practices relating to what material the jury is entitled to take with them in the deliberation room be codified.

Under the proposed section, the jury is entitled as of right to take into the deliberation room any exhibit entered in evidence in the trial, provided that no risk is posed thereby to the safety of the jurors or the integrity of the exhibit. With respect to all other matters placed on the record, the judge has a discretion as to whether or not they should be taken into the deliberation room. In exercising this discretion, the judge should weigh the probability that the material will assist the jury in reaching a proper verdict against the danger that the jury will be confused or misled by it. Reference might be made to the more detailed proposals in our Working Paper to guide the judge in the exercise of his discretion.

Additional
instructions

29. (1) The judge shall recall the jury and give it additional instructions

(a) if the original instructions were ambiguous, erroneous, or incomplete, or

(b) if the jury requests in writing additional instructions, unless the request concerns matters not in evidence, matters irrelevant to the issues, or matters which by law the jury is not entitled to consider in reaching its verdict.

No undue
prominence

(2) If the judge gives additional instructions to the jury he shall ensure that undue prominence is not given to the requested instruction and that related instructions are repeated.

Further
instruction
in presence
of prosecutor
and accused

(3) If the jury requests in writing further instruction it shall be conducted back into the courtroom where its request shall be given on the record, in the presence of the prosecutor and the

accused. Before the judge instructs the jury further he shall, in the absence of the jury, advise the parties of what additional instructions he intends to give and afford the parties an opportunity to object.

COMMENT

After the jury retires to deliberate, the judge may discover, or counsel may indicate, that some error was made in the instructions to the jury. Not infrequently, the jury, during the course of their deliberations, may ask the judge for an explanation of some aspect of the instructions on the law. On these occasions, the judge might have to recall the jury from their deliberations and re-instruct them.

Instructions given after the jury has retired are often critical because they will be on important aspects of the law which the jury might have misunderstood or upon which they are focusing. Therefore, the practice governing additional instructions should be clearly settled.

In this proposed section we codify the best aspects of the present law and practice. The section ensures that the additional instructions will be given fairly to the jury and that counsel will have an opportunity to object to any additional instructions before they are given. This will permit the judge to correct his instructions in the light of counsel's comments, and will preserve a record for appeal. An extended discussion of the present practice is contained in our Working Paper.

Review
of evidence

30. (1) The jury, during the course of its deliberations, may request in writing a review of certain testimony or other evidence about which it is in doubt or disagreement. The judge shall grant such a request unless it relates to a matter not in evidence or the answer is prohibited by law.

In presence
of accused

(2) Upon receiving a written request to review the evidence, the judge shall, subject to subsection (1), direct that the jury be returned to the courtroom, and, after notice to the prosecutor and the accused and in their presence, he shall give such requested information.

Decision
of judge

(3) The judge may permit the jury to hear the requested parts of the testimony and to examine the requested materials admitted into evidence, or if, in the opinion of the judge, it is reasonable to summarize the requested testimony, the judge may after hearing submissions from the parties, present a summary of the requested parts of the testimony.

Review
of other
related
evidence

(4) As well as submitting to the jury for review the evidence specifically requested by the jury, the judge shall also review other evidence relating to the same factual issue and the credibility of the relevant witnesses if he thinks it is necessary to do so in order to avoid giving undue prominence to, or a misleading impression of, the evidence requested.

COMMENT

This proposed section deals with the procedure for reviewing the evidence at the jury's request. Although by and large, it codifies present practice, the proposed section will ensure that this important aspect of the jury trial is conducted fairly and expeditiously and that the procedure is uniform across the country.

If the jury does not understand or cannot recall all of the evidence in the course of its deliberations, it will be unable to discharge its responsibility. Therefore, subsection (1) provides

that so long as the jury's request relates to the evidence, and the answer is not expressly prohibited by law, it should always be granted. Given the importance that a review of the evidence for the jury might have on its verdict, subsection (2) provides that counsel should always be given notice of such a review and that it should always take place in the presence of the prosecutor and the accused.

Under the present practice the requested parts of the testimony are usually presented to the jury. However, if it appears that it would consume an inordinate amount of time to find and read the requested part of the testimony to the jury, some judges ask the jury if a summary of the evidence based on the trial judge's notes will suffice. The jury's listening to the relevant testimony verbatim ensures that the review of the evidence is accurate. However, it can be time-consuming. Therefore, provided that it is surrounded by sufficient safeguards, as required by the proposed subsection, we think that the *Criminal Code* should sanction the practice of judges who in appropriate cases present a summary of the requested parts of the testimony.

In some instances, a review of the specific evidence requested by the jury would provide them with only one side of a factual issue, or would give a perhaps insignificant item of evidence undue prominence. In such a case, subsection (4) provides that the judge shall read to the jury, in addition to the requested testimony, unrequested but related testimony.

JURY VERDICTS

Unanimous

31. The verdict of the jury shall be unanimous.

COMMENT

Historically, one of the most characteristic features of the criminal jury in Canada is the requirement that all jurors must be unanimous before a verdict can be returned. This principle

should be explicitly included in legislation. The reasons supporting the unanimity requirement were extensively reviewed in our Working Paper. There we presented evidence which suggested that unanimity leads to increased accuracy of fact-finding and more acceptable verdicts. We also reviewed evidence which suggested that the problems some people associate with the unanimity requirement, hung juries and corrupt jurors, were not nearly so serious as is sometimes argued. Most groups and individuals responding to this recommendation in our Working Paper agreed that unanimity should continue to be an essential attribute of the criminal jury.

If jury
is unable
to agree

32. (1) Where the jury returns and informs the court that it is unable to agree, the judge may repeat his instructions on unanimity and require the jury to continue its deliberations if there is a reasonable prospect of agreement.

Further
instruction
on unanimity

(2) If, after the jury has deliberated for a reasonable period of time, the judge thinks that it may be assisted by further instruction on unanimity, he may recall it and repeat his instructions in that respect.

COMMENT

One of the most difficult questions facing a judge in instructing the jury is the extent to which he should encourage them to agree on a verdict. On the one hand, because of the costs of a deadlocked jury, jurors should be encouraged to reach a verdict. On the other hand, the unanimity requirement demands that the verdict of the jury reflect the opinion of each individual juror. There is a danger that the judge may use his authority to coerce individual jurors to agree with the majority for the sake of reaching a verdict, even if the verdict is against their conscientious beliefs.

In our Working Paper, we proposed extensive guidelines to be followed by the judge when instructing the jury on

unanimity. It would be inappropriate to include these guidelines in legislation, but later in this Report we recommend that they be adopted as a matter of administrative practice. However, the question of how the judge should deal with a jury which apparently cannot agree should be dealt with in legislation.

In subsection (1), we recommend that if the jury returns and informs the judge that they cannot agree, he should be able to require the jurors to continue deliberating if he believes that there is a possibility of agreement. However, he should not be allowed at this stage to give them new instructions on the need for reaching agreement. He should repeat to them only his original instructions on unanimity.

Subsection (2) recognizes the judge's right to recall the jury if they have been deliberating for some length of time and reinstruct them on unanimity. This is not intended to coerce the jury to reach agreement, but is designed to encourage them to engage in fruitful dialogue.

Discharging a
deadlocked
jury

33. (1) Where the judge is satisfied that the jury is unable to agree upon a verdict and that further detention of the jury would be useless, he shall discharge the jury and direct that a new jury be empanelled.

No review

(2) A discretion that is exercised under subsection (1) by a judge is not reviewable.

COMMENT

This proposed section simply restates the present section 580 of the *Criminal Code*. Obviously, a judge must be able at some point to dismiss a jury which cannot reach agreement.

Enquiry
from president
if verdict
unanimous

34. (1) When the jury, after completion of its deliberations, returns to the courtroom, the judge shall enquire of the president if a unanimous verdict has been reached by the jury.

If affirmative,
verdict
is announced

(2) If the president advises that a unanimous verdict has been reached, the judge shall request the president to announce the verdict and the president shall do so.

Polling
the jury

(3) Where a verdict has been returned and before the jury has been discharged, the jury shall be polled if so requested by the prosecutor or the accused or upon the court's own motion. The poll shall be conducted by the judge or clerk of the court asking each juror individually whether the verdict announced is his verdict.

If negative,
mistrial

(4) Where a juror answers the question mentioned in subsection (3) in the negative, the judge shall declare a mistrial and discharge the jury.

COMMENT

The proposed section outlines the procedure to be followed when the jury returns with its verdict. It also provides for the jurors to be individually polled as to the unanimity of their verdict at the request of any party or upon the court's own motion. While there was no requirement at common law that the jury be polled upon the timely request of any party, such a requirement seems a sensible way of resolving any doubt as to whether the verdict reflects the unanimous view of the jurors. Polling the jurors individually provides a procedure

which is quick, convenient and accurate, and there would appear to be no reason for denying a poll if it is requested by a party.

Proceedings
on Sunday, etc.
not invalid

35. The taking of the verdict of a jury and any proceedings incidental thereto are not invalid by reason only of their occurrence on a Sunday or holiday.

COMMENT

The jury must deliberate continuously until a verdict is reached. This section, which simply restates section 581 of the *Criminal Code*, recognizes the fact that in some cases the jury may have to deliberate or deliver its verdict on a Sunday or on a holiday.

Comments
by judge
limited to
thanks

36. At the conclusion of the trial, the judge may thank the jury for its public service but he shall not address such thanks to any individual juror nor praise or criticize the verdict.

COMMENT

Jurors perform a valuable public service and undoubtedly appreciate having it acknowledged by the judge. However, judges should not praise or criticize the jury's verdict. The jury should not reach its verdict to please or displease the judge and no pressure should be placed upon them to do so. Some jurors might be sitting on subsequent cases and they should not have to do so fearing the wrath or seeking the praise of the judge.

A judge who breaches this rule should be referred to the Canadian Judicial Council for disciplinary action.

Disclosure
of information
by a juror
is an offence

37. Every juror who discloses any information relating to the proceedings of the jury when it was absent from the courtroom, which was not subsequently disclosed in open court, is guilty of an offence punishable on summary conviction, unless the information was disclosed for the purpose of:

(a) an investigation of an alleged offence under this Act in relation to a juror acting in his capacity as juror, or giving evidence in criminal proceedings in relation to such an offence, or

(b) assisting the furtherance of scientific research about juries which is approved by the Chief Justice of the Province.

COMMENT

This proposed section restates section 576.2 of the *Criminal Code*, with two changes. First, the disclosure of information relating to the proceedings of the jury is restricted under section 576.2 to the situation where a juror is charged with obstructing justice. Under the proposed section, this is broadened to include the situation where a juror is charged with any offence under the *Criminal Code* if it is in relation to the juror acting in his capacity as juror.

Second, under the proposed section, jurors could disclose information relating to their deliberations if it is in furtherance of scientific research about juries which has been approved by the Chief Justice of the Province. There is a dearth of scientific information about jury decision-making. If we are to continue to learn about the jury, and how it reaches its verdict, such information might be important. The exception will be used only to assist valid, scientific research and only with the permission of the Chief Justice of the relevant province.

3. Recommendations for Administrative Action

There are four areas, discussed in our Working Paper on the jury, which we think require reform, but not in the form of legislative enactment. The Canadian Judicial Council is invited to review these areas and initiate some administrative action. These recommendations are designed to assist the jury in understanding and discharging its functions.

1. *Jury Orientation*

Thoroughly acquainting prospective jurors with the nature of their responsibilities, the conduct of a judicial trial and the common concepts that will be used throughout it are of the utmost importance if the jury is to fulfil its functions.

At present, in most provinces, judges and sometimes sheriffs orally instruct the jury, prior to the trial, about court procedures in general and jurors' responsibilities in particular. In some provinces, sheriffs deliver preliminary oral instructions to the whole jury panel, while judges give more specific instructions to the jurors selected before the trial of a particular case. In a few provinces, juror information books are also supplied to jurors.

However, we think that even more should be done to improve the quality of jury orientation materials and to ensure their use in every jurisdiction across Canada. Such measures cannot help but assist the jury in appreciating the concepts, procedures and traditions which attach to its role in criminal trials.

We recommend that orientation materials be prepared by the Canadian Judicial Council and that they be adapted by the appropriate provincial authorities for use in the provinces.

2. Jury Note-taking

In our Working Paper we reviewed the arguments advanced for and against jury note-taking. Despite the fears which some have expressed about note-taking distracting jurors and giving undue influence to good note-takers, we think that on balance jurors should be allowed to take notes. Permitting jurors to take notes should lessen jury confusion, diminish the strangeness of the courtroom, and assist jurors in understanding and recalling the evidence. That the advantages of jury note-taking outweigh the disadvantages has been confirmed in a number of jurisdictions in Canada where jurors are routinely given a clip board and pad and invited to take notes.

We recommend that administrative action be taken to ensure that jurors are provided with facilities to take notes during the trial.

3. Jury Instruction Guidelines

The judge's instructions to the jury on the law must be both accurate and yet understandable to the jury. Because of the complexity of many legal concepts this is obviously a difficult ideal to reach. At present, many judges exchange among themselves the various instructions which they use on different points of law. However, many juries still have difficulty understanding instructions on the law and many appeals are still based on jury instructions alleged to be erroneous. We think that instructions in law to the jury could be improved if a systematic effort were made to prepare and publish jury instruction guidelines.

Again in our Working Paper we reviewed at length the arguments for and against the preparation of jury instruction guidelines. In that paper we suggested that the use of the guidelines not be mandatory, but rather that they be used as guides, to be modified or supplemented in particular cases where necessary to fit the facts or particular circumstances of the case. A number of advantages could thereby be obtained by the use of jury instruction guidelines: time-saving, accuracy, uniform treatment, impartiality and intelligibility. Following our consultations with the legal profession, we remain convinced that jury instruction guidelines would improve the administration of justice.

We recommend that the Canadian Judicial Council prepare a collection of accurate and understandable jury instruction guidelines to be made available to all judges for use in criminal cases.

4. Instructing the Jury about Unanimity

One of the most difficult questions facing a judge in instructing the jury is the extent to which he should encourage them to agree on a verdict. On the one hand, a deadlocked jury imposes costs and delays on the judicial process and therefore jurors should be encouraged to reach a verdict. On the other hand, the unanimity requirement demands that the verdict of the jury reflect the opinion of each individual juror, and the judge's instruction on unanimity must not, in effect, lead some jurors to vote against their conscience for the sake of reaching a verdict. Thus, although the judge should encourage the jurors to reach agreement, he must not give an instruction that could be interpreted as placing unfair pressure upon them to reach agreement.

Under the present law, courts of appeal review each charge in which it is alleged that the trial judge's instructions to the jury were coercive, and determine whether it was coercive on the basis of the facts of each case. For reasons set out in our Working Paper, we concluded that this case-by-case

analysis of the language used in each instruction to encourage the jury to reach agreement was unsatisfactory. We therefore suggested that a standard instruction be given to every jury on the question of unanimity, or at least that every instruction on unanimity should fall within a number of guidelines.

We recommend that the Canadian Judicial Council prepare a standard instruction informing jurors of their responsibility to deliberate with a view to reaching agreement while exercising their individual judgment. The instruction should be consistent with the following guidelines:

- (a) that in order to return a verdict the jury must be unanimous; each juror must agree with it;*
- (b) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to their individual judgment;*
- (c) that in the course of deliberations, jurors should not hesitate to re-examine their own views and change their opinion if they become convinced that it is erroneous;*
- (d) that if a juror, after full and impartial consideration of the evidence with the other jurors, in light of the directions received on the law, is unable conscientiously to accept the view of the other jurors, he has the right and indeed the obligation to disagree with the other jurors, whether he is a member of the majority or minority; he should not surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of putting an end to the deliberations;*
- (e) that no instruction should be given which is directed solely at the minority;*
- (f) that no instruction should be given which implies the jury is not discharging its function if it does not reach a verdict.*