The Canadian Criminal Jury

Regina Schuller

Neil Vidmar

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INTRODUCTION

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

I. A BRIEF HISTORY OF THE CANADIAN JURY SYSTEM

English common law, including the right to trial by jury, was followed almost from the beginning of the development of the separate English colonies that eventually became the nation of Canada. For example, Nova Scotia recognized the right to jury trial in the 1750’s, after the English population began to exceed the original Acadian (French speaking) population. Jury trials were used in the inferior Courts of Common Pleas as well as in the Supreme Courts (superior courts) for civil as well as criminal matters. A General Sessions Court also used juries, and additionally there were coroner’s juries and grand juries, the latter working with magistrates.
to help administer local government. However, jury duties were reserved only for propertied men, and considered onerous—in some instances, jury duty required travel from distant areas, lodging at the juror’s expense and trial duties that might last many weeks. By about 1880, the original jury systems were in sharp decline and primarily reserved for serious criminal offenses. Similar use and gradual decline of the jury occurred in Upper Canada (most of which became the Province of Ontario). Following the defeat of the French army outside Quebec City, the law of England was established in the colony of Quebec in 1763. Although French civil law was restored in Quebec in 1774, English criminal law remained in force.

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

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

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

3. Id
4. Id. at 20–31.
5. Id. at 14.
6. Id. at 214.
8. Id.
11. Id. at 407–09. The Federal Court of Canada also does not provide for jury trial.
12. Id. at 407.
do occur, including trials for medical malpractice, but not at nearly the rates that they occur in the United States.13

II. LIMITATIONS ON THE RIGHT TO JURY TRIAL

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

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

13. Id. at 405, 409; ONTARIO LAW REFORM COMMISSION, CONSULTATION PAPER ON THE USE OF JURY TRIALS IN CIVIL CASES 14 (1994) (British Columbia).
17. See id. at 37–54.
18. Id. at 37, 39–40.
19. Id. at 42.
20. Id. at 37.
21. Id. at 38.
22. See id at 39–42.
23. Id. at 38.
24. Id. at 42. However, a few offenses are not eligible for jury trial. See Canada Criminal Code, R.S.C. 1985, c. C-46 § 553.
jury who speak the language of the accused, or, if special circumstances warrant it, a judge and jury composed of persons who speak both languages. Section 531 provides that a change of venue to a different territory within a province may be made in order to obtain a jury with the required language skills. Additionally, as will be discussed in more detail below, exceptions are made for aboriginal peoples in Canada’s arctic regions.

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

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

The composition of the jury list is controlled by provincial and territorial statute, and the general rule in the provinces is that the list is compiled by random selection from the electoral rolls in the province or local community. That means being a Canadian citizen, 18 years of age or older, and a resident of the jurisdiction in which the trial will be held.
Although not too many years ago the typical Canadian jury consisted primarily of white males selected by the local sheriff, the jury has become much more representative of the population; however, certain classes of persons will be excluded from jury service. In Ontario, for example, excluded persons include police officers, lawyers, trustees in bankruptcy, and employees of the Ministry of the Attorney General. Some provinces also exempt doctors, veterinarians, firefighters, ministers, and law students. Additionally, "person[s] who [have] been convicted of certain criminal offences within the last five years" are excluded.

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

36. Id. at 113.
37. See id. at 85 (law students), 100 (doctors, veterinarians, ministers, firefighters).
44. GRANGER, supra note 16, at 152–54.
The criminal jury is always composed of twelve persons. Generally no provision is made for alternate jurors, and removal of a juror is considered to be a very serious matter. A juror can be discharged, however, if he or she becomes ill at any time during the course of the trial or there is some other "reasonable cause" to discharge a juror. The judge is also vested with the power to declare a mistrial. The judge may continue the trial as long as ten jurors remain. Conviction of an accused by a jury of ten or eleven members has been held to be constitutional under the Charter.

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

48. GRANGER, supra note 16, at 143–44.
50. Id. at § 644(2).
51. See id. at § 644(2); see also GRANGER, supra note 16, at 190–98 (discussing the discharge of jurors).
52. See GRANGER, supra note 16, at 197–98.
53. See infra at pp. 18–28.
57. Id. at para. 28.
58. See id. at para. 56–57.
serted confidence in the experience of trial judges that firm instructions
from the judge caused juries to perform their duties according to the law.60
The trial judge may ask the assembled panel of prospective jurors if
any of them has health or other problems that would pose a hardship and if
anyone has a relationship with the parties or witnesses in the case, and
those persons may be excused.61 The remaining jurors are then randomly
selected and called one by one to face the accused.62 Prior to 1992, the
Crown had the right to “stand-aside” (also called “standby”) up to forty-
eight prospective jurors with no reason given.63 The stand-aside procedure
was adopted from English practice in the Criminal Code of 1892, with the
rationale for its use being to allow the Crown to eliminate jurors deemed
unfit or hostile to the Crown.64 In 1992, however, in R. v. Bain, the Cana-
dian Supreme Court ruled that stand-asides violated the Charter because a
reasonable person would conclude that it provided the Crown with an un-
fair advantage over the accused.65 Subsequently, Parliament amended the
Criminal Code and abolished stand-asides, but it simultaneously gave the
Crown an equivalent number of peremptory challenges, which prior to this
time only the accused had a right to exercise.66
In cases involving treason or murder, both the prosecutor and the ac-
cused are entitled to twenty peremptory challenges.67 For offenses in which
the accused may be sentenced to more than five years in prison, both sides
have twelve peremptory challenges, and for other offenses each side has
four.68 The purposes of the peremptory challenge are recognized as the
same as those originally articulated by Blackstone, who is oft and favorably
quoted on the issue.69 The ability to eliminate persons with whom the ac-
cused has an uncomfortable feeling, no matter what the basis behind the
impression of the prospective juror, provides a perception of trial fairness
to the accused. The jury list is provided to both sides shortly before trial,

60. See id. at para 42-43.
62. Id. at § 631(3).
63. GRANGER, supra note 16, at 144-45.
ries *353). Originally the number of stand-asides was unlimited, but in 1917 the number was reduced to
forty-eight. Id. at para. 52.
65. See id. at para. 1, 12.
66. See GRANGER, supra note 16, at 144-45.
68. Canada Criminal Code, R.S.C. 1985, c. C-46 § 634(2)(a-c). When multiple defendants are
involved in a trial, each co-accused has the same number of allotted peremptory challenges, but the
Crown’s number is not increased. See id. at §§ 634(2)(b-c), 634(4).
69. See Bain, 1 S.C.R. 91, para. 54 (Can.) (quoting 4 William Blackstone: Commentaries *353).
and the Crown is permitted to examine the list to determine if any of the jurors have a criminal record. Recently, in Ontario, a scandal erupted when it was discovered that in some instances Crown attorneys had gone beyond searching for criminal records and conducted background checks of persons on the jury list. That practice has been stopped. As we will discuss below in a separate section, there are important exceptions to the rule that the jurors are chosen without any questions about their impartiality.

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

73. See infra at pp. 18–28.
75. [1995] 1 S.C.R. 761 (Can.).
78. Id. at para. 6.
79. Id. at para. 6, 9–10.
In a concurring opinion, however, one justice commented that "[w]hile representativeness is not an essential quality of a jury," it is a "characteristic which furthers the perception of impartiality." Consequently, the prosecution's "apparent attempt" to modify the jury's composition undermined jury impartiality. In opinions that concurred with overturning the conviction, however, two Justices disagreed with this assessment, with one stating:

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

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

IV. THE ORGANIZATION AND STRUCTURE OF TRIAL

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

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

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

87. Id.
88. Id. at 319.
89. Id. at 319–20.
90. Id. at 317.
91. Id. at 316.
92. Id. at 327.
93. Id. at 330.
94. See Canada Criminal Code, R.S.C. 1985, c. C-46 §§ 16, 317. There appears to be no rule against special verdicts, but they are only used in cases that fall within these two exceptions.
95. Id. at § 16.
96. Id. at § 16. In 1991, in the case of R. v. Swain, [1991] 1 S.C.R. 933 (Can.), the insanity defense was successfully challenged; and in 1992, Bill c-30 was enacted, altering the name of the defense and the wording of the standard revised, Marilyn Pilon, Mental Disorder and Canadian Criminal Law, GOVERNMENT OF CANADA DEPOSITORY SERVICES PROGRAM, available at http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBedP/BP/prb9922-e.htm.
98. See GRANGER, supra note 16, at 322.
Sentencing the accused is the responsibility of the judge. In 1976 Canada abolished the death penalty and substituted a mandatory life sentence with no eligibility for parole for twenty-five years upon conviction of first-degree murder, so jury recommendations are moot on this matter. However, in instances where an accused who is under the age of eighteen has been found guilty of first- or second-degree murder, or an accused who is over the age of eighteen at the time of the offense is found guilty of second-degree murder, the judge must then tell the jury about the possible statutory range of the sentence and ask if it wishes to make a recommendation. In the instance of an adult found guilty of second-degree murder, for example, the judge must then tell the jury that the accused would ordinarily be eligible for parole after a mandatory ten-year imprisonment and ask the jury if it wants to offer a recommendation, although the recommendation is not binding. Case law has established that it is legal error to inform the jury about possible punishment prior to its verdict on guilty for any charge, including second-degree murder. "Several provincial courts have [ruled] that the . . . recommendation does not have to be unanimous." Finally, the jury's power to decide guilt can be removed if, at the end of the prosecution’s case, the judge decides that the Crown has not produced a prima facie case for guilt. In such an instance, the judge will enter a directed verdict of not guilty.

V. BALANCING OF FREE PRESS AND FAIR TRIAL

In February 2002 a joint task force of the Royal Canadian Mounted Police and the Vancouver police executed a search warrant on the farm of Robert Pickton and his siblings outside of Vancouver as part of a British
Columbia task force on missing women. Shortly after, the farm was sealed off. Mass media, from a distance, showed scenes of backhoes on the property. Eventually, Pickton was charged with twenty-seven counts of first degree murder, most of which involved female sex workers and drug addicts that he had invited to his farm, killed, and dismembered. Some of the remains were allegedly fed to his pigs, while other remains were shipped to a waste processing plant, and still other parts buried on the farm. In jail, Pickton confessed to killing a total of forty-nine women, making him one of the most notorious mass murderers in modern North American history. A preliminary inquiry was held in 2003, but there was a court-ordered ban on publication of the testimony that was not lifted until August 2010.

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

111. Bodies of Prostitutes Fed to Pigs, supra note 110.
114. Joyce, supra note 110.
116. Id.
117. Alternates can replace vacancies in the jury that occur between the selection phase and the commencement of the trial but are dismissed once the trial begins. Canada Criminal Code, R.S.C. 1985, c. C-46 § 644; See Neal Hall, Pickton Jury Candidates to Face Scrutiny, VANCOUVER SUN, Dec. 5, 2006, available at http://www.missingpeople.net/pickton_jury_candidates.htm. As the judge noted, the
It lasted two days. The jury began hearing evidence in January 2007. During the trial, a number of charges were dropped for lack of sufficient evidence. In December 2007, Pickton was found guilty of six counts of second degree murder that carried a "life sentence" of twenty-five years, the maximum sentence that he would have received if he had been found guilty of first degree murder. The guilty verdict resulted in appellate litigation, and not until a Canadian Supreme Court decision validated the jury verdict and judge's sentence was the mass media able to publish materials about the trial evidence. Much of the evidence is now accessible on the internet.

The Pickton case helps to illustrate how the Canadian legal system attempts to maintain a balance between the values of a free press and a fair trial by controls that the judiciary may place on the mass media to prevent pretrial publicity. England, with its severe contempt of court laws for those reporting court proceedings, emphasizes the value of fair trial over free press. The United States, with Nebraska Press Association v. Stuart and related cases, emphasizes the value of free press over fair trial. In contrast, Canada attempts to balance the two competing values. Section 11(d)
of the Charter guarantees an accused the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal," and section 2(b) provides for "freedom of the press and other media of communication." The Criminal Code also declares the right to a proceeding in open court. Two sections of the Code, however, place limits on these rights. Section 537 provides the judge with the power to exclude everyone but the prosecutor, the accused, and his counsel from the preliminary inquiry that is ordinarily held for indictable offenses. Section 486 of the Code confers the judge with authority to ban the public and press from all or part of criminal trial proceedings if it "is in the interest of public morals, the maintenance of order or the proper administration of justice." The apparent contradiction between these sections of the Code and the Charter guarantees are reconciled by section 1 of the Charter, which declares that the rights and freedoms are not absolute: "reasonable limits" may be "prescribed by law as can be demonstrably justified in a free and democratic society." In addition, section 539(1) of the Criminal Code provides that the accused person has the right to ask for an order banning publication of the content of the proceedings until the charges are dropped or the trial is ended. The motion must be granted; the judge has no discretion. The fact that the preliminary inquiry has been held may be reported, but information disclosed at the hearing cannot be reported. Defendants frequently invoke this right, particularly in cases that are likely to draw public interest. Consequently, the preliminary inquiry is seldom a source of prejudicial pretrial publicity.

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

126. Charter, supra note 9, at 2(b), 11(d).
128. See id. at 537.
129. See id. at 486.
130. Charter, supra note 9, at 1.
132. Id.
133. See GRANGER, supra note 16, at 213.
134. Id.
The ban does not apply if the jury is sequestered during the whole trial, but total sequestration is extremely rare.136

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

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

135. See Canada Criminal Code, R.S.C. 1985, c. C-46 645; see also WATT & FUERST, supra note 100, at 854–55 (commenting on this section).
136. See GRANGER, supra note 16, at 305–06.
139. See e.g.,W.R. Derrick Sewell & Timothy Oriordan, The Culture of Participation in Envtl. Decision Making, 16 NATURAL RESOURCES J. 1, 8 (1976).
141. Id. at para. 173.
142. Id.
v. Nova Scotia, the Supreme Court addressed the problem of pretrial publicity generated by public inquiries. The court conceded that publicizing evidence might "irreparably" prejudice jurors, but it emphasized the importance of public interest in the inquiry and placed the burden of proof on the accused to demonstrate the link between publicity and harm. In the decision, the Court stated:

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

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

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

143. Id. at para. 20.
144. Id. at para. 108, 158.
145. Id. at 143.
146. See id. at 145.
147. See id.
150. Kenny, 445 A.P.R. at para. 3.
foundland and across Canada. Kenny, one of the accused, moved for a permanent stay of proceedings on the ground of prejudicial pretrial publicity.\textsuperscript{152} The trial judge, while conceding that the publicity had prejudiced the community, nevertheless concluded that the risk of bias could be neutralized by jury selection procedures and judicial instructions, and denied the motion.\textsuperscript{153} Kenny then elected trial by judge alone and was convicted.\textsuperscript{154} His appeal of the denial of the motion to stay was affirmed by the Canadian Supreme Court.\textsuperscript{155}

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

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

\begin{thebibliography}{99}
\bibitem{} Id. at para. 9.
\bibitem{} Id. at para. 14.
\bibitem{} Id.
\bibitem{} Id. at para. 6.
\bibitem{} Id.
\bibitem{} Id. at para. 1.
\bibitem{} Id. at paras. 77, 83.
\end{thebibliography}
expression guaranteed by section 2 of the Charter. In fact, Dagenais asserted that, unlike the American model of a clash between free press and fair trial, section 1 of the Charter requires a balancing of values. It also noted that freedom of expression and the accused’s right to a fair trial is not always in conflict, such as when public scrutiny of the court process may protect the fairness of trials. Finally, Dagenais noted that publication bans can also protect the privacy of members affected by trial and other interests. It is important to make clear that even in cases similar to the Mt. Cashel and Pickton cases, publication injunctions involve delay, not permanent bans, on the reporting of relevant court proceedings.

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

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

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

163. Id. at para. 12.
164. Id. at para 12, 85.
165. Id. at para. 86.
166. Id. at para. 87.
169. See TANOVICE ET AL., supra note 34, at 77–83.
[Canada's] criminal law is premised on the ability of 12 jurors to do their job with "indifference" as between the Crown and the accused. . . . Our procedures in this respect differ from the American approach. In this country, people called for jury duty benefit from a presumption that they will do their duty without bias and prejudice.171

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

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

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

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

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


175. When the race of the parties might be an issue, recent case law has asserted that the accused need only present a prima facie case to challenge on grounds of potential racial bias, R. v. Wilson, [1996] 107 C.C.C. 3d 86, para. 21 (Can. Ont. C.A.); see also TANOVIČ ET AL., supra note 34, at 110–113 (discussing jury selection in Ontario when the accused is Black).
likely to be—his personality, beliefs, prejudices, likes or dislikes.”176 As a result, the challenge procedure involves a brief, structured questioning of the prospective juror by the lawyer invoking the challenge,177 typically the defense lawyer, with the potential jury panel usually removed from the courtroom while prospective jurors are called in individually and questioned.178 Ordinarily, the questions put to jurors are limited in number, frequently only one or two in number, and take a forced choice response format, requiring only yes or no answers.179 Usually the questions are written out in advance and approved by the judge. Foremost, the questions must directly address the juror’s state of mind.180

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

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

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


179. Id.

180. See id.


182. Vidmar, supra note 188, at 9.

183. Vidmar, supra note 188, at 9.
excused. This process then continues with Jurors 1 and 2 assessing impartiality for the selection of Juror No. 3.\textsuperscript{184} Then, Jurors 2 and 3 assess impartiality to select Juror No. 4, and so on until 12 jurors are impaneled.\textsuperscript{185} Thus through this rotating process the final jury is a jury composed of persons who have been deemed impartial by two of their fellow jurors. Ordinarily, as noted earlier, the jury panel is removed from the courtroom for the process on the theory that observing the questioning may affect how prospective jurors respond, but this decision is left to the judge and, on the grounds of efficiency, in some cases the panel remains in the courtroom for the selection procedure.\textsuperscript{186}

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

In \textit{R. v. Parks}, the leading authority on the issue, the jurors were asked:

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

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

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

\textsuperscript{184} Tanovich \textit{et al.}, supra note 35, at 164.

\textsuperscript{185} See Tanovich \textit{et al.}, supra, note 34. The history of this procedure in Canada has not been explored, but it undoubtedly comes directly from English law. See James Kennedy, \textit{A Treatise on the Law and Practice of Juries} 90 (1826); Nancy King, \textit{Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom}, 65 U. CH. I. REV. 433, 467–73 (1998) (documenting the existence of triers in colonial and post-colonial America).

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


\textsuperscript{188} \textit{R. v. Williams}, [1998] 1 S.C.R. 1128 at para. 1–2 (Can.).

\textsuperscript{189} \textit{Parks}, 84 C.C.C. 3d 353 at para. 16.

\textsuperscript{190} \textit{Id.} at para. 16. The judge was ruled in error for having refused this question. \textit{Id.} at 16–18, 92–93.
In what has been referred to as an “Ontario Court of Appeal quartet” by the Supreme Court of Canada in *R. v. Spence*,191 Ontario courts have ruled that the *Parks* question should be permitted in any trial in Ontario where the accused is black (*R. v. Wilson*)192 or where the accused is a member of any visible non-Caucasian minority, without the formal proof of community prejudice required to do so (*R. v. Koh*).193 In *R. v. Campbell*,194 the fourth in the quartet, the accused, a black man, was charged with sexually assaulting a sixteen-year-old white woman. Although the trial court judge permitted the defense to ask the *Parks* question, he refused to include any reference in the question to the fact that the complainant was white.195 On appeal, the Ontario Court of Appeal held that the trial judge had erred by failing to permit the defense “to inquire into the critical concern of partiality that may flow solely from the interracial nature of the offence.”196

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

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193. *R. v. Koh*, 1998 131 C.C.C. 3d 257, para. 30 (Can. Ont. C.A.). The court, in *R. v. Koh*, a case involving charges of narcotics trafficking, the Ontario Court of Appeal stated that racism was not unique or indigenous against blacks and extended the challenge to a person of Asian/Chinese origin. In its ruling it stated that “in spite of the absence of compelling evidence in support of *Sherrett* threshold test, it is not to be doubted that racist sentiment against persons of Chinese origin is present . . . and in sufficient numbers to raise serious concerns.” *Id.* at para. 25. The court went further ruling that “the same would apply to all visible non-Caucasian minorities.” *Id.* at para. 30.
195. *Id.* at para. 3.
196. *Id.* at para. 7.
198. *Id.*
199. *Id.* at para. 17.
200. *Id.* at para. 72. In *R. v Spence*, the accused, complainant, principal witnesses and jurors were not all of the same race. *Id.* at para. 1. The Supreme Court held that “it was within the discretion of the
The reasoning of the Parks decision was subsequently extended in British Columbia in the case of an aboriginal man facing charges of robbery of a white employee of a pizza store. In R. v. Williams, both the trial judge and the British Columbia Court of Appeal denied the motion for a challenge for cause.\(^{201}\) While acknowledging that there was widespread prejudice against aboriginal people in the community, the judges asserted that there was no evidence of a nexus between prejudice and the ability of the jurors to decide the case impartially if the jurors were properly instructed by the trial judge.\(^{202}\) The defense appealed, and in R. v. Williams, the Canadian Supreme Court, in a unanimous nine-zero decision, ruled that the challenge should have been allowed and directed a new trial.\(^{203}\) The Court recognized four basic types of potential prejudice, including racial prejudice,\(^{204}\) and their potential influences on jurors. Nevertheless, the decision still asserted the trial judge’s discretion to decide the merits of challenges for cause on a case-by-case basis.\(^{205}\)

Since its introduction to the courts, the challenge for cause procedure and question format has remained virtually unaltered. Most often the judge does not allow further exploration of the juror’s reasoning behind the an-
swer and the triers make their decision based on the prospective juror’s yes or no response as to whether he or she can be fair and impartial. As Tanovich notes, “R. v. Parks stands out as one of the most significant Charter race cases,” and the cases that followed it have clearly established that Aboriginal accused and other accused who may be stigmatized by forms of racial or ethnic prejudice are entitled to challenge prospective jurors for bias, but as the discussion that follows suggests, “the limited questioning allowed in challenge for cause renders it an imperfect device for ferreting out prejudice.”

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

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206. Its utility hampered “by the failure of the courts to permit a more sophisticated manner of questioning. TANOVICH, supra note 34, at 683.
208. Gayle, 54 O.R. 3d 36 at para. 11, 15. In a Quebec case, R. v. Mankwe, similar questions were proposed (e.g., “Do you believe that black persons commit more crimes in Canada than persons of other races? Do you believe that black persons have a greater tendency to lie than persons of other races?”) but not permitted, with this decision upheld by the Quebec Court of Appeal. [1997] 12 C.R. 5th 273. This latter decision was appealed to Supreme Court of Canada, and allowing the appeal, the Court ordered a new trial. R v. Mankwe, [2001] 3 S.C.R. 3, para. 1 (Can.).
209 Gayle, 54 O.R.3d at para 10.
210. Id. at para 18. Two defense expert witnesses argued the utility of the separation in the inquiry, while an opposing expert argued for the rolled up question format. Id. at para.24, 27.
211 Id. at para. 33.
It may well be that with the benefit of experience and the help of expert analysis on how best to uncover and assess racial bias, the challenge for cause process can be improved over time.\textsuperscript{212}

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

Some more limited alterations have now been accepted in Ontario. In \textit{Douse}\textsuperscript{215} and cases that have followed it (\textit{R. v. Joseph & Parris})\textsuperscript{216} prospective jurors, once sworn in, were provided with a written copy of the question\textsuperscript{217} and a response format that utilized a four choice response format:

Which answer most accurately reflects you answer to that question:
(a) I would not be able to judge this case fairly
(b) I might be able to judge this case fairly
(c) I would be able to judge this case fairly
(d) I do not know if I would be able to judge this case fairly.\textsuperscript{218}

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

\textsuperscript{212} \textit{Id.} at para. 34.
\textsuperscript{214} \textit{Id.} at para. 224.
\textsuperscript{215} \textit{Id.} at para. 281.
\textsuperscript{216} \textit{Regina v. Joseph and Parris} [2009], Court file No. CR-08-00002909-0000.
\textsuperscript{217} "As the judge will tell you, in deciding whether or not the prosecution has proven the charge against an accused, a juror must judge the evidence of the witnesses without bias, prejudice, or partiality. Would you ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the people charged are black?" \textit{Regina v. Joseph and Parris}, Court file No. CR-08-00002909-0000, August 21, 2009.
\textsuperscript{218} \textit{Id.}
situations and are often woefully wrong in their beliefs about the impact of various cues and social categories on their emotional and behavioral responses. More specifically, research related to aversive racism suggests that people may be unaware of existing biases and often maintain that they are personally fair and egalitarian, with research demonstrating that, while many people do not believe that they themselves are biased against Blacks, there is strong empirical evidence to suggest otherwise. Furthermore, even if people are able to identify the possibility that they may be biased against Blacks, they may not fully understand how and to what extent biases can affect their decisions or may not correct for their partiality if they lack the motivation or cognitive capacity to counteract these attitudes.

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

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

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

222. Id.


225. Id.

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

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

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

228. Regina A. Schuller, Veronica Kazoleas, & Kerry Kawakami, The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom, 33 LAW & HUM. BEHAV. 320, 324 (2009); Schuller, supra note 224.
231. Schuller, supra note 228.
232. Similar results have been found by Samuel R. Sommers, On Racial Diversity and Group Decision-Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 609–10 (2006). In a juror simulation study conducted by Sommers, mock jurors who participated in a race relevant voir dire designed to induce participants to think about their racial attitudes and how these might affect their overall reactions to the trial, in comparison to participants who received race neutral pre-trial questioning, were less likely to find a Black accused guilty. Id. The court in the Douse decision also noted the potential merits of letting jurors know the question earlier, thus allowing the prospective jurors time to reflect upon how racial attitudes might influence their treatment of the evidence. R. v. Douse, [2009] 246 C.C.C.3d 227, para. 82 (Can. Ont. C.A.).
233. In R. v Find, a case involving charges of sexual offences involving children, the Supreme Court established that demonstrating partiality on the basis of the nature of the crime will be difficult. Although not suggesting that “an accused can never be prejudiced by the mere fact of the nature and circumstances of the charges[,]” the court stated that in the case of offence-based bias, establishing "the
its progeny and the Williams decision are at once recognition of changing social conditions in Canada and an attempt to provide a remedy to foster the legal goal of a fair trial and public perceptions of fairness.

VII. CROWN APPEAL OF AN ACQUITTAL

It would be remiss to fail to mention a striking feature of Canadian law. While the Charter gives great weight to the presumption of innocence, the Crown does have a limited right to appeal a jury acquittal. The Code provides that the Attorney General has the right to appeal a verdict of acquittal or a verdict of not criminally responsible on account of mental disorder. The ground for an appeal must involve an issue of law, such as a claim that the jury was not properly instructed on the law. This limitation on double jeopardy requires a thorough review by appeal courts, but on occasion the Crown has been successful in obtaining a new trial. In 1986, in a highly publicized case, Guy Paul Morin was found not guilty of the murder of nine-year-old Christine Jessup. His primary defense was an alibi defense, but this was complicated by psychiatric testimony that Morin was suffering from severe schizophrenia such that if he did commit the crime, he would not have appreciated the nature and quality of the act. The Ontario Attorney General filed an appeal on the grounds that the judge misdirected the jury on reasonable doubt and that it had been improperly instructed about Morin's psychiatric condition. The Ontario Court of Appeal reversed the verdict and ordered a new trial. The Supreme Court of Canada upheld the reversal with respect to the reasonable doubt instruction. In his second trial, the issue of schizophrenia was abandoned but the alibi defense was expanded. Despite new evidence of serious police misbehavior, unreliable witnesses, and demonstration of unreliable forensic conclusions regarding hair and fiber samples, after nine months of trial testimony, the jury found Morin guilty of first-degree murder following a
week of deliberations. Morin appealed, but while the appeal was pending DNA evidence that had not been available during the first two trials eliminated Morin as the killer and his conviction was set aside. A subsequent public inquiry into justice system failures resulted in the lengthy 1998 Kaufman Report that made many recommendations regarding criminal procedure and the jury system.

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

VIII. RECENT DEVELOPMENTS REGARDING SCIENTIFIC EVIDENCE

As in the United States, the Canadian courts continue to grapple with issues of reliability, utility, and admissibility of expert evidence. The concerns have focused around both forensic evidence from the natural sciences such as DNA tests, fiber samples, and explosive residue, as well as expert evidence that falls more squarely within the domain of the behavioral sciences (e.g., evidence such as Battered Woman Syndrome, Child Sexual Abuse Accommodation Syndrome,” reliability of eyewitness
identification, and other social science evidence). Issues have been raised about the validity and reliability of some of the expert evidence and upon its impact on the jury.

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

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

248. See Paciocco, supra note 167, at 14; GOLD, supra note 247.
249. Id.
253. See GOLD, supra note 247, at 35, 45.
255. Id.
256. Id. at 21.
257. Id.
259. See Gold, supra note 247, at 23 ("[T]he U.S. Supreme Court expressly adopted the scientific method as the standard for all opinion evidence in U.S. federal courts, and this has now essentially been echoed by the Supreme Court of Canada in R. v. J-L.J.").
opinion evidence about Child Sexual Abuse Accommodation Syndrome was inadmissible in *R. v. Olscamp*. In other cases, expert testimony that failed to meet the criterion of necessity has been ruled inadmissible, for instance, in the case of expert evidence bearing on eyewitness reliability, and in a sexual abuse case, on testimony bearing on the delay of a child’s disclosure of the abuse. However, as commentators have pointed out, Canadian courts have been inconsistent in applying the *Mohan* criteria from case to case. Thus, *Mohan* set the stage for a control on what juries see and hear, but systematic application of these controls is still in its developmental stage.

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

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

263. R. v. D.D., [2000] 2 S.C.R. 275, para. 70 (Can.) (A ten-year old complainant delayed two and a half years before disclosing the abuse. The expert witness, a child psychologist was to testify that the delay in disclosure was not indicative of truth. The court ruled that “the content of the expert evidence ... was not unique or scientifically puzzling but was rather the proper subject for a simple jury instruction.”).
266. Id. at para. 29.
267. Id. at para. 55.
268. Id. at para. 1.
through experience and specialized training in the relevant field. To test the reliability of the opinion of these experts... using reliability factors referable to scientific validity is to attempt to place the proverbial square peg into the round hole.269

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

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

269. Id. at para. 109.
271. Id. at 6.
272. Id. at 7.
273. Id.
274. Among these was the case of Williams Mullins-Johnson, an Ontario man who spent twelve years in prison for the rape and murder of his four year old niece, whose death was later attributed to natural causes. Stephen T. Goudge, Inquiry into Pediatric Pathology in Ontario: Report, Vol. 2: Systemic Review 27, 30–32 (Toronto: Ontario Minister of the Attorney General, 2008). In overturning Mullins-Johnson's conviction, the Court of Appeal found there was no evidence he was guilty of any crime. Id. at 120. Mullins-Johnson was awarded $4.25 million in compensation. The Canadian Press, Mullins-Johnson awarded $4.25M for wrongful conviction, CTV Toronto (Oct. 21, 2010), available at http://toronto.ctv.ca/servlet/an/local/CTVNews/20101021/wrongful-conviction-compensation-101021/20101021/?hub=TorontoNewHome (last visited Feb. 18, 2011). He is but one of several people who were wrongly accused of killing children based on the flawed evidence from Dr. Charles Smith. See Goudge, supra note 270, at 5–7.
enhance public confidence in pediatric forensic pathology” that will ensure such miscarriages of justice never happen again.\textsuperscript{276} In October 2008, the over 1000 page report was released, with sweeping recommendations made, and legislation passed to create more checks and balances in death investigations.\textsuperscript{277}

\section*{IX. Aboriginal Peoples and the Jury System.}

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

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

\textsuperscript{276} Id. at 6.

\textsuperscript{277} See Goudge, \textit{supra} note 270; Goudge, \textit{supra} note 274. This resulted in a forensic pathology service, an oversight council and complaints committee, and improvements for training of forensic pathologists.


\textsuperscript{279} Id. at 48–49.

\textsuperscript{280} Id. at 49.

\textsuperscript{281} Id. at 50.

\textsuperscript{282} Id. at 51.

\textsuperscript{283} Id. at 51–52.

\textsuperscript{284} Id. at 59–61.

\textsuperscript{285} Id. at 61.
At the close of the trial, the prosecution contended that the accused killed the priests for their rifles. Defense counsel argued that the Inuit should be judged by the standards of their own culture. The judge instructed the jury that a cultural defense must be rejected. He also told the jury that if Sinisiak was found guilty of murder, he would have no choice, under Canadian law, but to sentence him to death. However, the judge also stated that he would recommend clemency, which he was confident would be granted. After an hour of deliberation, the jury returned a verdict of not guilty.

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

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

286. Id. at 62.
287. Id.
288. Id. at 63.
289. Id. at 64.
290. Id.
291. Id.
292. Id. at 64–65.
293. Id.
294. Id. at 66.
295. Id. at 67.
296. Id.
297. Id.
Rex v. Sinisiak served as a seminal event in attempts to establish the rule of law through jury trial for aboriginal peoples living in Canada’s arctic region, but a trial involving a roughly similar scenario was played out again as late as 1966 in the case of R. v. Aiyaoot. In an isolated hunting camp a small band of Inuit became stranded due to unusual weather conditions. Both shelter and food were scarce when Soosee, an unusually large and strong Inuit woman and the mother of Aiyaoot, began acting strangely, reported hearing spirits and attempted to kill her sleeping husband with a rock. The rest of the hunting party, frightened by her behavior, retreated to a small island where they could still observe her and the camp. Soosee began to destroy the tents and remaining supplies. Frightened by her behavior and the threat she posed to survival, the group concluded that she was possessed by evil spirits. After talking the situation over, the others sent her son and a nephew, Shooyook, back to the camp with loaded rifles in an attempt to placate her, but with a consensus view that if the attempt failed she should be killed. When Soosee began to attack the two men, she was shot and killed. The others returned to the camp and buried her according to traditional Inuit custom, placing the body on the hard permafrost and piling stones around and over the body.

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


299. Id. at 66.

300. Id. at 66.

301. Sisson, supra note 298, at 184.

302. Id.

303. Id. at 185.

304. Id. at 184–185.

305. Id. at 185.


307. Id. at 66–67.

308. See Sisson, supra note 298, at 183.

309. See id. at 182–183.
had been recruited as interpreters for the trial. Consequently, a plane was sent to recruit potential jurors from communities in the sparsely settled area; and after logging fifteen hundred miles, the plane returned with two Inuit who served on the six-person jury, which also included the first woman juror in the arctic region. The trial was marked by an understanding of the harsh circumstances faced by Aiyaoot and the other members of the hunting camp as well as Inuit cultural beliefs. The jury acquitted Aiyaoot but found Shooyook guilty of manslaughter. The judge sentenced Shooyook to two years in prison but suspended the sentence, and Shooyook was reunited with his wife and children that evening.

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

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

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

310. Id. at 182.
311. Morrow, Northern Justice, supra note 298, at 68; Sissons, supra note 298, at 183.
312. See Sissons, supra note 298, at 181–182; Morrow, Jury Verdicts, supra note 298, at 51.
313. Morrow, Northern Justice, supra note 298, at 70; Sissons, supra note 298, at 186.
314. Id.
318. Id.
to be tried by a judge or magistrate. However, with the establishment of the Territorial Court of the Northwest Territories in 1955, accused persons have increasingly exercised the right to jury trial.\textsuperscript{319} In the first fourteen years of the Court, there was an average of five trials per year.\textsuperscript{320} The \textit{Criminal Code} provided for six-person juries in the Northwest Territories because of the sparseness of population, and until 1965, women were prohibited from serving.\textsuperscript{321} Additionally, an eligibility requirement for jury service was the ability to speak and understand English.\textsuperscript{322} In consequence, between 1955 and 1968, despite the fact that aboriginal peoples were the accused in fifty-five percent of the cases, aboriginals served on only twenty-seven of the sixty-eight jury trials typically as only one of the six-member jury.\textsuperscript{323}

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

Christopher Gora conducted formal interviews with judges, lawyers, and other persons connected to the court process that revealed a number of problems with the implementation of jury trials.\textsuperscript{328} While every effort is made to keep the trial in the community in which the offense occurred, major problems have arisen in this regard.\textsuperscript{329} Sometimes the community is too small to obtain a jury, particularly when many of its members are related to the victim or the accused.\textsuperscript{330} Linguistic problems continue to be a
source of difficulty because of the lack of trained interpreters. In addition, local political struggles between families and ruling cliques can prevent the formation of a jury in that location. Thus, a change of venue is required, bringing additional problems regarding preparation of the case and accessibility of witnesses. Many of Gora’s respondents also noted a substantial trend toward acquittals, especially in comparison to trials before a judge alone. Additionally, there appears to be a greater reluctance to serve on juries than elsewhere in Canada. Both the acquittal rates and the reluctance to serve may reflect unwillingness to pass judgment on one’s neighbor. However, it also appears to reflect a preference for community values and traditional cultural ways of handling deviance that are in conflict with the legal values and processes of the broader Canadian society.

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

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

331. Id. at 173.
332. Id. at 172.
333. Id. at 172. This problem was also raised during informal interviews that author Vidmar undertook in Baker Lake, an Inuit community of about 1,400 persons, in the summer of 1997.
334. Id. at 173.
335. See Gora, supra note 328 at 174–80.
336. Id. Having no formal courthouse, trials in smaller communities take place in hotels, community centers, or schools. The temporary spatial designs, however, are made similar to more traditional court settings.
337. Vertes, supra note 317.
338. Id. Justice Vertes also drew attention to the fact that other forms of alternative dispute resolution, such as sentencing circles, sentencing dispositions with restorative justice aims and local Justices of the Peace. Id. at 21.
CONCLUSION

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

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