Structural Aspects of Terrorist Mega-Trials: A Comparative Analysis

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PART I

Introduction and Issue Definition

The proliferation of global terror has prompted many countries to re-evaluate the means by which they should respond to specific and often horrific terrorist acts committed within their jurisdiction. The tools available to government in the development of a counterterrorism strategy are multidimensional: military and diplomatic action, intelligence gathering, economic retaliation and law enforcement through domestic criminal justice systems.

In recent years, some authorities have argued, forcefully, that the intersection of international terrorism with Anglo-based criminal justice systems develops a pressure point on the legal landscape that is simply unacceptable and not in the overall public interest.[1] They argue that a focused criminal law response leaves too many militants in place, and encourages the notion that a nation can be attacked with relative impunity.[2] They also argue that fair trial requirements such as disclosure of information to the defence actually feeds into the agenda of militant groups intent on overthrowing democratic regimes, and in this sense "(criminal) trials don't work for terrorism. They work for terrorists".[3]

The contrary view is equally compelling. While resort to the criminal law is not as blunt a form of violence as the use of military force, the law and the criminal justice system in Canada represent the institutionalization and legitimization of coercive power by the state. As Mark A. Drumbl, associate professor of law at the Washington and Lee University noted in 2004:[4]

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[1] Andrew C. McCarthy, "Terrorism on Trial: the Trial of Al Qaeda", 36 Case W. Res. J. Int'l L.513 (2005); Amos Guiora, "Targeted Killing as Active Self-Defence", Case W. Res. J. Int'l L.319 (2005); see as well Mark A. Drumbl, "'Lesser Evils' on the War on Terrorism", Case W. Res. J. Int'l L.335 (2005); The use of law as a weapon against terrorism in the future was examined in considerable detail at a day-long symposium involving a group of high-level United Nations officers, former US government officials, noted prosecutors and defence counsel, and prominent journalists and scholars. It was held at the Case Western Reserve University School of Law on October 8, 2004, and was entitled "Terrorism on Trial". For an excellent summary of the issues and the symposium, see Michael P. Scharf, "Terrorism on Trial, 36 Case Res. J. Int'l 287 (2005).

[2] McCarthy, *ibid*, at page 518 and see Sharf, *ibid*, at page 289, where he notes that the 9/11 attack "triggered a seismic shift in the US approach to dealing with terrorists".

[3] McCarthy, *ibid*, at page 521

[4] Mark A. Drumbl, *supra*, at page 335-6

> Let us not underestimate the force of the criminal law to neutralize, deter, punish and stigmatize. Terrorism is an illegitimate use of force, but it also is a crime, and there are many compelling reasons for casting it as such in full complement to availing ourselves of military means to combat it when these are necessary in self-defence, or authorized by the United Nations Security Counsel, or required to track down and incapacitate terrorist war criminals.

Conceptualizing the use of force and resort to the court system as mutually exclusive response mechanisms is clearly based on a false premise. Both can be pursued separately, or in tandem.

In Canada, the hydraulic pressure of public opinion[5] in the wake of the 9/11 attack on the United States prompted the federal government to enact the *Anti-Terrorism Act*.[6] That legislation provides for a number of terrorism-related offences such as financing terrorist activity,[7] using or possessing property for terrorist purposes,[8] knowingly participating in a terrorist group to facilitate terrorist activities,[9] and knowingly facilitating a terrorist activity[10]. Terrorism, however, is multifaceted in nature and a "terrorist trial" could, as in the case of Air India, involve charges of murder, as well as allegations of treason, genocide, kidnapping, high jacking, offences relating to explosives or even other offences related to common criminal activities.

The tension between terrorism and the criminal law process has also prompted some to suggest that the structure of traditional Anglo-Canadian trials—including the role of the trial judge and jury— ought to be changed to reflect the reality of often lengthy and complex proceedings.[11]

That is the issue with which this paper is concerned. Should the institutional underpinning or "structural" elements of the trial process in Canada be changed to meet the tremendous challenges posed by terrorist trials? Can we provide trials for accused terrorists that comport with Canadian standards of justice, notwithstanding the complex challenges inherent when national security is at risk?[12] For instance, should juries as we presently know them continue in these types of cases? Or should their structure be changed? Should the jury reduce in size, or be augmented through "alternates"? Should

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[5] To use that wonderful phrase coined by Justice Holmes, dissenting, in *Northern Securities Co. v US*, 193 US, 197 (1904) at page 400-1, more recently referred to in *Payne v Tennessee* 501 US 808 (1991), per Stevens J., Blackman J. concurring, both in dissent.
[6] Part II.1 of the *Criminal Code*, enacted by SC 2001, c.41 sec. 4
[7] *Ibid* sec.83.2
[8] *Ibid* sec 83.4
[9] *Ibid* sec 83.18
[10] *Ibid* sec 83.19
[11] In additional to lengthy and complex proceedings in court, the criminal investigation by police, intelligence agencies and forensic scientists is often very lengthy and equally complex As Scharf, *supra* noted at page 287 the Lockerbie investigation lasted three years. The Air India investigation spanned 20 years.
[12] For a helpful discussion of this issue, see McCarthy, *supra*, and Scharf, *supra*

we empanel “special juries” with expertise in the area, or continue with a random selection of jurors based on neutral criteria?

Trial by judge and jury or judge alone traditionally sees a single judge hearing the case. Should that change? Should we look at a panel of judges, with no jury, or should we consider an alternate judge sitting with the judge and jury?

Some have argued that the real problem here is the emergence of mega-trials—and complex proceedings— with multiple defendants, many counts, and a witness list that almost guarantees that the trial will last for many months, if not years. Are we conceivably looking at some cases that may never reach a verdict because it collapses under its own weight?

Before considering these issues, I propose to set the stage by analyzing a number of underlying considerations: if we are considering critical changes to our criminal justice system, what are the fundamental principles against which such changes should be measured? What types of terrorist trials have arisen in the past decade or two, and what structural issues have they had in common, if any? What trial structures have existed in the Anglo-Canadian tradition since this country’s adoption of the British adversarial model during the 18th and 19th century, and what variations have been accepted in law or in practice since then? Moreover, are we raising an increased risk of wrongful conviction if we alter fundamental structures that have been in place for centuries?

PART II

Fundamental Principles Underlying This Study

The issues raised in this study have been examined against a background of certain principles or values which I regard as fundamental. These principles have, in particular, been taken into account when deciding whether there is a need for change, and in evaluating the merit of various proposals for reform. As these values have played an important part in this study, I thought it critical to articulate them at the outset so that the views and opinions later expressed can be better understood and assessed.[13]

Seven Principles Underlying this Study

a) The Pursuit of Truth

At an earlier stage in Canada's history, appellate courts emphasized that a criminal prosecution is not a contest between individuals, "but is an investigation that should be conducted without feeling or animus on the part of the prosecution, with the single view of determining the truth".[14] In recent years, this "single view" has been nuanced to reflect the need for a fair trial.

Justice L'Heureux-Dube, in dissent in 1989, observed that a jury is involved in a "fact-finding mission". She continued: "once the evidence has been allowed, it is then incumbent upon the jury the attach weight or probative value to the various elements adduced at trial. The judge assists the jury by determining the extent to which the evidence can be confronted by the opposing party, which, in the case of testimonial evidence, often takes the form of cross-examination as to credibility". She concluded by observing that "a delicate balance must be struck between the fundamental interests at stake given that arriving at the truth remains a central premise of the administration of criminal justice. Such interests include, among others, the extent to which the credibility of witnesses may be impeached as against the possible risks of encroachment upon of the fairness of the trial, including the accused person's right to present a full defence, and the degree of prejudice suffered by the accused."[15]

The Supreme Court of Canada spoke more authoritatively on the purpose of a criminal trial in the case of *R v Handy*.[16] There, at paragraph 44, Justice Binnie noted that "the criminal trial is, after all, about the search for truth as well as fairness to an accused".

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[13] These principles have been drawn largely from the excellent work of the Law Reform Commission of New South Wales in Australia: Report 48 (1986) "Criminal Procedure, the Jury in a Criminal Trial", cited at http://www.lawlink.nsw.gov.au/lrc.msf/pages/r48toc

[14] *R v Chamandy* (1934), 61 CCC 224 (Ont.C.A.) at 227

[15] *R v Howard* (1989), 48CCC (3d) 38 (SCC) at pages 52-53

[16] (2002), 164 CCC (3d) 481, per Binnie J. on behalf of a unanimous nine-person court (including Justice L'Heureux-Dube).

That sentiment was reflected in a decision of the Court of Appeal in Ontario delivered just a few weeks before the decision in *Handy*. In that case, Doherty J.A., in the context of the proposed exclusion of evidence under the *Charter*, questioned whether the *Charter* violation in issue and the resulting exclusion of evidence "extracted too great a toll on the truth-seeking goal of the criminal law.[17]

While the pursuit of truth is clearly a desirable goal of criminal procedure, it is not to be sought at any cost. As the Australian Law Reform Commission has said:[18]

> The serious consequences of conviction, fear of error, a concern for individual rights and a fear of abuse of governmental power have limited the search for truth in criminal matters.

Recent appellate decisions in Canada likewise have emphasized that while the pursuit of truth is an important objective, it must comport with fair trial requirements.[19]

b) Public Confidence and Perceived Legitimacy of Proceedings

Ultimately, the criminal justice system must be accountable to the community it serves. Public confidence in the criminal justice system is a prerequisite to its effectiveness, and ultimately to its moral authority to decide disputes. Over time, the criminal law must be capable of absorbing and reflecting community standards, and the process by which guilt is determined should be consistent with contemporary standards within the general community.

Community participation in the criminal justice system provides one means to engender public confidence and a perception of legitimacy. Participation as jurors should be available to all members of the community except those who are clearly disqualified by law. It should be noted that in a wide variety of contexts, the Supreme Court of Canada has consistently underscored the importance of public confidence in the administration of criminal justice in this country.[20]

The principle of public confidence in terrorism cases raises unique challenges. It is especially important that the public in the broadest possible sense—the international

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[17] *R v Kitaitchik* (2002), 166 CCC (3d) 14 (Ont.C.A.), at par.47. The truth-seeking goal of the criminal law has been emphasized by senior appellate courts in Canada, the United States and in the Commonwealth: *R v Noel*, 2002 SCC 67; *R v Darrach*, 2000 SCC 46; *R v Mills* (1999), 139 CCC (3d) 321 (SCC); *Portuondo v Agard*, 529 U.S. 61 (2000); *James v Illinois*, 493 US 307 (1990); *R v Apostilides* (1984), 53 ALR 445 (HC); *Police v L*, 1996 NSDCR LEXIS 28

[18] Australian Law Reform Commission, Evidence (ALRC) 26 Interim 1985 par. 58

[19] *R v Hart* (1999) W.C.B. Lexis 8435 at par. 4; *R v Ludacka* (1996) W.C.B. Lexis 11926 at par.2; *R v Hodgson* (1998), 127 CCC (3d) 449 (SCC), per L'Heureux-Dube, J.

[20] *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49; *Provincial Court Judges Association of New Brunswick v New Brunswick et al*, 2005 SCC 44; *R v Mapara*, [2005] 1 S.C.R. 358 at par. 63; Application under Section 83.28 of *Criminal Code*, [2004] 2 S.C.R. 248; *Ell v Alberta*, [2003] 1 S.C.R. 857 at pars 23, 24, 29 and 50.

community—not only have confidence in the process but also see it as a legitimate proceeding with the moral authority to adjudicate fairly.

c) Fairness and the Rule of Law

The fundamental feature of any criminal justice system is that it be fair. In this context, fairness has a number if dimensions. It requires an element of certainty and consistency in the application of the law and procedure, although there should be sufficient flexibility to cope with variations between cases as well as different and changing circumstances. In general, the occasions upon which flexibility is justifiable are properly determined by reference to contemporary community standards. In achieving the goal of fairness, the principle that justice should not only be done, but be seen to be done is important.[21] The appearance of justice is therefore a necessary part of the substance of justice.

d) Efficiency

The administration of criminal justice must be efficient. That noted, there is little agreement on the criteria by which efficiency should be measured. Certainly, efficiency can and no doubt should be measured primarily by reference to the standard and quality of justice. There is also a strong argument that efficiency should be assessed by reference to the cost and duration of criminal proceedings. It is probably fair to say that the efficient use of available resources involves those resources being applied to obtain a fair result in a reasonable manner for the least possible cost and in the shortest possible period of time. Error, duplication, waste, unfairness, delay, uncertainty and a lack of public confidence are all indicators of inefficiency.[22]

e) Openness and the Publicity of Criminal Proceedings

The freedom of the individual to discuss the institutions of the state, and its policies and practices, is pivotal to any notion of democratic rule. The liberty to criticize and express contrary views has long been thought to be a safeguard against government tyranny and corruption.[23]

It is clear that the courts, especially the criminal courts, play a pivotal role in any democracy. It is only through the courts that the individual can challenge government and obtain a decision binding on the state.

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[21] The Supreme Court of Canada has noted that this is one of the most fundamental principles in our case law, the formulation for which is best found in *R v Sussex Justices*, [1924] 1KB 256, per Lord Chief Justice Hewart: *Chatel v R* [1985] 1 S.C.R. 39 at par. 13. It is interesting to note that three years after the formulation of this principle in *Sussex Justices*, the same court expressed the view that a typographical error had been made in this famous quotation. Justice Avory contended that the word "seen" should have read "seem": *R v Essex Justices; ex parte Perkins*, [1927] 2 KB 475

[22] Law Reform Commission (New South Wales), *supra*

[23] *Liberty of the Press* by James Mill (New York: Augustus M. Kelly, 1825 at page 18)

The courts, too, must therefore be open to public scrutiny and public criticism of their operations. This point was made powerfully by Jeremy Benthem, in a way that has been approved by the Supreme Court of Canada, the House of Lords, the United States Supreme Court, appellate courts in Australia as well as the High Court of New Zealand:[24]

> In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.

In recent times, the Supreme Court of Canada and other Commonwealth courts have observed that the principle of open courts is anchored on three main grounds. First, and primarily, public accessibility to our court system is an important ingredient of judicial accountability.[25] It fosters public confidence in the court system as well as the public's understanding of the administration of justice.[26] As well, the open court principle, as the very soul of justice, acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law.[27]

The second broad rationale concerning the openness principle concerns the deterrence and public denunciation functions of the sentencing process. In criminal cases, the sentencing process serves the critically important function of permitting the public to determine what punishment fits a given crime, and whether sentences reflect consistency and proportionality.[28]

The third rationale concerns the ability of the openness principle to support other democratic values such as the right of free expression. The reasoning is this: the right of the public to information concerning court proceedings depends upon the ability of the media to transmit this information to the public. Debate in the public domain is therefore predicated on an informed public, which in turn is reliant upon a free and vigorous media. Essential to the freedom of the media to provide information to the public is their ability to have access to the courts and their process.[29]

f) Balancing Individual Rights With the Public Interest

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[24] *Re Vancouver Sun*, [2004] 2SCR 332; *CBC v New Brunswick* (1996), 110 C.C.C. (3d) 193 (SCC) at page 202-3; *Scott v Scott* [1913] A.C.417 (H.L.); *Richmond Newspapers v Virginia*, 448 US 555; In *Re Oliver*, 333 U.S. 257; *R v Tait* (1979) 24 A.L.R. 473 (F.C.A.); *John Fairfax Publications v Ryde Local Court*, 2005 NSWCA 101; Newton v Coroner's Court [2005] NZAR 118.

[25] *CBC v New Brunswick*, *supra*, at page 202-3, per La Forest J. on behalf of all nine members of the court.

[26] *CBC v New Brunswick*, *supra*, at page 203d

[27] *CBC v New Brunswick*, *supra*, at page 203d

[28] *CBC v New Brunswick*, *supra*, at page 222

[29] *CBC v New Brunswick*, *supra*, at page 222. Generally, concerning the role of the media, see: Bruce A. MacFarlane, Q.C. and Heather Keating, "Horrific Video Tapes as Evidence: Balancing Open Court and Victim's Privacy" (1999), 41 CLQ 413.

Terrorist trials inevitably involve a clash between individual rights and the broader public interest. For the individual accused, there are a range of rights and freedoms that are guaranteed in the *Charter of Rights and Freedoms*, and much of the procedure set out in the *Criminal Code* is intended to assure the accused of a fair trial.

Most 21st Century terrorist acts are intended to strike a broad blow at government or the public at large. There is, therefore, a need to protect the security of society as a whole. This issue is brought in sharp relief where national security information sought to be shielded by government is thought to be important in making full answer and defence in a specific case. The issue is also raised in the context of attempts to eliminate or reduce the involvement of juries in terrorist cases. As will be discussed later on in this paper, citizen participation in the criminal justice process allows the public to understand the machinery of the criminal justice system, and also assures a greater acceptance of both the process used and the result of a trial.[30]

g) Minimizing the Risk of Convicting the Innocent

For centuries, the criminal justice system has developed, relied upon and incrementally refined a body of rules and procedures to ensure that guilty persons charged with a criminal offence are convicted, and the innocent are acquitted. Key elements of the criminal justice system are intended to achieve that objective. The burden of proof on the Crown—proof beyond a reasonable doubt—is the highest known to the law. Additionally, the presumption of innocence and the rules concerning hearsay and character evidence, the right to disclosure of the prosecutions case and the entitlement to be tried by one's peers are all intended to safeguard the accused against wrongful conviction.

As long as guilt or innocence remains in human hands—as inevitably they must—wrongful convictions will continue to occur. Realistically, therefore, the challenge to those involved in the criminal justice system is to *minimize* the number of miscarriages of justice that occur.[31]

There are often a number of immediate causes leading to wrongful conviction, such as eyewitness misidentification, inadequate disclosure by the prosecution, false confessions and police mishandling of the investigation. There are, however, four critical environmental or "predisposing circumstances" that foster wrongful convictions to occur in the first place. Three are directly relevant[32] to the present discussion: public pressure to convict in serious, high profile cases; an unpopular defendant, often an outsider and member of a minority group; and what is often referred to as "noble cause corruption"—

[30] See Part VII, *infra*, entitled "Terrorist Trials in the Future—Reform Options".

[31] See *Convicting the Innocent: A Triple Failure of the Justice System*, by Bruce A. MacFarlane, Q.C., a paper presented at the Heads of Prosecution Agencies in the Commonwealth Conference at Darwin, Australia on May 7, 2003. (now published at: (2006) 31 Manitoba Law Journal 403)

[32] The fourth predisposing circumstance involves the conversion of the adversarial process into a "game", with the result that the pursuit of the truth has surrendered to strategies, maneuvering and a desire to win at virtually any cost. This predisposing circumstance could also be brought into play in terrorist cases in certain circumstances.

the belief that the end justifies the means because the suspect committed the crime and improper practices are justifiable to ensure a conviction.

Against this backdrop, it is important to consider whether and to what extent changes in fundamental structures that have been in place in the criminal justice system for centuries may exacerbate the situation and raise the risk of miscarriages of justice to an unacceptable level. This issue will be dealt with later on in this paper, but at this stage it will be sufficient to note that a risk analysis is especially important when assessing any potential changes to the process of trial by jury.[33] Convictions entered in the UK during the ten year IRA bombing campaign— later shown in several instances to involve terrible miscarriages of justice—provide clear reminders to everyone in Anglo-based criminal justice systems how these environmental or "predisposing circumstances" can combine together and fuel each other into a wrongful conviction. Tragedies of this sort serve no one's interests, and can only lead to a reduction of public confidence in the justice system.

[33] See part VII, "Terrorist Trials in the Future—Reform Options".

PART III

Previous Terrorist and Mega-trials

In this Part, I propose to situate the issue of future terrorist trial structures into the larger picture of previous trial experiences, in Canada and elsewhere. Some of the cases that follow involve terrorism in its "classic" form, such as the Lockerbie airline bombing. I also intend to review three Canadian gang mega-trials, as there are some parallels between those types of cases and terrorist trials.

I do not intend to embark on a lengthy dissertation on any of these cases. Rather, the discussion on each will involve a rather tight comment on the charge, some context on why charges were laid, the nature of the tribunal hearing the case, issues that arose, and the result. In Part IV, I will draw together the common elements that arise from this 57-year, five nation journey.

1. The Albert Guay Affair

Canada's first, and one of the world's first, in-flight airplane bombings took place in the province of Quebec on the 9th of September 1949, killing all 23 passengers and crew.[34] This incident has a number of disquieting parallels with the bombing of Air India flight 182, although, as I will show, the result in court was quite different.

During World War II, Albert Guay of Quebec City met and married Rita Morel. The marriage was a happy until the Guay's had their first baby, and debts started to accumulate. Mr. Guay met a seventeen-year-old waitress, started dating her, then, under an assumed name, gave her an engagement ring. This relationship fell apart when Ms. Guay found out about the affair. Albert Guay decided that the best strategy to get his girlfriend back was to get rid of his wife.

Guay enlisted the assistance of an employee of his, a clockmaker named Genereux Ruest, and together they made a bomb consisting of dynamite, blasting caps, a battery and an alarm clock. The device was fitted with a delay mechanism. The dynamite had been purchased by Ruest's sister, Marguerite Pitre, at a local hardware store.

Guay then purchased an airline ticket for his wife (as well as $10,000.00 life insurance, a common practice at the time), and convinced her to go to Baie Comeau, Quebec to pick up some things for him. The bomb, hidden in a parcel, was picked up by Pitre from Guay and delivered to the airport by her. Just before takeoff, it was checked onto the flight for which Ms. Guay had been booked. An airport clerk later reported that all of the cargo on

[34] Some have argued that the Canadian incident was the first in-flight airplane bombing in history. In fact, there had been at least two earlier incidents, including one (apparently with a similar motive) in the Philippines in May of the same year: "Albert Guay Affair" Aviation Safety Network, http://www.aviation/safety.net/database/record.php?id=19490507/o&lang=nl

that flight had been paid for by well-known shippers—except one parcel. The "exception" was nonetheless accepted at the last minute, and was quickly placed into the forward baggage compartment of the aircraft. Pitre, the deliverer, did not board the plane. Nor did Albert Guay or Genereux Ruest. The parcel delivered by Pitre was addressed to a fictitious person in Baie Comeau.

The plane crashed twenty minutes after take off. Four witnesses in the area, all on the ground and in different places, heard an explosion just before the plane started to descend. Courts later found that Mrs. Guay "was murdered by the explosion of a time bomb which was taken to the aeroplane and caused to be put on board of it by Mme. Pitre, the sister of the appellant (Ruest) who did this on the express instructions of Guay".[35] The crash attracted worldwide attention. It was, at the time, the largest mass murder that had taken place in North America. A trial judge would later say to the jury that the disaster was "a hideous crime, without precedent in our legal annals, a crime that is revolting to the soul and conscience of an honest population.[36] Pitre attempted suicide ten days after the bombing and, while in hospital, confessed to her involvement in the crime.

Guay immediately sought to collect on the insurance bought on his wife's life, but was quickly arrested by police and charged with the murder of his wife.

The case proceeded in the normal courts and, in due course, Guay, Ruest and Pitre all faced charges of capital murder—which, at the time, carried a mandatory punishment of death by hanging.

For tactical reasons, the Crown proceeded separately against the three accused.[37] It was thought that one or more of the defendants could be called as prosecution witnesses against Guay and, potentially against each other. Guay's trial proceeded first. In February 1950, he was convicted before a jury, sentenced to hang, and at the age of 33 was executed on January 12, 1951. Bombmaker Ruest likewise was tried before a judge and jury, and, despite an appeal to the Supreme Court of Canada that resulted in a split decision, was executed on July 25, 1952. Marguerite Pitre was tried for murder before a judge and jury, convicted, and executed on January 9, 1953. She was the last woman to hang in Canada.[38]

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[35] *Ruest v R* (1952), 104 CCC 1 (S.C.C.)
[36] *Ibid* at 7.
[37] Pitre was called to testify against Ruest
[38] The facts of this terrible tragedy have been drawn from the following sources: *Ruest v R* (1952), 104 CCC 1 (S.C.C.); Bruce Ricketts, "The Worst Mass Murder in North America", http://www.mysteriesofcanada.com/quebec/mass_murder.thm; Time Magazine, "Flight to Baie Comeau", published October 3, 1949; Time Magazine, "Fame, of a Sort", published January 21, 1951; Time Magazine, "Judgement of Death", published August 4, 1952; "The Clockwork Bomb Affair", http://www.everything2.com/index.pl?node_id=1522582; "Timeline: The Albert Guay Affair", http://www.virtualmuseum.ca/exhibitions/myst/en/timeline/mcq/guay.html; "Albert Guay: Mass Murderer: http://www.famouscanadians.net/name/g/guayalbert.php

While the case against Guay was strong, the evidence adduced against Pitre and Ruest was less clear. It raised issues about whether, and to what extent, both knew of Guay's nefarious plot. Did Ruest know that the bomb was destined for an airplane or, as he contended, was he led to believe that the dynamite was intended to blow up tree stumps? And did Pitre know she was delivering a bomb to the airport—or, as she contended, did she think she was delivering a statue? *Mens rea* was therefore a pivotal issue, and the trial judge's charge to the jury on the burden of proof resting on the Crown formed the key issue on appeal.

The judicial record of Ruest's trial is better known, as the case went to the Supreme Court of Canada. His trial lasted sixteen days. Seventy-seven witnesses were called by the Crown, and eleven for the defence. More than 100 exhibits were filed in court. The case for the Crown was largely circumstantial, and amounted to the classic evidentiary jigsaw puzzle.

In a split decision (7-2), Fauteux, J. (Rinfret, C.J.C., Kerwin, Taschereau, Rand, Estey and Kellock, JJ. concurring) held that while the trial judge may have misspoken when he suggested that the evidence needed to demonstrate innocence before an acquittal was justified, the totality of the evidence inevitably pointed to the guilt of the accused. Cartwright, J. (Locke, J. concurring) would have ordered a new trial on the basis that the error may have misled the jury in reaching its verdict.

Despite the imposition of the ultimate penalty on the three defendants, I have not been able to find any criticism of the proceedings undertaken or the conclusions reached by the various judges or juries in this trilogy of very difficult cases. If anything, both the judges and the juries seem to have done a good job sorting out who did what—although it is always a bit unsettling when the highest court in the land arrives at a split decision in a death penalty case.

2. The IRA Terrorist Campaign

On January 30, 1972 "Bloody Sunday," British paratroopers killed 13 unarmed Catholics during a peaceful civil rights march in Londonderry, Northern Ireland. On July 21, 1972, the IRA rocked Belfast with 22 bombs in 75 minutes, leaving 9 dead and 130 injured. A politically fuelled bombing campaign ensued during the next decade, with 3637 lives lost in what the Irish now refer to as "The Troubles."[39]

Most of those killed were civilians: mothers, fathers, shoppers, pub-goers, and children. The public was outraged and frightened. In many minds, the IRA had become "Public Enemy Number One". It was from this pool of citizens that police investigators would be selected to investigate IRA bombings over the next several years. And it was from

[39] For an account of these events, reference can be made to "Convicting the Innocent: A Triple Failure of the Justice System", by Bruce A. MacFarlane, Q.C., a paper presented at the Heads of Prosecutions Agencies in the Commonwealth Conference at Darwin, Australia on May 7, 2003 (now published at: (2006) 31 Manitoba Law Journal 403)

precisely this same pool that judges and jurors would hear cases that, regrettably, led to terrible miscarriages of justice in Britain during the 1980s. I will deal with the miscarriages point later in this paper; for the moment, I will focus sharply on the court structures that were used to hear these cases in England and in Northern Ireland.

One of the most frightening aspects of the IRA miscarriages of justice is that they occurred with the full range of Anglo criminal justice system safeguards in place: they were tried in the normal courts, not special ones, before experienced judges and properly empanelled juries, based on well established criminal law that was applicable to everyone in England. All of the defendants were represented by competent counsel, and had access to an appellate process that was available to everyone in England.

The Birmingham Six were convicted by the unanimous verdict of a jury, on 21 counts of murder. In 1991, the Court of Appeal quashed the convictions, freeing the defendants.[40] What, then, went wrong? On behalf of the court, Lloyd L.J. noted that on the basis of the evidence led at trial, the case was convincing. The jury fulfilled its task. Nonetheless, two parts of the evidence were suspect: scientific evidence concerning bomb traces, and the police interviews. The forensic evidence was in doubt, the court concluded, and several of the police investigators "were at least guilty of deceiving the court."[41] Concerning the role of the jury, the Court of Appeal made the following comments:[42]

> Rightly or wrongly (we think rightly) trial by jury is the foundation of our criminal justice system. Under jury trial, juries not only find the facts, they also apply the law. Since they are experts in the law, they are directed on the relevant law by the judge. But the task of applying the law to the facts, and so reaching a verdict, belongs to the jury, and the jury alone. The primacy of the jury in the English criminal justice system explains why, historically, the Court of Appeal has so limited a function.
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> No system is better than its human input. Like any other system of justice, the adversarial system may be abused. The evidence adduced may be inadequate. Expert evidence may not have been properly researched or there may have been a deliberate attempt to undermine the system by giving false evidence. If there is a conflict of evidence, there is no way of ensuring the jury will always get it right. This is particularly so where there is a conflict of expert evidence, such as there was here. No human system can expect to be perfect.

The Guildford Four were convicted of murder in 1975 by a court composed of a judge and jury for pub bombings by the IRA that killed seven people. An appeal taken three years later failed. In 1989, the Home Secretary referred the case back to the Court of Appeal after new evidence was found. In 1989, the convictions were quashed after the

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[40] (1991) 93 Cr. App. R. 287 (CA).
[41] *Ibid* at page 318.
[42] *Ibid* at page 311.

Director of Public Prosecutions decided not to support the convictions of the four defendants. A public inquiry was called into the case.[43]

Further miscarriages of justice concerning IRA bombings emerged in England. They followed the same pattern. The Maguire Seven were convicted in 1976 for possessing explosives. The defendants had been accused of running an IRA bomb factory in North London during the mid-1970s. Unlike the Guildford Four Trial, scientific evidence played a pivotal role in the trial of the Maguire Seven. New evidence arose; the Home Secretary referred the case to the Court of Appeal, where the Director of Public Prosecutions conceded that the convictions were unsafe. It should be noted that the Court of Appeal acted on the very narrow ground "that the possibility of innocent contamination cannot be excluded."[44]

Others, however, thought differently. Brian Ford, a leading expert, openly questioned whether there had been a closing of ranks, and expressed concern that the Crown scientists had been operating a state-run service to get convictions, rather than offering independent scientific expertise.[45] He appears to have been right, and the IRA saga got even worse.

Judith Ward was charged with 12 counts of murder and 3 counts relating to explosions. She was tried at the Wakefield Crown Court before a judge and jury. She pleaded not guilty to all counts, but was convicted on all—through a majority vote on one count and unanimously on all others. She was sentenced to a total of 30 years imprisonment. The case for the Crown rested on confessions that were allegedly made to the police and expert evidence from government scientists that traces of nitro-glycerine had been found on her. She appealed neither conviction nor sentence.

Seventeen years later, the Home Secretary referred her case to the Court of Appeal for a reassessment. It was said that she suffered from a mental disorder that explained her statements to police. It was also contended that both the police and prosecution had failed to disclose evidence that would have affected the course of the trial. The most serious contention concerned the scientific evidence. Glidewell, J. on behalf of the unanimous court, concluded that three senior government scientists called as Crown witnesses at trial had deliberately misled the court; that they had done so in concert; and that they had taken "the law into their own hands, and concealed from the prosecution, the defence and the court, matters which might have changed the course of the trial".[46]

What lessons can be learned as a result of the IRA miscarriages in England? For present purposes, the first and most important lesson is that the court and trial structures in place in England at the time seemed to work reasonably well. For the most part, juries appeared

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[43] Sir John May, Report of the Inquiry into the Circumstances Surrounding the Convictions arising out of the Bomb Attacks in Guildford and Woolwich in 1974, Final Report (1993-94 H.C.449)
[44] *R v Maguire* (1992) 94 Cr. App. R. 133 at 152-3.
[45] Laboratorynewshttp://www.sciences.demon.co.uk/aforensc.htm.
[46] *R v Ward*, [1993] 2 All E.R. 577 (C.A.)

to have acted reasonably based on the evidence that was provided to them.[47] The miscarriages occurred for reasons quite separate and apart from structural considerations. First, it became evident that the "hydraulic pressure" of public opinion created an atmosphere in which state authorities sought to convict someone despite the existence of ambiguous or contradictory evidence. Second, scientists working in government-operated laboratories tended to feel "aligned" with the prosecution, resulting in the perception that their function was to support the theory of the police rather than to provide an impartial, scientifically-based analysis.[48]

3. Northern Ireland

In 1973, the right to a jury trial for terrorist offences was suspended in Northern Ireland.[49]

When the United Kingdom government imposed direct rule on Northern Ireland in 1972 following Bloody Sunday, it tried to steer towards a policy, known as "criminalization", of dealing with political violence through the criminal courts.[50] It set up a commission chaired by Lord Diplock, a British law lord, to review criminal procedure, which recommended a number of security measures, including the introduction of single judge trials known as "Diplock" trials in place of the jury in cases of political violence.[51]

The rationale for trial by judge alone was two fold. First, violence on the part of paramilitary organizations meant there was a persistent threat of intimidation, which extended to jurors as well as to witnesses, and a "frightened juror is a bad juror."[52] Second, the Diplock commission pointed to the danger of perverse verdicts by partisan jurors.[53]

One of the fundamental assumptions underlying the introduction of Diplock courts was that the jury could be taken out of the criminal justice system in certain types of cases without disrupting the essential adversarial quality of those trials. The legislation has been controversial, with support on both sides of the equation. Some have argued that Diplock courts may have provided a reasonable approach to an extreme situation;[54]

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[47] There may well be one caveat here. In the case of the Birmingham Six, the defendants applied for leave to appeal their convictions on the basis that the judge, Bridge, J., as he then was, had displayed excessive hostility to the appellant's case, and had given so clear an indication of his view of the facts and the witnesses as to deprive the jury of the chance to form an independent opinion. This application was, however, dismissed by the Court of Appeal: *R v McIlkenny* (1991) 93 Cr. App. R. 287 at 288

[48] It should be observed that this issue was raised in the Driskell Public Inquiry in Canada. Former Chief Justice LeSage delivered his report on the issue to the Government of Manitoba in January, 2007..

[49] The Northern Ireland (Emergency Provisions) Act 1973 provides the basic framework for all emergency provisions legislation in Northern Ireland from that time forward.

[50] "Justice Under Fire: The Abuse of Civil Liberties in Northern Ireland", by Anthony Jennings (1988)

[51] "The Restoration of Jury Trial in Northern Ireland: Can We Learn from the Professional Alternative?", by John D. Jackson, 2001 St. Louis- Warsaw Trans'l 15

[52] John D. Jackson, *ibid* at page 16

[53] *Ibid*

[54] John D. Jackson, *supra.* Professor Jackson noted that "there has been less evidence in Diplock trials of specific miscarriages of justice as compared with England and Wales where jury trial remains in all serious

others have argued that trial by judge alone increased the rate of conviction, and that less than five years into the use of Diplock courts, 82% of the population of Northern Ireland advocated a return to jury trials.[55]

The widespread perception of illegitimacy was fed by the use of "supergrass" informants and coerced confessions, which played a role in so many Diplock court convictions.[56] Whether the sense of illegitimacy flowed from the use of Diplock courts, or arose from the use of supergrass informants and apparently coerced confessions continues to be a source of controversy in the UK.[57]

Two assistant professors of law at the University of St. Thomas School of Law conducted an examination of the experience in Northern Ireland, and concluded that there was no evidence to support the two-fold rationale for resort to Diplock courts in the first place; there was no evidence demonstrating that this strategy had done anything to diminish political violence in Northern Ireland; and that some have contended that these anti-terror tactics have been described as "the best recruiting tools the IRA ever had".[58] In the result, the authors arrived at the following conclusion:[59]

> The elimination of jury trials, coupled with the systemic use of informants and coerced confessions undermined confidence in the justice system without reducing violence. Ultimately, these policies were a dramatic failure.

In the intervening years, the number of cases tried by judge alone in Ireland have declined from a high of over 300 cases a year to about 60 a year. In 2006, the government announced plans to legislate a presumption of jury trial in Northern Ireland while still retaining the option of having trial by judge alone in cases where the DPP can satisfy a statutory test yet to be developed but likely including concerns about interferences or perversion of the administration of justice. Under the program of "security normalization" announced in 2005, the legislation underpinning the Diplock system is scheduled to be repealed on July 31, 2007.[60]

4. World Trade Centre Bombing (1993)

On February 26, 1993, a massive bomb exploded in the parking garage of the north tower of the World Trade Centre building in New York City. It killed six people, and left a

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criminal cases…" and concluded that "it has been argued that in the rightful haste to restore a jury trial to Northern Ireland it would be wrong to ignore entirely the Diplock experience of the last thirty years".

[55] "Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland" by Michael P. O'Connor and Celia M. Rumann, 24 Cardozo L.Rev. 1657 (2003) at page 1697-1699

[56] David Bonner, "Combating Terrorism: Supergrass Trials in Northern Ireland", 51 The Modern Law Review 23 (1988).

[57] *Ibid*

[58] *Ibid* at 1662

[59] *Ibid* at 1699

[60] "Replacement Arrangements for the Diplock Court System: A Consultation Paper", issued by the Northern Ireland Office in August, 2006.

crater six stories deep in the building's basement floors. The goal of the attack was to devastate the foundation of the north tower in such a way that it would collapse onto its twin tower.[61]

The mastermind behind the bombing was Ramzi Yousef, who had been born in Kuwait and was likely raised in Kuwait. In 1992, Yousef entered the United States with a false Iraqi passport, and over the next several months developed the plan to make a bomb. Along with several others, Yousef, operating from his home in Jersey City, began assembling the 1500-pound urea nitrate fuel oil device for delivery to the WTC. He fled to Pakistan within hours of the explosion.

Yousef then became an international terrorist along the lines of The Jackal. He assisted in plans to assassinate the Prime Minister of Pakistan, Benazir Bhutto. The plot failed when Yousef and another were interrupted by police outside Bhutto's residence as they were planting the bomb. In 1994, Yousef travelled to Southeast Asia and attempted to bomb the Israeli Embassy in Bangkok. He then made assassination plans to kill Pope John Paul the 2nd and United States President Bill Clinton. The plan was never implemented. In Manila, he placed a bomb in a mall, which detonated several hours later. No one was hurt. In 1994, he masterminded the bombing of the Miss Universe Pageant. Later that year, he masterminded the bombing of a Wendy's hamburger stand. Two weeks later, on the 1st of December 1994 Yousef and a friend bombed the Greenbelt Theatre in Manila. Eleven days later, Yousef assembled a bomb and arranged for it to explode on an airplane bound from Manila to Tokyo. One passenger was killed.

During this time, the US government offered a $2,000,000.00 reward for the capture of Yousef. A friend betrayed Yousef and on the 7th of February 1995, he was arrested by US and Pakistani officials in Pakistan. He was returned to the United States and charged under the criminal laws of New York. He was held in custody pending trial in the normal courts.

On November 12, 1997, Yousef was found guilty of masterminding the 1993 bombing, and in 1998 he and a number of others were sentenced to 240 years each in relation to charges of conspiracy, bombing a building used in interstate commerce, bombing property and vehicles owned by an agency of the United States, transporting a bomb in interstate commerce, bombing or destroying a vehicle used in interstate commerce, assaulting federal officers and two counts of using and carrying a destructive device in relation to a crime of violence. During the sentencing hearing, US district court Judge Kevin Duffy (sitting with a jury, including alternate jurors) referred to Yousef as "an apostle of evil" before recommending that the entire sentence be served in solitary confinement. In the result, ten militant Islamist conspirators—including Yousef—were convicted for their part in the bombing. An 11th had earlier been deported to Jordan by

[61] *The New Jackals: Ramzi Yousef, Osama Bin Laden and the Future of Terrorism*, by Simon Reeve, 1999 (Northeastern University Press); "The World Trade Centre Bomb: Who is Ramzi Yousef? And Why it Matters", by Laurie Mylroie, *The National Interest*, Winter, 1995/96, http://www.fas.org/irp/world/iraq/956-tni.htm

the US government. He was charged, but acquitted by a Jordanian court and now lives in Saudi Arabia.[62]

On April 4, 2003 a three judge panel of the Federal Appeals Court in New York upheld Yousef's conviction for the 1993 bombing as well as a 1994 plot to blow up a dozen American airliners as they flew across the Pacific (the unsuccessful "Bojinka" plot, the evident forerunner to the conspiracy alleged to have taken place in the UK during August, 2006).[63]

In affirming conviction, the United States Court of Appeals for the 2nd Circuit said as follows:

> Judge Duffy carefully, impartially and commendably conducted the two lengthy and extraordinarily complex trials from which these appeals were taken. The fairness of the proceedings over which he presided is beyond doubt.[64]

Yousef is now held in the high-security Super Max Prison ADX in Florence, Colorado. Other terrorists held there include the Unibomber, Terry Nichols and, prior to his execution, Timothy McVeigh.

There is an interesting postscript to the World Trade Centre bombing. The 1993 bombing was simply one overt act in an indictment or series of indictments obtained against various al Qaeda members during the 1900s. There was an over-arching indictment that named Osama Bin Laden, which alleged that the defendants were members of an international terrorist organization that was involved in the bombing of several United States embassies. Although Bin Laden was never arrested, authorities were actively searching for him with a view to having him tried in the United States. The filing of this indictment, and the attempt to locate Bin Laden is significant in the sense that it illustrates quite coldly both the advantages and disadvantages of relying upon the criminal justice system to counter the threat of international terrorism.

The advantage is obvious. If efforts to locate had been successful, and Bin Laden had been tried and sentenced in the United States, 9/11 may never have occurred. However, the lack of success points to the clear disadvantages in relying upon the criminal justice system. The US law reports are replete with judicial decisions on the various motions brought by Bin Laden and his co-conspirators. Amongst other things, Bin Laden sought dismissal of the indictment without appearance, dismissal of particular counts from the indictment, the striking of alleged surplusage from the indictment, disqualification of certain attorneys from serving as advocates for the government, disqualification of US citizens from serving on the jury, dismissal of counts due to lack of jurisdiction and dismissal of counts on the basis that they failed to state an offence known to law.[65] In a

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[62] Ramzi Yousef, http://www.reference.com.browse.wiki/ramzi_yousef
[63] *US v Yousef*, 327F. 3d 56, cert. den. 540 U.S. 933
[64] 327F 3d 56 at 291
[65] For instance, see *US v Usama Bin Laden et al*, 91 F. Supp. 2d 600; *US v Usama Bin Laden*, 92 F. Supp. 2d 189; *US v Usama Bin Laden*, 93 F. Supp. 2d 484 (2000)

word, the attempt to prosecute Bin Laden ended in gridlock, and bogged down in the US justice system at precisely the same time that Bin Laden and others were planning the 2001 attack on the United States.

5. Oklahoma City Bombing

On April 19, 1995 a massive explosion tore apart the Murrah Building in Oklahoma City, Oklahoma, killing a total of 168 people and injuring hundreds more. In the moments after the explosion, national media distributed sketches of mid-eastern men. Numerous terrorist groups were mentioned. This all made sense at the time, as two years prior, the World Trade Centre in New York had been bombed by Islamic terrorists. It took several days before these initial reports were proven wrong. Nineteen minutes after the explosion, Timothy McVeigh was arrested travelling north out of Oklahoma City, after being pulled over for driving without a license plate on his vehicle.

On August 10, 1995 a federal grand jury returned an 11-count indictment against McVeigh and Terry Lynn Nichols, charging one count of conspiracy to use a weapon of mass destruction, eight counts of first degree murder and other violations of US law. The government filed a notice of intention to seek the death penalty.[66]

From that point on, a number of criminal justice system safeguards were triggered. On February 19, 1996 the District Court granted McVeigh's motions for a change of venue, transferring the case from Oklahoma to Denver, Colorado. On October 25, 1996 the District Court granted a motion for severance between McVeigh and Nichols, and ordered that McVeigh's trial proceed first. McVeigh's trial began with a voir dire of prospective jurors on March 31, 1997. A jury of 12 with 6 alternates was sworn by the District Court on April 24, 1997, and opening statements commenced that same day.

At this stage, I should comment briefly on the concept of "alternate jurors" in US law, as six were appointed in both the Yousef and McVeigh cases. In lengthy criminal proceedings, the federal rules of criminal procedure[67] permit the trial court to empanel up to six alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties. Alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other juror. The court may retain alternate jurors after the jury retires to deliberate. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations over again. It should be noted that prior to a 2002 amendment to this rule, the trial judge could not substitute an alternate after deliberations had begun, evidently on the basis that it was not desirable to allow a juror who is unfamiliar with the prior deliberations to suddenly join the group and participate in the voting without the benefit of earlier group discussion.[68]

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[66] *United States v Timothy James McVeigh*, 153 F.3d 1166 (1998), cert. den. 1999 US lexis 1780
[67] Federal Rules of Criminal Procedure, Title VI. Trial, USCS Fed Rules Crim. Proc. Rule 24
[68] *US v Lamb*, 529 F. 2d 1153 (9th Cir. 1975); and see my discussion of this point in Part VII "D", *infra*

The evidence in the Oklahoma City bombing case was horrific. The Murrah Building was destroyed by a 3000 to 6000 pound bomb composed of an ammonium nitrate-based explosive carried inside a rented truck. In the fall of 1994, McVeigh and Nichols sought, bought and stole all of the materials needed to construct the bomb. They then rented a number of storage lockers in Kansas where they stored the bomb components. During the guilt phase of the trial, which encompassed 23 days of testimony, the evidence demonstrated that the bomb had killed 163 people in the building and 5 people outside. Fifteen children in a daycare centre, visible from the front of the building, and four children visiting the building, were included among the victims. Eight federal law enforcement officials also lost their lives. The explosion was felt and heard six miles away. McVeigh later said that he wanted to cause a general uprising in America, and that the bombing would occur on the anniversary of the end of the Waco siege. McVeigh rationalized the inevitable loss of life by concluding that anyone who worked in the federal building was guilty by association with those responsible for Waco.[69]

The effect of the bombing on the city and the United States was immense. The bomb injured over 800 people and destroyed or damaged more than 300 buildings in the surrounding area, leaving several hundred people homeless and shutting offices in downtown Oklahoma City. Over 12,000 people participated in relief and rescue operations in the days following the blast, many of whom developed post-traumatic stress disorder as a result.

The national focus climaxed on April 23, 1995 when President Bill Clinton spoke in Oklahoma City. He criticized radio talk show hosts for alleging that federal officials were acting illegally. Schools across the country were dismissed early and ordered closed in the wake of the bombing. The fact that 19 of the victims had been children, most of them in the building's daycare centre, was seized upon by the national media.

Until the September 11, 2001 attacks, the Oklahoma City bombing was the worst act of terrorism within US borders. It was the largest criminal case in US history. FBI agents conducted 28,000 interviews, collected 3.5 tons of evidence and almost one billion pieces of information on the case.

Timothy McVeigh was sentenced to death for the bombing after being convicted of murdering federal law enforcement officials, amongst other offences. He was executed by lethal injection at a US penitentiary on June 11, 2001. Terry Nichols was convicted of 160 counts of first degree murder plus other felony charges, but avoided the death penalty because of a jury deadlock. He was sentenced to life without parole by Judge Steven Taylor.

6. The Lockerbie Disaster

On December 21, 1988 Pan Am Flight 103, originating in Frankfurt, West Germany, made a routine stop at Heathrow International Airport in London to take on more

[69] *United States v Timothy James McVeigh*, supra at page 1177

passengers destined for Kennedy Airport in New York. Thirty-nine minutes after departure from Heathrow, the plane exploded over the small Scottish town of Lockerbie.[70] In a matter of minutes, 243 passengers from 21 countries, 16 crew members and 11 towns-people died. Exploding aviation fuel threw a 300-foot fireball skyward that left a crater on the earth 20 feet deep, and covered a vast area of the Scottish countryside with wreckage and human body parts.[71] Much of the town of Lockerbie was destroyed. The explosion and resulting crash remains Britain's largest mass murder.

The ensuing criminal investigation was massive. More than 4 million pieces of wreckage were spread over an area spanning 845 square miles of northern England and southern Scotland. The scientific investigation involved 22 separate organizations, and the police inquiry involved 70 law enforcement agencies in four continents. Fifteen thousand people were interviewed in 20 counties, 35,000 photographs were taken, and 180,000 pieces of evidence were gathered, secured and stored for use in court.[72] After two years of painstaking investigation, a picture began to emerge.

A fragment of a circuit board, smaller than a fingernail, was discovered in debris scattered across the county of Cumbria in the northwest region in England.[73] Prosecutors maintained that this fragment came from the electronics that detonated the bomb, hidden inside a Toshiba radio in the cargo hold. Other evidence pointed to two alleged Libyan government security agents who had worked for Libyan Airlines in Malta. On November 13, 1991 a Scottish judge issued a warrant for the arrest of Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah, and the next day a US Grand Jury in Washington, D.C. handed down an indictment for murder against both.[74]

The United States and the United Kingdom both demanded that Libya immediately surrender both accused for trial, even though neither country had an extradition treaty with Libya. Citing the "lynch mob atmosphere" prevailing in the United States and United Kingdom concerning this case, Libya refused to comply with the demands for surrender.[75] In the weeks that followed, Libya showed no willingness to make the accused available for trial or to acknowledge its involvement in the terrorist acts. The UN Security Council subsequently passed two resolutions tending to place pressure on Libya: surrender the suspects, accept responsibility for Libyan officials, disclose all it knew of

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[70] There is considerable literature on the terrible tragedy that occurred at Lockerbie. Some of the more helpful commentaries are: Caryn L. Daum, "The Great Compromise: Where to Convene the Trial of the Suspects Implicated in the Flight Pan Am 103 bombing over Lockerbie, Scotland", 23 Suffolk Transnat'l L. Rev. 131 (1999); The Lockerbie Trial and Appeal judgments can be found on the internet: http://www.scotcourts.gov.uk/library/lockerbie/index.asp; Michael P. Scharf, "Terrorism on Trial: The Lockerbie Criminal Proceedings", ILSA J. Int'l and Comp. L. 355 (2000); Robert Black, "Lockerbie: A Satisfactory Process but a Flawed Result", 36 Case W. Res. J. Int'l L. 443 (2004); David R. Andrews, "A Thorn on the Tulip—A Scottish Trial in the Netherlands: The Story Behind the Lockerbie Trial", 36 Case W. Res. J. Int'l L. 307 (2004); Julian B. Knowles, "The Lockerbie Judgments: A Short Analysis", 36 Case W. Res. J. Int'l L. 473 (2004)

[71] *Ibid*

[72] David R. Andrews, *supra*, at page 308

[73] Michael P. Scharf, *supra*, at page 359; Robert Black, *supra*, at page 444

[74] David R. Andrews, *supra*, at page 308

[75] Michael P. Sharf, supra, at page 356

the crimes, and pay appropriate compensation. The resolutions also provided for significant economic sanctions against Libya.[76]

The case went into gridlock. In November 1994, President Nelson Mandela offered South Africa as a neutral venue for the trial, but this was rejected by former British Prime Minister John Major. Mandela's offer was repeated to Major's successor, Tony Blair, twice in 1997. On the second occasion, Mandela is alleged to have warned that "no one nation should be complainant, prosecutor and judge" in the Lockerbie case.[77]

A compromise was eventually worked out as a result of diplomatic efforts undertaken by the United Nations, United States, United Kingdom and Libya. Under this arrangement, the Libyans would be tried in a neutral venue, the Netherlands, before a panel of Scottish judges (with no jury) under Scots criminal law and procedure. This would be the first Scottish criminal trial involving serious charges that proceeded without a jury.[78] Under Scottish law, special legislation was necessary to permit a Scottish court to sit outside Scotland. The necessary legislation provided that, for the purpose of conducting criminal proceedings against the two accused, the Scottish High Court of Judiciary could sit in the Netherlands in accordance with its provisions[79]; I will deal with the specifics of this extraordinary instrument, below.[80] This arrangement was engineered by legal academic Professor Robert Black of Edinburgh University, supported by the then Foreign Secretary, Robin Cook.[81]

At an early stage, it was recognized that Scottish rules of evidence and procedure that govern the trial differed in several material respects from the rules in place in the United States. Under Scottish rules, for example, probable cause need not be confirmed at a preliminary hearing prior to trial. As well, it is a peculiarity of the Scottish system that no one may be convicted of a crime without corroboration. Under Scottish criminal procedure, out of court statements may be introduced when a witness is dead, has disappeared or refuses to appear at trial. Perhaps the greatest difference includes the range of verdicts that can be rendered: "proven", "not proven", and "not guilty". If convicted, defendants in Scotland cannot be exposed to the death penalty and Scottish prosecutors can appeal an acquittal on a legal point.[82]

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[76] David R. Andrews, supra, at page 810

[77] Pan Am Flight 103 Bombing Trial, http://www.en.wikipedia.org/wiki/pan_am_flight_103_bombing_trial (Note: I have not been able to find any other source attributing this quotation to Mandela); Generally, see "Strategic Moral Diplomacy: Mandela, Qaddafi, and the Lockerbie Negotiations" by Lyn Boyd-Judson, Volume 1 Foreign Policy Analysis (March 2005)

[78] "Scots Law Under the Microscope" by Professor John P. Grant, School of Law, University of Glasgow, *The Journal*, May 1999, page 18: http://www.journalonline.co.uk/article/1001112.aspx

[79] Julian B. Knowles, *supra*, at page 473

[80] Statutory Instrument 1998 no. 2251, "The High Court of Justiciary (Proceedings in the Netherlands) (United Nations) order 1998

[81] "Pan Am Flight 103 Bombing Trial", *supra*, at page 2; Robert Black, *supra* at "FN d1"; and see "Scots Law Under the Microscope", *supra*

[82] Michael P. Scharf, "Terrorism on Trial: The Lockerbie Criminal Proceedings", 6 ILSA J. Int'l and Comp. L. 355 (2000)

It is important to note some of the structures that were put in place for the Lockerbie trial. Rather than being heard by a regular 15-member Scottish jury, the case was tried before a panel of 3 judges. There are differing versions on how this came about. Michael P. Scharf, a Professor of Law and Director of the Centre for International Law and Policy and former Attorney-Advisor for United Nations affairs, has written that the case was heard by a panel of judges rather than a jury "at the request of the defence".[83] David R. Andrews, who in his capacity as Legal Advisor to the US Department of State was an American "insider" in setting up the trial, has written that the Lord Advocate of Scotland was prepared to dispense with the jury on the basis that it would "not be practical to absent a group of Scottish citizens for the better of a year". Andrews continued that aside from opting for a panel of three judges rather than a normal Scottish jury, the Lord Advocate "was adamant that there should be no divergence from Scots criminal law and procedure. This required legislation in the form of an "Order in Council" that was prepared by the Lord Advocate without requiring a vote by Parliament.[84]

Under the High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998 (the so-called Order in Council), the criminal proceedings against Al-Megrahi and Fhimah were specifically to be conducted in accordance with the law relating to proceedings on indictment before the High Court of Justiciary in Scotland.[85] The Lord Justice Clerk was required to appoint three judges to constitute a court, and was further required to nominate one of them to preside. Questions of law were to be determined on a majority vote. At the conclusion of the case, the verdict was to be determined on the basis of a unanimous or majority decision, and was required to be delivered in court by the presiding judge.[86]

The Lord Justice Clerk was also required to appoint an "additional judge" to sit with the court. That judge could participate in all of their deliberations, but could not vote in any decision which was required to be taken. In the event that one of the originally appointed judges died or was absent, the additional judge would assume the functions of the deceased or absent judge.[87] Any appeal against the verdict could be heard either in the Netherlands or in Scotland, and would be heard by five Scottish judges.[88] An explanatory note at the conclusion of this order, noted *not* to be part of the order, said this: "This order, made under *The United Nations Act* 1946 pursuant to a resolution of the Security Council of the United Nations.[89]

I have dealt with the background to the Lockerbie case in considerable detail for a couple of reasons. First, the obstacles to even getting the case going were immense. Second, as I will be noting later on, there is a sense amongst some scholars and other involved in the case that trial in an neutral third party country should generally *not* be seen as a viable option in terrorist cases, and should essentially be seen as a "one-off". Finally, the

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[83] Michael P. Scharf, *supra*, at page 358
[84] David R. Andrews, *supra*, at page 313; and see "Scots Law Under the Microscope", *supra*
[85] Statutory Instrument, *supra*, par. 3
[86] *Ibid*
[87] *Ibid* at par. 7
[88] *Ibid* at par. 14
[89] *Ibid*

decision to dispense with a jury did not flow from issues of intimidation or the prospects of empanelling a partisan jury, as in the case of the Diplock courts; rather, the third party venue was an outgrowth of the reality that the trial was being held thousands of miles away from where the offence had occurred.

The trial commenced on the 3rd of May, 2000 before Lords Sutherland, Coulsfield and McLean. On January 31, 2001, after 130 court days, the court returned a unanimous verdict of guilty of murder in respect of the first accused, Al-Megrahi, and a unanimous verdict of not guilty of murder in respect of the second accused, Fhimah. Al-Megrahi was sentenced to life imprisonment, with a recommendation that he serve at least 20 years.[90] It is interesting to note, as well, that a number of websites provided streaming video live, and that the proceedings were broadcast live in both English and Arabic over the internet by the BBC.[91]

An appeal against conviction was immediately brought by Al-Megrahi. The appeal court consisted of five Lords Commissioners of Justiciary who sat in the Scottish court in the Netherlands. It was led by Lord Cullen, a distinguished jurist who was Scotland's most senior judge. The hearing extended from January 23 to February 14, 2002. The court unanimously dismissed the appeal on March 14, 2002 in a judgment that exceeds 200 pages.[92]

For reasons that are not entirely clear, an appeal against the sentence imposed was severed away from the appeal against conviction, and was still pending at the time of the writing of this essay.[93]

In a news release issued after the appeal court dismissed the appeal against conviction, Lord Advocate Colin Boyd said, amongst other things, "Today's decision has brought to an end the judicial proceedings at the Scottish court in the Netherlands". After thanking all of the agencies of the United States government that assisted Scotland as well as the Scottish police, the Scottish court service, the Scottish prison service and the Dutch government, the Lord Advocate said that: "the Scottish justice system has been placed under unprecedented international scrutiny over the past two years. Scottish justice has stood up well to that scrutiny".

With the passage of time, the Lord Advocate's tone of optimism and praise has been dampened somewhat. The verdicts reached by both the trial courts and the court of appeal have been severely criticized, and the proceedings were not in fact brought to a conclusion. On the 23rd of September, 2003 the Scottish Criminal Cases Review Commission received an application from solicitors acting on behalf of Al-Magrahi requesting that the Commission review his conviction. Under Scots' law, if the Criminal

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[90] The full transcript of the judgment at trial (and on appeal) can be found at: http://www.scotscourts.gov.uk/library/lockerbie/index/asp

[91] *Ibid*

[92] The appeal judgment can be found on the internet: see footnote 90, *supra*. For an interesting critique on this judgment, see Robert Black, *supra*, at page 447

[93] BBC News, June 8, 2006: http://www.news.bbc.co.uk/1/hi/scotland/5061170.stm

Cases Review Commission believes, after thorough investigation, that a miscarriage of justice may have occurred, and that it is in the interests of justice that a reference should be made to the courts, it may refer the case to the High Court. Once referred, the High Court determines the case as if it were a normal appeal.[94] Given the enormity of the trial and appeal proceedings, the Commission sought and received significant resources to conduct the investigation.

I do not propose to undertake an analysis of the results of the case, nor to analyze the various commentaries that have been published. Suffice it to say that the critics have been quite vocal and the criticisms searing. Robert Black, Professor of Scots law at Edinburgh Law School since 1981 who, by his own admission, "is sometimes described as the architect of the scheme whereby a Scottish court sat in the Netherlands to try the Libyans accused of the Lockerbie bombing" contended and "will continue to maintain that a shameful miscarriage of justice has been perpetrated and that the Scottish criminal justice system has been gravely sullied".[95] In 2005 a former Scottish Police Chief signed a statement claiming that key evidence in the Lockerbie trial had been fabricated. The officer, now retired, contended that the tiny fragment of circuit board crucial in convicting Al-Megrahi was planted by US agents.[96]

Political intervention took place in late 2005. Lord Fraser of Carmyllie, the former Lord Advocate who issued the arrest warrant for the sole Libyan convicted of the Lockerbie bombing, cast doubt on the reliability of the main witness in the trial. The former conservative minister described Tony Gauci, whose testimony was central in the case, as "not quite the full shilling" and "an apple short of a picnic". While making clear that this does not mean that he believes Al-Megrahi was innocent, Fraser said that he should be free to leave Scotland to serve the remainder of his sentence in Libya.[97] Following Fraser's comments on October 23, 2005 *The Times*, in a lead editorial, took the position that the case ought to be re-examined carefully, to determine whether there is strong enough evidence to reopen the case.[98]

During the proceedings, the UN Secretary-General appointed Professor H. Koechler as an International UN Observer at the Lockerbie trial. He subsequently characterized the proceedings as a classic "show-trial" reminiscent of the Cold War era, and has described the result as "a spectacular miscarriage of justice".[99]

On June 28, 2007 the Scottish Criminal Cases Review Commission delivered its decision on the application filed by Al-Megrahi to re-open his case. It allowed the application on

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[94] Scottish Criminal Cases Review Commission: News Release found at: http://www.sccrc.org.uk/news
[95] Robert Black, *supra*, at page 451
[96] "Police Chief- Lockerbie Evidence was Faked", http://www.news.scotsman.com/index.cfm?id=1855852005 (August 28, 2005, *Scotland on Sunday* by Marcello Mega)
[97] http://www.timesonline.co.uk/article/0,,2090-1839307,00.html
[98] "It is time to look again at Lockerbie", by Magnus Linklater, *The Times*, October 26, 2005: http://www.timesonline.co.uk/article/0,,1062-1843063,00.html
[99] I.P.O. Information Service, statement of Dr. Hans Koechler, International Observer at the Lockerbie trial, issued on October 14, 2005: http://www.i-p-o.org/nr-lockerbie-14oct05.htm

a very limited ground – that the evidence did not support the finding of key facts in the case, and that therefore a miscarriage of justice may have occurred, and in the interests of justice the case should be referred back to the High Court. The Commission, however, rejected the "conspiracy theories" that had been circling around the case for years. On that point, the Commission said:[100]

> Many of the press reports published during the review have simply involved a repetition of certain of the original defence submissions received by the Commission at the beginning of its review, and which have formed the basis of a large part of the Commission's investigation. As indicated in this release, the Commission has concluded after full and proper investigation that these submissions are unsubstantiated and without merit. In particular the Commission has found no basis for concluding that evidence in the case was fabricated by the police, the Crown, forensic scientists or any other representatives of official bodies or government agencies.

Are there any lessons that can be learned as a result of the Lockerbie trial? David R. Andrews, the US "insider" who was intimately involved in the case, has offered the following interesting observations:[101]

a) measured against the goal of conducting a Scottish trial in a third country, the effort was a stunning success;

b) the cost, however, was immense—the trial alone cost more than $150,000,000 and involved virtually every level in the UK, US and Dutch governments;

c) for some of the victims' families, it brought closure although for some it brought further anguish, as the real culprit, Muammar Gaddafi, was not held accountable;

d) the initiative provided a means for Libya to take steps to make amends for its terrorist behaviour: in the aftermath of the trial, Libya paid each family approximately $10,000,000;

e) a third country trial is not a model that ought to be considered lightly, if ever again. "The process of setting up such a specialized tribunal is cumbersome and enormously time consuming. Given the political and practical situation we faced with Libya this solution was appropriate, and it worked. But it is hard to imagine a situation in the future that would lend itself to a similar solution".

Finally, and most importantly, resort to special structures or proceedings made the case particularly vulnerable to unfair (and unfounded) criticism that it was a "show trial" cobbled together on the basis of a political agenda. Distressingly, this argument can, it

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[100] News Release, "Abdelbaset Ali Mohmed Al Megrahi", issued by the Scottish Criminal Cases Review Commission on June28, 2007, at par. 7.2

[101] David R. Andrews, *supra* at page 318

seems, be advanced despite the eminence and independence of the jurists hearing the case.

7. The Air India Bombing

In the early morning hours of June 23, 1985, Air India flight 182, carrying 329 people, was destroyed mid-flight by a bomb located in its rear cargo hold. Remnants of the plane and bodies of some of the victims were recovered from the Atlantic Ocean off the coast of Ireland. There were no survivors.[102]

As a result of a multinational police investigation that followed, it was determined that two suitcases had been checked at the Vancouver International Airport on the morning of June 22, 1985 and loaded onto two aircraft without any accompanying passengers.

In October, 2000 Ripudaman Singh Malik and Ajaib Singh Bagri were charged with a series of offences under the *Criminal Code* alleging their involvement in a conspiracy to commit murder and place bombs on an aircraft. The trial commenced in April, 2003 and continued for approximately 16 months involving approximately 230 court days. In his reasons for judgment, the trial judge made it clear that despite the length and complexity of the case, as well as the passage of time, "there can be no lowering of the standard of proof from that required in any criminal trial (proof beyond a reasonable doubt)".

The trial judge had a clear understanding of the horrendous nature of the crimes involved. He said this:[103]

> Words are incapable of adequately conveying the senseless horror of these crimes. These hundreds of men, women and children were entirely innocent victims of a diabolical act of terrorism unparalleled until recently in aviation history and finding its routes in fanaticism at its basest and most inhumane level.

Two others were implicated in the same crime. Inderjit Singh Reyat was convicted after trial for two counts of manslaughter with respect to a parallel bombing incident in Japan.[104] Talwinder Singh Parmar, an unindicted co-conspirator in the case, was believed to be the leader in the conspiracy to commit the crimes. He was killed in India on October 14, 1992.[105] At the conclusion of the trial, both Malik and Bagri were acquitted on the basis that the Crown had failed to establish the crimes beyond a reasonable doubt.

A couple of points ought to be underscored at this stage. First, the case proceeded on the basis of the normal criminal laws and procedure, in the usual courts having jurisdiction. Even with the admissions of fact, the trial lasted almost one and a half years. Without the admissions, it was widely believed that the trial would have lasted approximately three

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[102] The account of the facts in this case is drawn heavily from the decision of Josephson, J. reported at R v Malik and Bagri, 2005 BCSC 350 (Canlii)
[103] *Ibid* at par. 1254
[104] *Ibid* at par. 1277
[105] *Ibid* at par. 1256 and 1275

years. While the trial proceeded before a judge sitting alone, it was open to the accused to have elected trial by judge and jury. Whether a jury trial of such magnitude would have been fair for either the Crown or the defence is a matter of much debate.

At the conclusion of the trial, the lead prosecutor and one of the leading defence lawyers joined forces to discuss the case, with emphasis on the lessons learned from a complex mega-trial.

Robert Wright, Q.C. and Michael Code presented a lengthy document entitled "Air India Trial: Lessons Learned" to the 2005 Justice Summit at Toronto, Ontario on the 22nd of November, 2005. The document is unparalleled in Canada, and is extremely helpful in understanding the challenges posed by a terrorist mega-trial. Messrs Wright and Code are to be commended for this extraordinary document.

This "Lessons Learned" Report is divided into two basic parts. First, prosecutorial administration and management issues. Second, litigation issues.

The prosecutorial administration and management issues concerned the following: project management, personnel, facilities, communications, Crown disclosure to defence, victim services, witness services, technology, security and external relations. I do not propose to deal with this part at any great length, but wish to make a couple of observations. First, the Report underscores the importance of gaining prosecutorial support at the highest levels "for a special administrative management approach to a mega-case". A second lesson learned is this: "use a project management approach to managing a mega-case, including a project manager, project team, project management planning, budgeting, risk assessment, implementation, monitoring and evaluation."

The "litigation issues" portion of this Report is more directly related to the issues under consideration in this paper. Wright/ Code immediately identified an issue that is critical in terrorist mega-trials: should it proceed before a jury, or a judge alone. The authors noted that "there are considerable advantages to negotiating a re-election to trial by judge alone", and recommended that the Chief Justice of the court be drawn into the pre-trial discussions. The authors recommend a re-election on the basis that the selection of the trial judge emerge as a consensus issue, not simply the result of the direction of the Chief Justice. The authors note that the mutual advantages to both the Crown and the defence, in negotiating a re-election to trial by judge alone, can provide the beginnings to a more cohesive relationship between the parties:

> The intangible or long term advantages to the administration of justice are that the Crown and the defence get used to working together from the beginning, in a collaborative fashion, in trying to achieve a successful trial. Making the mega-trial work for both sides becomes a shared goal and both parties take ownership of their chosen judge.
>
> Second, the lead prosecutor must have a resilient, pragmatic and flexible personality. The authors note that there will inevitably be disagreements in the

> course of a long trial, and some of those disagreements will be significant. However, the lead prosecutor must remain above these adversarial disputes and continually initiate discussions that lead to resolution of the many issues on which the parties should be able to agree. *If every little point has to be fought out in trial, the "mega-trial" will never end.* (emp. added)

From a purely practical standpoint, the authors emphasize that the level of resources available inevitably affects the litigation behaviour of Crown counsel and defence counsel, so a delicate balance must be attained between too little and too much time and money. The following is sage advice:

> When Crown counsel have no other responsibilities and have dedicated police officers available to investigate the most minor and insignificant points, the trial can be delayed for no good purpose. Similarly, defence counsel who are guaranteed generous levels of "cash for life" from the public purse will not be eager to return to the challenges of their ordinary practice where retainers are almost always limited. In conclusion, a delicate balance is required for too little resources for the Crown and the defence and too much resources.

Further advice includes:

a) the importance of admissions, and their relationship the Crown's approach to disclosure;

b) the importance of assigning one person on both the Crown and defence teams to deal with the issue of disclosure;

c) electronic disclosure must play a substantial role in the disclosure process;

d) creative solutions must be found to the problem of withheld material—including, for instance, permitting defence counsel an opportunity to review the withheld material or a summary of it upon the giving of an undertaking of confidentiality

The Air India trial was clearly blessed with competent and reasonable counsel who were prepared to work towards a reasonable solution within an adversarial framework. That will not always be the case. The Air India experience places into sharp relief a number of difficult and critical issues:

- Will some terrorist mega-trials reach the point of being unmanageable, and incapable of leading to a fair result?

- How much should we expect of jurors? Can we, instance, expect them to set their lives aside, and dedicate themselves entirely to a trial for three years? How do we guard against the prospect that health issues on the part of jurors, the judge or counsel could effectively derail a terrorist mega-trial?

- In a multi-year complex trial, what resources and supports can be provided to jurors to ensure that they can take all of the evidence into account when rendering a verdict?

- What legal and practical framework is required to ensure that a multi-year trial will actually *reach a verdict*, particularly trials involving a judge and jury?

8. Gang Mega-trials

Terrorist trials are in many ways quite unlike gang mega-trials, but there are some similarities. For that reason, I thought it useful to quickly review some of the more recent gang mega-trials in Canada. Some have been successful; others have been spectacular and highly visible failures.

a) The Manitoba Warriors Case

One of the first gang mega-trials was *R v Pangman et al*, generally referred to as the "Manitoba Warriors case".[106] On November 4, 1998 35 accused were directly indicted following a police undercover operation called "Operation Northern Snow". The accused were charged with over 100 counts of trafficking in cocaine, conspiracy to traffic and *Criminal Code* offences including criminal organization counts. In essence, the Crown alleged that the accused formed the backbone to a well-established Aboriginal street gang in Winnipeg that controlled much of the cocaine traffic in the city. The case was jointly prosecuted by a team of federal and provincial prosecutors,[107] and, at various stages, ten defence counsel were at the table. No facilities existed to hear such a case, and the province was forced to build a new courthouse to allow the case to proceed. The trial was expected to last two years before a judge and jury. The case was a logistical nightmare.

The case became derailed for two basic reasons. First, the defence team immediately established a "motions committee" and for the next 15 months brought a series of pre-trial motions designed to defeat the prosecution on issues quite apart from the merits of the case. One motion, to sever the accused into more manageable trials, was successful[108], but the rest of the motions were dismissed.

The second reason for derailment involved the politicization of the case. On national television, an opposition (Aboriginal) Manitoba MLA contended the charges were racially motivated, and labelled the newly-minted court facility an "Indian Courthouse". Within days of the airing of the program, a general election was held in the province, government was defeated, the opposition formed the new government, and the MLA in question found himself in Cabinet. The lead prosecutor shot back, threatening to sue the new Cabinet Minister for defamation. A cloud floated over the case. Once again, political

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[106] There are many reported decisions on this case, but the two leading ones are *R v Pangman* (2000), 144 Man. R. (2d) 204 (C.A.); *R v Pangman* (2001), 154 CCC (3d) 193 (Man.C.A.).
[107] Under a direct indictment signed by both the Deputy Attorney General of Canada and the Deputy Attorney General of Manitoba.
[108] *R v Pangman* (2000), 149 Man. R. (2d) 68 (Q.B.)

intervention in a case already choked with public controversy made fair trial requirements even more difficult to meet, especially before a jury.

Once the motions were completed, and the new courthouse was ready to hear the case, a few of the accused broke ranks and entered pleas of guilty to some of the counts. They were at the lower end of the criminal organization structure, and, with the benefit of pre-sentence detention credits, their sentences expired shortly after disposing of the charges. The defence strategy quickly shifted, and the rest of the accused entered guilty pleas and were sentenced to imprisonment for periods that ranged from six to nine years.[109]

The media and the public saw the case as a mega-trial that failed—despite the fact that 34 of the 35 accused were found or admitted guilt, and went to jail. However, from the public's perception: a new courthouse was constructed specifically for a trial that never happened. The Crown plea-bargained the case away including the criminal organization counts, and there was a lingering odour that the charges had been politically fuelled.[110] Total cost of the case was 8.9 million dollars, of which 3.2 million was set aside for legal aid to represent the accused at a trial that never proceeded.

b) The Zig Zag Conspiracy Case

The Zig Zag Crew were (and are) a puppet gang of the Hells Angels in Manitoba. They are street level criminals involved in extortion, gun-running and drug debt collection.

In May, 2002 police laid an information charging eight members of the Zig Zag Crew with 60 counts under the *Criminal Code*, including conspiracy to murder. Essentially, the case concerned a gang war on the streets of Winnipeg two years earlier. To avoid the prospects of a mega-trial, the Crown endeavoured to reduce the scope of the case by reducing the number of accused to five (from 8) and the number of counts to 36 (from 60). The accused were held in custody pending trial, either because no application was made or because bail was refused. The case for the Crown was based largely on the proposed testimony of a police informant, together with tens of thousands of intercepted private communications.

During the next two years, the case went into gridlock. Defence counsel made repeated motions on various issues, including their client's purported right to choose private defence lawyers through the provincial legal aid scheme, as well as the lawyer's purported right to charge fees well in excess of the legal aid tariff. The case provoked a legal aid crisis in the province, with most lawyers in Manitoba withdrawing their services until more money was provided by the province.

Crown disclosure proved difficult. It was provided in pieces once received from the police, and continued for two years. Crown counsel advised of her intention to request a

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[109] *R v Pangman* (2001) 154 CCC (3d) 193 (Man.C.A.). For a critique of the case, see Don Stuart, *Canadian Criminal Law*, 4th ed (Toronto : Carswell, 2001), at p. 649

[110] *Ibid* at par. 6

direct indictment, but that request was not made for many months so the case was simply adjourned from time to time in the Provincial Court.

The case started to unravel in early 2004. The evidentiary collapse of the case started to crystallize in the spring of 2004, when the Crown's star witness, who was not in witness protection, started to withdraw his cooperation, He said he would change his testimony if certain demands he was making were not met. After a review of the case, the Crown concluded that the prosecution could not be sustained, and proceedings were stayed in June, 2004. The accused, who had been held in custody awaiting their trial for over two years, were immediately released from jail to a throng of supporters, media photographers and a stretch limo. The case did not come close to reaching a verdict. Total costs of the case were in the region of 2.5 to 3 million dollars, of which 1.5 million dollar had been earmarked for legal aid representation at a trial that, once again, did not occur.

c) Chan Mega-Trial in Alberta

In 2003 a drug conspiracy mega-trial of immense proportions collapsed under its own weight in Alberta.[111] On September 8, 2003 Justice Sulyma stayed proceedings before a jury was even empanelled on the basis that the police and Crown had failed to understand their disclosure obligations, and as a result late and failed disclosure had prejudiced the accused's right to a fair trial[112]. Although the indictment was not tried, and no verdict was reached, the cost to the pubic was huge: $20,000,000 in defence fees, and $2,000,000 to build a new high security courthouse.[113]

The Crown had elected to frame the case as a mega-trial from the outset: 36 persons were charged on a single information with a total of 21 drug related offences. A new information was laid charging 37 individuals with a total of 34 offences. Two months later, a new information was sworn against the 37 accused, charging them with a total of 41 offences. A direct indictment against 35 of the accused was then preferred, charging them with 39 counts. Guilty pleas, stays of proceedings and a severance order reduced the number of accused to 11[114].

Disclosure to the defence proved to be a daunting exercise. Given the volume of disclosure, a decision was taken early to provide disclosure in electronic format. A 39 CD set was prepared. However, on June 8, 2000 Judge Maher ordered that disclosure be provided in hard copy. The Police Disclosure Unit had difficulty keeping up with the volume of copies to be made and as of April 2003, 153,651 pages of disclosure had been entered into the software system. It was estimated that the hard copy disclosure would be in the neighbourhood of 180,000 pages.

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[111] The case generated many rulings, including the following: *R v Chan* (2001) 160 CCC (3d) 207 (ABQB); *R v Chan* (2002) 164 CCC (3d) 24 (ABQB); *R v Chan* (2002) 168 CCC (3d) 396 (ABQB); *R v Chan* (2002) 169 CCC (3d) 419 (ABQB); *R v Chan* (2003) 172 CCC (3d) 349 (ABQB); *R v Chan* (2003) ABQB 759

[112] *R v Chan*, 2003 ABQB 759

[113] Globe and Mail, September 10, 2003

[114] *R v Chan, supra*

After the commencement of the trial, 36 boxes of material were found at RCMP Headquarters and two further boxes were found in one of the investigator's basement. This material started to be disclosed well after the start of the trial, and continued as of the date of the motion[115].

Noting that the accused had been imprisoned pending trial for around a year, and that the discovery of the huge amount of material almost a year after the proceedings had begun was "nothing short of shocking",[116] a stay was entered in respect of each of the accused on the basis that their rights under section 11(b) of the *Charter of Rights and Freedoms* to be tried within a reasonable time had been breached. Media coverage at the time forecasted the demise of mega-trials, and one of the defence lawyers, a former Crown Attorney, said: "I've said from the beginning that too many people were charged with too many charges, and put all together it becomes unwieldy".[117]

d) Lessons Learned from the Gang Mega-Trials

There are at least four key lessons to be learned from these and other recent gang mega-trials.

First, and most importantly, the Crown bears responsibility for framing the case in such a way that it is manageable and can reasonably be considered by a judge and jury. In general, there should be no more than eight accused or so, fewer if possible. This may mean identifying the principal players, and proceeding against them first.[118] This may also mean that separate trials may be required for lesser players. Equally important, the number of counts should be reasonable in number, and describe the core allegations of the Crown. Where possible, substantive and conspiracy counts ought not to be mixed on the same indictment to avoid having to instruct the jury that the three-pronged test in *Carter* concerning the co-conspirator exception to the hearsay rule applies to conspiracy counts, but not necessarily to substantive charges such as drug trafficking.[119] Finally, it is not generally in the public interest to frame a case in such a way that its size, length and complexity outstrips the court facilities available in the judicial centre where the trial will take place.

Second wherever possible, the disclosure package should be ready or largely ready to be provided to the defence at the time the charges are laid. This can be accomplished more often in cases where the police have been investigating for an extended period of time and can control the timing of the charges. It will be more difficult where a terrorist act occurs, and charges need to be laid immediately.

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[115] *Ibid* at par. 612, 619
[116] *Ibid* at par. 636
[117] Globe and Mail, *supra*, quoting Hersh Wolch
[118] There is no obligation to proceed against every person against whom there is evidence : R v Catagas [1978] 1 W.W.R. 282 (Man.C.A.) at 287
[119] *R v Carter* (1982), 67 CCC (2d) 568 (S.C.C.); *R v Mapara* (2005), 195 CCC (3d) 225 (S.C.C.)

Third, the Government of Canada ought to consider amending the *Criminal Code* to empower the Crown to provide disclosure in an electronic format, subject to judicial oversight. Surely as we move well into the 21st century familiarity with computers and software forms a part of the core competency of a practicing lawyer.[120]

Finally, the gang mega-trials illustrate the critical importance of judicially controlled case management, and the need for new powers in the *Criminal Code* to enforce directions from the trial court. I will deal with this point in a bit more detail in Part VII, "Terrorist Trials in the Future—Reform Options, Some Non-Structural Considerations", as well as in Part VIII, "Summary and Concluding Observations".

9. Recent Cases

There are a significant number of terrorist cases that have arisen quite recently which are still pending before the courts. Some arose during preparation of this paper. I will review them quite briefly, with particular emphasis on the structural aspects of the proceedings—where that is known. If nothing else, they provide a flavour for 21st century terrorist cases, and the new challenges posed by them.

a) Momin Khawaja: The Alleged Canadian Detonator

In March 2004, Canadian and UK police arrested eight men in connection with an alleged bomb conspiracy. The targets included Europe's largest shopping mall, the Bluewater Centre east of London, as well as a popular London nightclub and British trains.[121] It was alleged that the defendants planned bombings in Britain in retaliation for British support of US policy. The prosecution contended that the defendants were fully prepared and had acquired all of the necessary materials to execute their plans. Police had seized over 600 kilograms of ammonium nitrate fertilizer from a west London storage depot—the same bombing ingredients used in the Oklahoma bombing.[122] Seven of those charged were tried in the Old Bailey for planning the bombing with two unindicted co-conspirators—one in Canada, the other in the United States. The Canadian, Mohamed Momin Khawaja, is alleged to have constructed 30 remote-controlled detonators, with a range of around two kilometres, to trigger the bombs around the London area.[123] While not charged in the

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[120] Of interest, the Alberta Court of Appeal has issued a Notice to the Profession with respect to electronic appeals in that court. Facta and supporting materials where the trial was ten days or longer must now be filed in an electronic format unless otherwise ordered. In shorter cases, e-filing is available with leave of the Court. Electronic versions of facta must be hyperlinked to authorities and the appeal book. https://www.albertacourts.ca/ca/efiling/

[121] The Fifth Estate, "The Canadian", http://www.cbc.ca/fifth/thecanadian.html ("The Fifth Estate"); "Ottawa Man Built 30 Detonators, UK Terror Trial Hears", Ian McLeod and Sarah Knapton, CanWest News Service, Ottawa Citizen, Friday, July 21, 2006 ("Ottawa Citizen"); "Accused Ottawa Terrorist Reveres bin Laden, UK Court Hears", Ian McLeod et al, CanWest News Service, Thursday, July 20, 2006 ("Canada Com"); "Guns, Jihad Books Found in Ottawa Home of Accused Terrorist", Ian McLeod et al, CanWest News Service, Ottawa Citizen, Wednesday, July 19, 2006 ("Ottawa Citizen 2"); "Northeast Intelligence Network, UK Terror Suspects", March 25, 2006 ("Northeast Intelligence Network")

[122] "Ottawa Citizen", *supra*; "Northeast Intelligence Network", *supra*

[123] "Ottawa Citizen", *supra*

UK, Khawaja is the first person in Canada to be charged under the new *Anti-terrorism Act* proclaimed in 2001.[124]

All three countries involved in this case laid charges under their normal domestic criminal laws applicable to everyone, and have proceeded in the normal criminal courts. The UK trial, described as the largest since 9/11[125] commenced before a judge and a twelve- member jury in February, 2006, and resulted in a finding of guilt respecting five of the defendants.[126] For the most part, the case for the prosecution consisted of police surveillance, seizures, intercepted e-mail, information found on computer hard drives and the proposed evidence of an unindicted co-conspirator.

The sole Canadian charged has elected trial by judge alone in the Ontario Superior Court of Justice. A pre-trial motion to have certain provisions of the *Anti-Terrorism Act* declared unconstitutional was partially successful, deferring a trial originally scheduled for January, 2007 Interlocutory appeals on various issues by both the Crown and the accused have further delayed the trial, now expected to proceed in the fall of 2007 at the earliest.[127]

b) July 2005 London Bombings

On July 7, 2005 four bombs exploded in rapid succession in London, England, three of them in London Underground trains and one on a double-decker bus.[128] Fifty-six persons were killed, including the four suicide bombers, and around 700 people were injured. A subsequent Home Office report on the attack described it as "an act of indiscriminate terror", which killed or maimed "the old and the young, Britons and non-Britons, Christians, Muslims, Jews, those of other religions and none.[129] It was the deadliest single act of terrorism in the UK since the Lockerbie disaster in 1988, and the deadliest bomb attack in London since the Second World War.[130]

Precisely two weeks later, on July 21, 2005, a number of persons tried—but failed—to set off explosive devices at three London underground stations and one double-decker

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[124] Sections 83.18 and section 83.19 of the *Criminal Code,* S.C. 2001, c.41, s.4; and see "The Fifth Estate", *supra;* and "Ottawa Citizen", *supra*

[125] "Northeast Intelligence Network", *supra*

[126] "Canada Com", *supra*; "Ottawa Citizen 2", *supra; BBC news, "Five get life over UK bomb plot", April 30, 2007*

[127] *R v Khawaja,* (Court File No: 04-G30282); Ottawa Citizen, May 30, 2007

[128] In a subsequent Home Office report on the attack, it was concluded that the three train bombs exploded "almost simultaneously", with the fourth, on the bus, exploding 57 minutes later: "Report of the Official Account of the Bombing in London on 7th July 2005", May 11, 2006 (London: The Stationery Office), available online at: http://www.homeoffice.gov.uk/documents/7-July-report.pdf?view=Binary

[129] *Ibid* at page 4

[130] "Home Office Report", supra; FoxNews.com "Report: Fifth Man Planned to Take Part in London Train Bombings", Sunday, July 23, 2006: http://www.foxnews.com/story/0,2933,205159,00.html ("Fox News"); Guardian Unlimited, "One Year On, A London Bomber Issues a Threat From the Dead", Friday July 7. 2006, The Guardian: http://www.guardian.co.uk/attackonlondon/story/0,,1814654,00.html ("Guardian"); Guardian Unlimited, "Police Anti-terror Efforts at All-time High", Monday, July 3, 2006, The Guardian: http://www.guardian.co.uk/attackonlondon/story/0,,1811828,00.html ("Guardian 2")

bus. The detonators of all four bombs exploded, but none of the main explosives detonated. There were no casualties, and no one was injured.[131]

The resulting police investigation was massive. Over one thousand London detectives were assigned to prevent further attacks. Scotland Yard interviewed 12,500 potential witnesses, seized over 26,000 exhibits including 142 computers, and examined over 6,000 hours of CCTV footage.[132]

In March and May, 2007 a total of 7 persons were arrested and charged with "commissioning, preparing or instigating acts of terrorism" in connection with the July 7th bombings, and 17 were arrested and indicted in connection with the second, failed attempt. [133] The cases are proceeding in the normal courts, and what has been described as a "terrorist trial log jam" has caused the first trial to be deferred from September, 2006 until sometime in 2007. Authorities recently advised that there is "now a record 90 terror suspects awaiting trial in Britain's severely overcrowded prisons".[134]

c) The Ontario Terrorism Arrests

On June 2, 2006 Canadian authorities arrested 17 persons (12 adults and 5 youth) and charged them with a series of terrorist and firearms offences. Police alleged they were supporters of al-Qaeda who had received or provided terrorist training in rural areas of Ontario near Toronto.[135] An 18th defendant was arrested and charged August 3rd, 2006 at his home in Mississauga, Ontario.[136]

Police and Crown authorities have been very careful about the pre-trial information that is being released about the case. Evidently, however, it is alleged that many of the accused had been trained together, and were planning a series of attacks against unspecified targets in southern Ontario.[137] Authorities have excluded the CN Tower and the Toronto Transit Commission as targets, but have not ruled out the Parliament building in Ottawa.[138] Early reports suggest that the group acquired what they believed to be three

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[131] Jurist: Legal News and Research, "UK Police Charge 17th Person for Failed London Bombings", Friday, January 27, 2006: http://www.jurist.law.pitt.edu/paperchase/2006/01/uk-police-charge-17th-person-4.php ("Jurist"); CNN.Com, "UK Police: Latest Bombers Failed", Friday, July 22, 2005: http://www.cnn.com/2005/WORLD/europe/07/21/london.tube/ ("CNN.Com")

[132] "Home Office Report", *supra* at page 26

[133] "Home Office Report", *supra*; Guardian Unlimited, July 3, 2006, *supra*; It should also be observed that on the 1st anniversary of the fatal attack, July 7, 2006, al-Qaeda's Deputy Leader, Ayman al-Zawahiri claimed that two of the suicide bombers had been trained in the manufacture of explosives at al-Qaeda camps: "Guardian", *supra*

[134] "Crisis as Terrorist Trials Hit Log Jam", http://www.timesonline.co.uk/article/0,,2-2392704,00.html

[135] CBC News, "Plot Suspects Appear in Court", June 3, 2006, http://www.cbc.ca/stories/canada/national/2006/06/03/terror-suspects.html

[136] CTV.ca, "Police Charge 18th Terror Suspect in Ontario", August 4, 2006: http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060803/ansad_asari_060803/200...

[137] "CTV.ca", *supra*; Canada.com, "First Adult Terror Suspect Accused of Planning Attacks in Ontario Gets Bail", Canadian Press, July 20, 2006; "Plot Suspects Appear in Court", *supra*

[138] The Australian, "Canada Plot Probe Goes Global", June 7, 2006: http://www.theaustralian.news.com.au/story/0,20867,19387232-2703,00.html

tons of ammonium nitrate during an RCMP sting operation--three times the amount of bomb-making material that killed 168 persons in Oklahoma City 11 years earlier.[139]

All of the accused have been charged under normal statutes (*Criminal Code, Youth Criminal Justice Act*) in the usual courts. The prosecution team consists of six lawyers from the Ministry of the Attorney General in Ontario as well as Justice Canada. The adult defendants have elected trial by judge and jury, and early indications suggest that pre-trial motions will last many months, perhaps up to a year or so, with the trial lasting around two months after that. Disclosure issues loom heavily in the balance, and, consistent with previous terrorist trials, it can reasonably be assumed that an inherent tension will develop between the prosecutor's obligation to disclose all relevant evidence and security agency's equally pressing need to maintain confidentiality over certain information respecting national security.

d) UK Airplane Conspiracy (2006)

Twenty-four young and well-educated British men were arrested in the UK on August 10, 2006 in relation to an alleged plot to conduct suicide bombing aboard at least ten transatlantic air flights.[140] British and US authorities believed that liquid or gel explosives were to be smuggled on board in carry-on luggage, then assembled in-flight with detonators disguised as common electronic devices, such as camera flashes.[141] Authorities said the suspects planned to inflict a maximum loss of life by blowing up the aircraft in simultaneous waves over the Atlantic, or possibly over major US cities.[142]

US Homeland Security Secretary Michael Chertoff said the plan bore some of the hallmarks of Al-Qaeda, and Paul Stephenson, Scotland Yard's Deputy Commissioner said that "this was intended to be mass murder on an unimaginable scale".[143]

While police and security officials had been monitoring the activities of the group for some time,[144] execution of the plot obviously became imminent when it was learned that some members of the group were about to make a "dry run".[145] In this sense, timing of the arrests, and, to a lesser extent, the laying of any charges, was not entirely in the

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[139] BBC News, June 4, 2006, "Canada Charges 17 Terror Suspects", http://news.bbc.co.uk/2/hi/americas/5044560.stm; *The Globe and Mail*, "The Making of a Terrorist Mole", Friday, July 14, 2006 at page one.

[140] The Globe and Mail, August 11, 2006 at page 1; National Post, August 11, 2006 at page 1; Winnipeg Free Press, August 11, 2006 at page 1

[141] The most common liquid explosive is nitroglycerin, the key ingredient in dynamite. As little as a few ounces is sufficient to blow a hole in the fuselage wall of an aircraft. At high altitudes, with pressurized cabins, a hole of this nature can cause a plane to blow apart in seconds. This is what occurred in 1994, when, with the use of a watch and a nine volt battery, al-Qaeda blew up a Japanese airline bound for Narita Airport: Winnipeg Free Press, *ibid*, at pages A-6 and A-7.

[142] The Globe and Mail, National Post and Winnipeg Free Press, *supra*

[143] Winnipeg Free Press, *supra*

[144] In early reports, police indicated that those arrested were "predominantly British-born, and of Pakistani descent", and that the arrests "came as a result of surveillance of a suspect Islamist extremist network that began last year (2005)": National Post, *supra*, at page 1

[145] The Globe and Mail, National Post and Winnipeg Free Press, *supra*

control of police. This will place authorities in the position of playing "catch up" in terms of trial preparation, disclosure packages, assessments of withheld material due to national security concerns, etc.

At the time of writing, a total of 25 persons have been detained pursuant to the *Terrorism Act* (2006), which permits detention for up to 28 days, subject to extensions on application to the courts.[146] Fifteen of those arrested were charged with criminal offences—primarily conspiracy to commit murder, preparing acts of terrorism, possession of articles useful to a person preparing an act of terrorism and failing to disclose information of material assistance in preventing an act of terrorism. Nineteen of the suspects had their assets frozen by the Bank of England.[147] In September, 2006 the prosecutor advised the Central Criminal Court that the trial would likely commence during the spring of 2008.[148]

The UK conspiracy case bears several important parallels to the conspiracy case in Ontario. The suspects in both are young, generally well-educated, middle-class, born and educated in the west, integrated into their local society, and, in essence, are alleged to be "home grown extremists" inspired—but not necessarily commanded—by al-Qaeda. In contrast to the Air India and Lockerbie tragedies, the perpetrators are prepared to commit suicide for their cause, and achieve martyrdom. Where the plot is thwarted before it goes forward, the suspects can be arrested locally and do not require extradition from another country. This may mean that resulting trials will, in the absence of a significant number of pre-trial motions, proceed with dispatch. More often, however, they will be subject to the same mega-trial pressures of multiple joinder of counts and accused, pre-trial motions, disclosure issues, electronic surveillance and national security confidentiality claims, thus triggering a significant compression factor.

e) The Pickton Case

Around five years ago, Robert Pickton was arrested and charged with several counts of murder. Since then, he has been indicted on twenty-six counts of first-degree murder in the deaths of women, many of whom were prostitutes from Vancouver's Downtown Eastside. Nearly all of the lengthy and complex preliminary proceedings after Pickton's arrest took place under a publication ban.[149]

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[146] Terrorism Act 2006, Ch.11 (Eng.) [Royal Assent given March 30, 2006]. Section 23 of the legislation provides for the extension of the period of detention.

[147] Jurist Legal News and Research, August 29, 2006 "UK Police Charge Three More Suspects in Airplane Bomb Plot": http://www.jurist.law.pitt.edu/paperchase/2006/08/uk/police/charge/three/more/suspects.php; Jurist Legal News and Research, August 23, 2006 "British Judge Allows Second Extension of Detentions for Uncharged Terror Suspects": http://www.jurist.law.pitt.edu/paperchase/2006/08/british/judge/allows/second/extension.php; CBC News, "Bank of England Releases Names of Bomb Plot Suspects", August 10, 2006: http://www.cbc.ca/story/world/national/2006/08/10/bombing-aircraft.html

[148] Foxnews.com, September 4, 2006 "Trials in British Airplane Bomb Plot Unlikely until 2008: Prosecutor Says"

[149] *R v Pickton*, [2002] B.C.J. No. 2830 (P.C.)

British Columbia courts severed the counts, placing the accused on trial for six charges of first-degree murder, leaving twenty to be tried at a later stage.

The accused elected to be tried by judge and jury, and the trial commenced in January, 2007.

For several reasons, the trial will test whether Canada's laws can cope with a lengthy, complex and high-profile trial such as this. First, there was a concern that, despite the publication ban, individuals and organizations may publish the evidence from the preliminary inquiry on the internet. Indeed, a review of the most powerful search engine confirms that there are hundreds of thousands of hits for this case. However, the vast majority simply track progress in the case, and even the most avid researcher would be hard-pressed to find any detailed publication of the evidence led at the preliminary inquiry.

Empanelling the jury commenced in December, 2006. It was widely expected to be an extraordinarily difficult task to find twelve persons who could approach the case without bias. In fact, the full jury panel, including two alternates, was empanelled within two days. The trial judge warned the jurors that the evidence they hear may be "graphic".

It is significant to note that at the start of the case, the trial judge ruled that the defence would have about fifteen minutes to provide opening comments immediately after the prosecution provides its opening address to the jury. The accused would not, however, be required to indicate at that time whether he will testify during the trial in his own defence. Defence counsel advised the court that the defence would prefer to address the jury before the evidence is called to provide an alternative context for the testimony of the Crown witnesses. In Part VIII of this paper, I note that research in cognitive psychology suggests that advising a person on how to frame information he or she is about the receive enhances later recollection, aids in the interpretation of complex material, and leads to a greater level of satisfaction in processing the information. The trial judge's ruling on this point appears to accept this philosophy.

Two major challenges face the court in this case. First, the trial is expected to last one year. Only two jurors can be discharged during the trial, following which a mistrial must be ordered. Even before the trial started, one juror candidate dropped out on the second day of selection for financial reasons. At the time that the jury was empanelled, defence counsel expressed concern that jurors may have to be discharged during the trial, requiring the case to start all over again. He added: "that's a potentially very poor and inefficient system".[150] Second, if the evidence during the first trial is, in fact, "graphic", fair trial requirements will be even more difficult to meet in the event of a second trial dealing with the twenty counts of murder that remain. At the time of writing, the trial continues before the courts in British Columbia.

[150] ctv.ca, "Eleven Jurors Chosen for Pickton Murder Trial in January", December 11, 2006.

f) Sauve and Trudel: Collapse of a First Degree Murder Mega-trial

One of the longest and mostly costly criminal trials in Canadian history was terminated by a judge of the Superior Court of Ontario on the 12th of January, 2007 on the basis that the proceedings on an indictment charging first degree murder breached the accused's right to trial within a reasonable time guaranteed under section 11(b) of *The Charter of Rights and Freedoms.*

The indictment focused on two underworld killings that took place in Ottawa during 1990. Both accused had previous, serious criminal records, as did the key Crown witnesses. The Crown's case depended heavily on the evidence of one D.G., a dealer and user in drugs. D.G. was on the witness stand for 30 days, mostly in cross-examination. He admitted he had lied to police, fabricated evidence and lied at the preliminary inquiry. Two other Crown witnesses, similarly members of the underworld, were on the stand for 16 and 7 days respectively, mostly in cross-examination.

The trial was a very difficult one, involving accused who were criminals, witnesses who were criminals, jailhouse informants, retracted testimony and post-trial recantations. On this state of affairs, the Court of Appeal later said this: "many of the witnesses were deeply involved in the Ottawa criminal underground and the fair presentation of their evidence posed serious problems…. We have attempted to approach this case bearing in mind the many difficulties faced by the trial judge and counsel at the trial. This court does, however, have an obligation to ensure that the law is properly applied so that the appellants obtained a trial that does not produce a substantial wrong or miscarriage of justice. That obligation does not disappear because a trial, like this one, was unusually long and complex, or because a retrial may be taxing to the administration of justice."

Sauve and Trudel were convicted on both counts of first degree murder by a court composed of a judge and jury. In 2004, the Ontario Court of Appeal unanimously ordered a new trial, largely on the basis of the frailties associated with the Crown's evidence and the failure on the part of the judge to provide a clear and explicit direction to the jury that is was dangerous to act on some aspects of the Crown's evidence. However, in granting a new trial, the Court of Appeal did observe that it was "a close case". Nonetheless, the case went back to the trial court for a new hearing.

The decision by the new trial judge to enter a judicial stay revolved almost entirely around the length of time that it took to bring the case to a final verdict: during the passage of time, two unreliable underworld informants had been dropped from the Crown's case; the extraordinarily lengthy preliminary inquiry, which lasted two and a half years, was caused "almost entirely" by problems related to Crown disclosure; in total, the case had cost almost $30,000,000.00 to prosecute and defend, and had taken a "crippling" toll on the Ontario Legal Aid Plan; court transcripts had taken four years to prepare; with allegedly corroborating evidence no longer available, the case relied heavily on an informant who was completely unreliable; and some witnesses had remained in the witness protection program, receiving payments to testify. The total of

unreasonable delay attributable to the Crown was three and half years, the trial judge ruled. As a consequence, the memories of the key witnesses had been “ravaged” through the passage of time, and the prejudice to the accused was “manifest”. No appeal against this decision was taken by the Crown.

This case represents the most recent illustration of a mega-trial involving serious charges that has simply collapsed under its own weight – in this case through the passage of an extraordinary amount of time required to hear the case fully and fairly.

PART IV

Structural Issues Arising in Terrorist Trials

In this Part, I will examine the structural issues and patterns that emerge from the cases outlined in Part III. The case sample is relatively small, so one must be careful not to infer too much; nonetheless, as I will show, some useful issues and patterns do seem to emerge. While I have divided this Part into six patterns or themes, they are not watertight compartments, so some overlap does occur.

1. Normal Courts and Laws Are Preferred

In general, governments have relied upon their normal courts and criminal law to deal with acts of terrorism. Northern Ireland and Lockerbie are exceptions, and in those cases there were compelling reasons to depart from the norm. Northern Ireland found itself in the midst of a two-decade long terrorist campaign and acted in accordance with a judicial recommendation to move away from trial by jury; Lockerbie departed significantly from the norm, but significant legitimacy questions have resulted and continue to be debated.

2. Horrific Cases Often Generate Anxiety Concerning Court Structure and the Ability to Have a Fair Trial

The "hydraulic pressure" of public opinion in exceptionally horrific cases can infect and distort the normal decision-making process by jurors, police, prosecutors, scientists, and, perhaps, even judges. Citizens can become enraged for a variety of reasons—although usually it is because of the horrific nature of the crime, the victim or victims involved or the unpopularity of the defendant. An enraged citizenry can make a fair trial very difficult. Departures from the norm—but within the overall, established legal framework—may become necessary to ensure that a miscarriage of justice does not occur. Fair trial screens include: a venue change (McVeigh; Lockerbie), severance of accused and counts (the gang Mega-trials), disallowing "supergrass" evidence (Northern Ireland), and banning juries (Northern Ireland; Lockerbie). But it is critical to remember that the distortion can and often does occur outside of the courtroom, well before the trial even starts.[151] And, as I note later, appellate courts in England and the United States have

[151] As I argue below, there is a basis to believe that jurors in the cases that I have reviewed, and perhaps more broadly throughout the Commonwealth, have generally done a pretty good job of assessing cases. Failures, where they occurred, more commonly were occasioned by other elements of the criminal justice system, such as deception by witnesses, prosecutorial misconduct or a failure to disclose. In a recent article, Bennett Gershman contends that juries generally get it right, but verdicts can be wrong through extrinsic factors that corrupted the integrity of the trial: Bennett L. Gershman, "How Juries Get It Wrong—Anatomy of the Detroit Terror Case", 44 Washburn L J 327 (2005). Two Members of the International Society for the Reform of Criminal Law, from Canada and England, reached a similar conclusion in: "Juries: How Do They Work? Do We Want Them?", by Michael Hill, Q.C. and David Winkler, Q.C. (December 2000), at page 3.

emphasized the importance of respecting the rule of law, including the role of the jury, even in times of chaos and terrorism.

3. Terrorism in the 21st Century Has Changed, and Requires New Approaches to the Trial Process

Suicide bombers and decentralized conspiracies based on ideology or political agendas, whose genesis lies thousands of miles from the acts of terrorism, have changed the face of terrorist trials. As evidenced by 9/11, the UK conspiracy (2006) and the Ontario conspiracy (2006), an attempt to make perpetrators accountable through the criminal justice system is lengthy and extremely expensive, if it can be done at all. Generally, the case against the accused is circumstantial, based heavily on documents, intercepted private communications, long-term surveillance, e-mail traffic, data on computers, and, sometimes, the testimony of someone involved in the conspiracy. Length and complexity raise significant questions about whether the traditional Canadian trial structure (one judge and twelve jurors) is appropriate, or whether we need a new approach that ensures a verdict will be reached based on a fair consideration of the evidence. Reliance on the criminal process also raises questions about whether those truly responsible are held to account, or whether, as alleged in Lockerbie, "bit players" end up being the ones in the prisoners' box.[152] In many cases, this is the result of reliance by the criminal justice system on evidence that is both admissible and available to the court system.

4. Structural Considerations

Appellate judges in both the UK and the US have emphasized the need to respect the Rule of Law and the role of the jury, even in the face of horrific acts of terrorism or treason. That noted, the UK, US, Northern Ireland and Scotland have made some adjustments to the structure of the trial system to meet the demands of lengthy and complex cases and, in the case of Northern Ireland, to the immediate challenges posed by terrorist trials. Amongst others, this has permitted: alternate judges, alternate jurors, an expansion in the number of jurors hearing the case, the use of judge alone trials to replace what would otherwise be trial by judge and jury, and changes in venue. Some of these structural innovations such as the change of venue or the use of alternative jurors do not seem to have affected the perceived integrity of the trial process, but others such as the use of judge alone may have had that effect.

5. Mega-trials of Any Sort Require Special Attention

The first "mega-trial" in Canada[153] was probably the so-called "Dredging conspiracy", heard in the Ontario courts during the late 1970s.[154] In that case, twenty personal and

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[152] David R. Andrews, "A Thorn on the Tulip—A Scottish Trial in the Netherlands: The Story Behind the Lockerbie Trial", 36 Case W. Res. J. Int'l L. 307 at 318 (2004)

[153] The definition of what amounts a "mega-trial" is somewhat elusive, and I recognize that there are different perspectives on the issue. A significant number of factors can drive a mega-trial, either singly or

corporate defendants were charged in a seven-count conspiracy indictment arising out of an alleged bid-rigging scheme extending over a period of eight years.

The trial lasted 197 court days spanning a period of 15 months. At the conclusion of the evidence, defence counsel addressed the jury for seven days, the Crown address extended over eleven days, the charge to the jury lasted seven days, objections to the charge lasted eleven days, and the jury deliberated for fourteen days.

To put the matter into context: the jury began its deliberations fully *three months* after the last defence lawyer finished his closing address to the jury.

The twenty accused were charged with a total of fifty-three offences. The jury brought in forty guilty verdicts against thirteen of the accused. It found various accused not guilty of nine offences and was unable to reach a verdict on four counts.

In a unanimous judgment that occupies 320 pages in the law reports, the Ontario Court of Appeal affirmed the jury's verdict on all but seven counts, for which it ordered new trials. That decision was affirmed by the Supreme Court four years later.

The jury in the Dredging case did a good job sorting out who did what, with whom, and in relation to what counts. Today, however, it would likely have been seen as an "overloaded indictment", requiring severance of accused and counts.[155]Mega-trials since then have had mixed success. Some have collapsed under their own weight. In the post-Charter era, they provide a goldmine of motions for defence counsel. Competent, and reasonable counsel can make a mega-trial work, but is it reasonable to assume that mega-trials will usually be blessed with such a sense of cooperation within an adversarial framework? And how often can the state ask citizens to set aside a year or two, or more, of their lives to hear a single case?

The length of a mega-trial seems directly proportional to the risk of not reaching a verdict at all: the presiding judge, jurors, and witnesses may die or become ill; formerly cooperating co-conspirators scheduled to testify for the Crown may disappear or withdraw their cooperation. Defence witnesses may move away and become unreachable.

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in combination—especially the number of accused, number of counts, the complexity of the evidence and the amount of time that will be required for the trial, including defence evidence. In this paper, when speaking of a "mega-trial" I am generally referring to a trial that will take many months, usually nine or more, or years, to complete.

[154] *R v McNamera et al* (no.1) (1981), 56 CCC (2d) 193 (Ont.C.A.), affirmed 19 CCC (3d) 1 (S.C.C.); This was discussed as recently as the 2006 Report of the Advisory Committee on Criminal Trials in the Superior Court of Justice of Ontario, dated May, 2006 and released October, 2006 at par. 308: http://www.ontariocourts.on.ca/superior_court_justice/reports/ctr/ctreport.htm

[155] In Part VII ("Some Non-Structural Considerations"), I deal with the duty on the Crown not to overload an indictment, anchored on the proposition that it is in the interests of justice that a trial be fair and manageable, and within the comprehension of a lay jury: *R v Ng* (1999), 138 CCC (3d) 188 (BCCA) at par. 34. See, especially, the helpful decision in *R v Pangman* (2000), 149 Man. R. (2d) 68 (QB), which examines the leading decision on the issue in the United States: *US v Casamento*, 887 F. 2d 1141 (2d cir.N.Y., 1989), cert. den. 493 U.S. 1081

On the subject of mega-trials, I have deliberately focused on non-terrorist trials because it seems to me that the risk of mistrials or not reaching a verdict arises not from the existence of terrorism charges, but from the risks inherent in increasingly lengthy and complex criminal proceedings. The observations and thoughts that I will be making in Part VIII of this Report will therefore not be directed at terrorism trials *per se*, but to terrorism proceedings that are at risk due to their extreme length and complexity.

6. Politicians Sometimes "Wade into" Criminal Trials

The intersection of partisan politics and the criminal justice system is not a happy one. On occasion, though fortunately quite rarely, Attorneys General have had to resign as a result of political interference in criminal cases.[156] Political commentary before or during a criminal trial can have the effect of derailing the case, as occurred in an earlier Canadian prosecution. There, the accused was an Inspector with the RCMP who was charged with theft of computer tapes containing the list of members of the Parti Quebecois. The defence called a former RCMP officer who had been in charge of operations relating to separatists/ terrorists in Quebec at the time of the alleged offence. In the National Assembly, the Premier denounced not only the actions of the witness, whose credibility he attacked in colourful and abusive language, but also those of the defence lawyers, the federal government and the RCMP. The diatribe lasted twenty minutes, and received exceptional publicity in the media. The trial judge stayed proceedings on the basis that a fair trial could not be held, and that decision was upheld by the Court of Appeal, but was reversed by the Supreme Court on the basis that a stay was premature because there was no evidence indicating that it would be impossible to select an impartial jury.[157]

That case aside, Canada has had little experience with political interference in criminal cases. Some authorities have argued that this comes as a result of the integrity of the office-holders in Canada.[158]

Politicians are most likely to "wade into" a criminal case involving some political considerations, or a case in which the politician has been personally involved. That is evidently what has occurred in the Lockerbie case. A former Lord Advocate (roughly the equivalent of the Attorney General), who had authorized proceedings at a very early stage, is now said to have made remarks that cast some doubt on the correctness of the verdict. That state of affairs is presently being examined by the Scottish Criminal Cases Review Commission.

More recently, UK Prime Minister Tony Blair indicated that he opposed the death penalty in the case of Saddam Hussein, placing him at odds with the position of the United States. Blair's view was widely shared by European leaders, many of whom noted their

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[156] Bruce A. MacFarlane, Q.C. "Sunlight and Disinfectants: Prosecutorial Accountability and Independence Through Public Transparency", (2002), 45 C.L.Q. 272 at 278 (Footnote 15) and 283-4

[157] *R v Vermette* (1998), 41 CCC (3d) 523 (S.C.C.)

[158] MacFarlane, supra, at page 278 (footnote 15) quoting Professor Edwards, widely regarded as one of the Commonwealth's leading experts on the Office of the Attorney General.

opposition to capital punishment but welcomed Saddam's trial and conviction, as did the Prime Ministers of Australia and New Zealand.[159]

The point, however, is this: terrorist cases are highly visible, often emotionally charged proceedings that capture the attention of the public. They raise substantial public safety issues and elected officials run the risk of compromising the case in a misguided attempt to satisfy the public that such an incident will not occur again or that matters have been taken care of. Despite the legal risks, the political imperative to step in and satisfy the public sometimes seems irresistible.

[159] Winnipeg Free Press, November 7, 2006, "Blair Opposes Death Penalty". The former Iraqi dictator was executed on the 29th of December, 2006 following his trial, sentencing hearing and a resulting appeal to Iraq's highest court.

PART V

Trial Structure from an Anglo-Canadian Historical Perspective

In this Part, I will review the structural elements of a criminal trial in Canada from an historical perspective—with particular emphasis on the judge and jury.

1. Anglo Roots

Sir William Blackstone, in his classic treatise on English law,[160] said that "…the founders of the English law have with excellent forecast contrived, that no man should be called to answer to the King for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow-subjects, the grand jury: and that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion." He argued that the jury acted as the "grand bulwark" of the liberty of all Englishmen", by acting as a barrier between the liberty of the people and the prerogative of the Crown, and by acting as a check against judges that have been appointed by the government.[161] Presumptively, therefore, a jury consisted of twelve "of his equals and neighbours, indifferently chosen".

2. Transition to Canada

In Canada's first criminal law textbook, published in 1835, W.C. Keele, an attorney in Toronto, observed that the criminal law of England was statutorily adopted in Canada in 1774 and, in Upper Canada specifically, as the law of England stood on September 17, 1792.[162] Keele noted, however, that a "*special jury"* could be obtained for the trial of any indictment or civil action, without any motion in court. The Clerk of the Peace was required to deliver to the Sheriff "a list of the persons assessed 200 pounds and upwards". Forty names were then drawn by the Sheriff and each party could strike out the names of twelve. The remaining 16 persons were then summoned as "special jurors" for the trial.[163]

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[160] *Commentaries on the Laws of England* (London: 1765, First Edition, 4th Volume) at page 349 (Blackstone's *Commentaries* proceeded through 23 editions in the UK, 13 in the US, with the last emerging in 1897)

[161] *Ibid*

[162] *The Provincial Justice or Magistrates Manual, Being a Complete Digest of the Criminal Law, and a Compendious and General View of the Provincial Law; With Practical Forms, for the Use of the Magistracy of Upper Canada,* by W. C. Keele, an attorney of the Supreme Courts of Law at Westminster (Toronto: the U.C. Gazette Office, 1835) at 254. Keele was born in England in 1798 and emigrated to Canada, settling near Toronto. He practiced law in southern Ontario and published books on several aspects of the law, although he is best known for his study of the criminal law. His text proceeded through five editions, the last emerging in 1864.

[163] *Ibid* at page 255. This procedure is said to have been based on English statutory law: 48 G.3, c.13

What did a trial in early Canada actually look like? The earliest verbatim account that I was able to find involved the ongoing conflict between the Earl of Selkirk, later Lord Selkirk, and the NorthWest Company in the "Indian Territories" (later, western Canada, specifically the Red River (Winnipeg) area). The account is recorded in a relatively rare book entitled *Report of the Proceedings Connected with the Disputes Between the Earl of Selkirk and the North-west Company, at the Assizes, held at York, in Upper Canada, in October 1818 (from minutes taken in court).*[164]

Essentially, Governor Robert Semple was killed on June 19, 1816 near Red River. Under special legislation passed in 1803 for the purpose, the trial proceeded at York in Upper Canada rather than in the "Indian Territories".[165] A Grand Jury was convened to consider whether an indictment should be found in the matter. Chief Justice Powell, Mr. Justice Campbell and Mr. Justice Boulton, as well as two Justices of the Peace, presided. After hearing the evidence, the Grand Jury found an indictment against thirteen persons, and on October 23, 1818 returned "no bill" respecting three.[166]

The trial commenced on October 6, 1818. It resembled today's trial process in many respects, with a few notable differences. The Attorney General and Solicitor General appeared personally for the Crown. The accused were represented by three lawyers; twelve men were sworn in as jurors; but, notably, the resulting three separate trials were presided over *by a panel of three superior court judges*: the Chief Justice, and Justices Campbell and Boulton.

Both of the Law Officers of the Crown provided the opening address to the jury, followed by the usual examination and cross examination of witnesses, and submissions respecting the admission of evidence. At the conclusion of the case, responsibility for charging the jury rotated between the Chief Justice in the first trial, and Mr. Justice Boulton in the second and third. It is evident that the three judge panel was actively involved in the trial throughout: during Justice Boulton's charge to the jury in the second trial, the Solicitor General rose to object on a point of law, but it was the Chief Justice who responded, on behalf of the panel.[167]

Whether and to what extent a *panel* of judges heard all serious cases in early Canada is unclear from the transcript of this case: certainly, counsel did not raise the point, and the issue simply was not discussed. It should be remembered, however, that the case had been "transferred in" from the "Indian Territories", and did involve the murder of the local governor. It was, therefore, a case of considerable notoriety. As a postscript, it should be noted that in each of the three trials, the jury acquitted all of the accused after only about an hour of deliberation.

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[164] London: B. McMillan, Bow-Street, 1819
[165] *Ibid*, appendix, page 46
[166] *Ibid* at page six.
[167] *Ibid* at page 140 ("Trial of the Accessories")

3. 1892 Codification of the Criminal Law

When Canada proclaimed into force its *Criminal Code* in 1893, it became the first nation in the British Empire to enact a national code of criminal law. Codification was a revolutionary step, to say the least: it enabled law makers and practitioners to go beyond strict precedent and to identify weaknesses in existing laws more easily. It also simplified the task of understanding the law, as well as suggesting amendments. As Canada's first Minister of Justice, Sir John A. Macdonald saw the codification of criminal laws as a way to create a stronger bond between the provinces.[168]

The 1892 *Criminal Code* brought a sense of certainty to the structural underpinning of the criminal justice system. It also offered a degree of flexibility based on regional considerations and the reality that Canada was an emerging nation with a sparse population.

The *Code* contained a definition of a "Superior Court of Criminal Jurisdiction" in all of the provinces and territories.[169] Every court of criminal jurisdiction in Canada had jurisdiction to try all offences within the jurisdiction of the court, but could not try offences committed entirely in another province.[170] The court was empowered to order a change of venue, providing that the trial proceeded in another district or county *within the same province*.[171]

The 1892 *Criminal Code* preserved the role of the Grand Jury. No more than 23 grand jurors, and not less than 12, could be sworn in. The law was clear, however, that any number from 12 to 23 constituted a legal grand jury. However, at least 12 of them needed to agree to find a "true bill". If twelve did not agree, they were obliged to return "not a true bill".[172]

The traditional British model of 12 jurors[173] was retained for the trial. There were, however, certain variations. In Manitoba and Quebec, an accused was entitled to a "mixed jury" consisting of one-half English and one-half French speaking jurors.[174] Prior to the 1892 *Code*, an alien was entitled to be tried by a jury *de medietate linguoe*, which permitted trial by a jury composed of one-half citizens and one-half aliens or foreigners, if so many of them could be found. The new *Criminal Code* banned this practice.[175] Later, the *Criminal Code* provided that only six jurors needed to be sworn in Alberta, the

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[168] Generally, see *The Genesis of the Canadian Criminal Code of 1892*, by Desmond H. Brown. (Toronto: The Osgoode Society, 1989); *The Birth of a Criminal Code: The Evolution of Canada's Justice System* (Toronto: University of Toronto Press, 1995).
[169] *The Criminal Code, 1892* [55-56 Vict., c.29, s.3(y)]
[170] *Ibid*, section 640
[171] *Ibid* section 651
[172] *The Criminal Code of Canada*, by Henri Elzear Taschereau, reprinted with a forward by the Honourable Fred Kaufman (Toronto: The Carswell Company, 1980) at page 734 ("Taschereau")
[173] Section 667 (3) of the 1892 *Criminal Code*. It was part of section 419 of the English Draft Code of 1878 which, in turn, finds its roots in English statute: 39 and 40 Vict. C.78, s.19
[174] *Ibid* at page 772 and 774.
[175] *Ibid* at page 771

Yukon and the Northwest Territories.[176] As well, later amendments to the *Criminal Code* uniquely provided that an accused may, with consent, be tried by a judge of the Superior Court of criminal jurisdiction in Alberta *without a jury*.[177]

Flexibility was also demonstrated in the structural underpinning for criminal appeals. Where no transcript or record of the original trial proceedings existed, the trial judge often sat with *en banc* criminal panels in appeals *from their own judgments*. Not surprisingly, there were cases where the trial judges would dissent when appeals from their judgments were allowed, but this did not always follow. Frequently, the trial judge would concur in his own reversal. Evidently, this practice was adopted because of the smaller bench and the exigencies of travel between large judicial centres.[178] The point is, however, that since early times, Canada has demonstrated considerable flexibility in its approach to the structure of a criminal trial.

4. The Current Legal Framework

Under *The Canadian Charter of Rights and Freedoms*, any person charged with an offence has the right, except in the case of military offences, "to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment".[179] In this respect, it should be noted that almost all of the offences set out in Part II.1 of the *Criminal Code* concerning terrorism carry a maximum punishment of five years, ten years, fourteen years or life imprisonment, thus triggering this provision.[180] Additionally, traditional criminal law offences for which a terrorist may be charged, such as murder and hijacking of an aircraft, all carry maximums of five years or more.

In the post-Charter era, appellate courts in Canada have emphasized the importance of trial by jury. In one case,[181] Blair, J.A. traced the history of jury trials in England, the United States and Canada, and said the following:

> This history demonstrates that the right of trial by jury is not only an essential part of our criminal justice system, but is also an important constitutional guarantee of the rights of the individual in our democratic society. In all common law countries it has, for this reason, been treated as almost sacrosanct and has been interfered with only to a minimal extent.

The starting point in the *Criminal Code* is section 471, which provides that "except where otherwise expressly provided by law, every accused who is charged with an indictable

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[176] The rather colourful and somewhat checkered history to this provision can be found in the first edition of *Martin's Criminal Code* (Cartwright and Sons: 1955 at pages 688-670)
[177] *Ibid*; and see *R v Bercov* (1949) 96 CCC 168 (Alta.C.A.)
[178] McClung, J.A. describes this practice both in Ontario and Western Canada between 1868 and 1912 in *R v Robinson* (1989), 51 CCC (3d) 452 (Alta.C.A.), at page 473 (footnote 8)
[179] Section 11 (f) of the *Canadian Charter of Rights and Freedoms*
[180] There are a few exceptions: offences referring to the freezing of property and hoax terrorist activity can be proceeded on summary conviction.
[181] *R v Bryant* (1984), 16 CCC (3d) 408 (Ont.C.A.) at page 423

offence shall be tried by a court composed of a judge and jury". However, Parliament has enacted a number of exceptions to this general rule, some of which are not always conditional on the accused's consent to another mode of trial. In recent years, the number of trials by jury has decreased to the point where in many parts of Canada trial by jury is the exception rather than the rule.

The majority of the indictable offences not listed in section 469 of the *Criminal Code* (which includes, for instance, murder, treason, piracy) permit the accused to elect the mode of trial as set out in section 536(2) of the *Code* and, within limits, the accused may change an election. The Attorney General is given a narrow discretion to override this section and require a trial by jury under section 568 of the *Code*.[182] In general, however, the intention of the various provisions in the *Code* is to give the accused the right to determine the manner of trial when charged with an indictable offence.

Under the current provisions of the *Criminal Code*, the presumptive size of a jury in Canada remains at twelve.[183] That number is not, however, constitutionally frozen based on the practice under the old common law in England and Canada.[184] Rather, it is a starting point which can be varied legislatively according to the circumstances.[185]

For instance, if the trial judge considers it advisable "in the interests of justice", one or two alternate jurors may be ordered for a trial.[186] If a full jury of twelve plus alternates cannot be empanelled despite compliance with the *Criminal Code*, the court may summons as many persons, whether qualified at law or not, to provide a full jury and complement of alternate jurors that were ordered.[187] Alternate jurors must attend the *start* of the trial. If there is not a full jury present, alternates are substituted in order until there are twelve jurors. Alternates not required are then excused from further duty.[188] As discussed below, a criminal trial begins when an accused in put in charge of the jury:[189]

If a juror needs to be replaced because of illness or some other reasonable cause, before any evidence has been led before a jury, but after the alternates have been excused, the presiding judge may select a replacement juror from the panel summonsed, or by summonsing talesman from the street.[190] After the trial has commenced, the trial judge is empowered to discharge a juror, without replacement or alternate, where the court is satisfied that the juror should not, by reason of illness or other reasonable cause, continue to act as a juror.[191] Where, in the course of the trial, a juror dies or is discharged under

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[182] At least one trial court has concluded that this provision is constitutionally secure: *R v Hanneson* (1987), 31 CCC (3d) 560 (Ont.H.C.J.)
[183] Section 643 (1) and section 631(5) *Criminal Code*
[184] *R v Genest* (1990), 61 CCC (3d) 251 (Que.C.A.), at 260-61
[185] For instance, Alberta moved from a jury of six to a jury of twelve in 1969: S.C. 1968-69, c.38, s.50
[186] S.631 (2.1) *Criminal Code*
[187] Section 642(1) *Criminal Code*
[188] Section 642.1 *Criminal Code*
[189] *R v Basarabas* (1982), 2 CCC (3d) 257 (S.C.C.) at 266
[190] Section 644(1.1) *Criminal Code*
[191] This power to discharge, under section 644(1) of the *Criminal Code*, is discussed below.

section 644(1), the jury remains properly constituted for all purposes, provided that the number of jurors does not drop below ten.[192]

The current federal criminal law policy is thus clearly evident: the trial must commence with twelve jurors, either selected in the normal way, or through alternates, or by seeking talesman.[193] If, after the commencement of the trial, one or more of the twelve jurors "drops out" due to illness or death or other reasonable cause, the jury may continue providing that the number of jurors does not drop below ten. Once it drops to nine, *a mistrial is required*.

The implications for a terrorist mega-trial are serious. Under the current legislative framework, most of the legislative safeguards are built into the front end, before the trial starts. Once it commences, only two jurors can be discharged before a mistrial *must* be ordered. In an 18 month or two year trial, the risks of that happening are significant and disturbing.

A line is thus drawn in the sand: the trial does not commence until the accused is placed in the jury's charge, and the jury is advised of the charge and the plea, and of their duty to inquire whether the accused is guilty or not guilty of the offence charged.[194] The Supreme Court of Canada outlined the rationale for this rule in the following terms:[195]

> …There is no good reason for denying an accused a full jury where no evidence has been led. An accused should not be lightly deprived of his or her right to be tried by a jury of twelve persons. It would be undesirable to start a trial with less than that number…to advance in time the stage when the trial is forced to proceed with one juror missing, beyond that required by common sense and the plain language of the *Code*, is to increase the likelihood, in a lengthy trial, should other jurors fall ill, that mistrials will have to be declared because the requisite number of jurors is lacking.

A few further points should be noted concerning the jury under the current legal framework. First, an accused who has absconded from his or her trial loses the right to trial by jury unless he or she can show a legitimate excuse for the failure to attend or remain in attendance.[196]

Second, the court can take steps to protect the privacy or safety of a juror or alternate juror. If it is in the best interests of the administration of justice, the court may direct the clerk to refer to the juror by number and, where such an order is made, may also make an order of non-publication concerning the identity or any information that could disclose

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[192] Section 644(2) *Criminal Code*
[193] *R v Wellman* (1996), 108 CCC (3d) 372 (BCCA) (Before the scheme of alternates was enacted); see, generally, sections 642 *et seq*
[194] *R v Basarabas* (1982), 2 CCC (3d) 257 (S.C.C.) at 266 (7-0)
[195] *Ibid* at 265-6
[196] Section 598 *Criminal Code*. The Supreme Court of Canada has ruled that this provision is constitutionally secure: *R v Lee* (1989), 52 CCC (3d) 289 (S.C.C.) (5:2)

the identity of a juror or alternate juror.[197] This provision will have particular application in cases of terrorism and organized crime.

Third, where a jury is unable to agree on its verdict, the trial judge may discharge the jury and either direct a new trial or adjourn the case on terms that seem appropriate.[198] Finally, a judgement may not be stayed or reversed after verdict only by reason of an irregularity in the empanelling of the jury.[199]

To this point, I have only examined the role of the *jury* within the current legal framework. A few points should be made about the role and continuation of the *trial judge* in the context of lengthy criminal trials.

Section 669.2 of the *Criminal Code* provides an exhaustive scheme of how to handle a trial when the original trial judge dies or, for whatever reason, cannot continue to hear the case to verdict.

The general rule is that another judge of the trial court may continue the trial.[200] If a decision has already been reached by the jury or the original trial judge, the substitute judge may sentence the defendant if he or she was found guilty.[201] Where the trial had commenced but no adjudication had been made, the substitute judge shall commence the trial as if no evidence had been taken.[202] In a jury trial, the substitute judge may either continue the trial or start all over again.[203] If continued, the evidence adduced is deemed to have been adduced before the substitute judge.[204]

The discretion to either continue the trial or start over again in a jury trial is the most problematic part of this scheme. In month 22 of an expected 24 month trial, the temptation to start again is, in one sense strong: it was the original trial judge who made all of the rulings and heard all of the witnesses.[205]

In another sense, however, the argument in favour of continuing is equally strong, although it may be seen as being anchored on issues of cost and convenience. The reality is that in some cases it may be difficult to recommence an extraordinarily long trial once it aborts on the eve of verdict: witnesses have dispersed, some may no longer be available

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[197] Section 631(3.1) and (6) *Criminal Code.* And see *R v Jacobson*, (2004), 196 CCC (3d) 79 (Ont. S.C.J.)
[198] Section 652(1) *Criminal Code*
[199] Section 670 *Criminal Code*
[200] Section 669(1) *Criminal Code*
[201] Section 669.2(2) *Criminal Code*
[202] Section 669.2(3) *Criminal Code*
[203] Section 669.2(4) *Criminal Code*
[204] Section 699.2(5) *Criminal Code*
[205] A trial judge is entitled to express a view on the factual issues in the case to assist the jury: *R v Steinberg*, [1931] S.C.R. 421; *R v Boulet*, [1978] 1 S.C.R. 332, including a "fair comment" on the credibility of a witness: *R v Buxbaum* (1989), 70 C.R. (3d) 20 (Ont.C.A.), lv. ref. 37 O.A.C. 318 n, as long as the summing up is not "fundamentally unbalanced": *R v Mears* (1993), 97 Cr. App. R. 239 (P.C.), and the trial judge makes it perfectly clear that they have the right and duty to form their own conclusions, and can reject the opinions expressed: *R v Broadhurst* [1964] A.C. 441 (P.C.) at 464; *R v Gunning*, [2005] 1 S.C.R. 627 at pars. 27 and 31.

and those formerly cooperating with authorities may no longer wish to have anything to do with the case. There is also provision for the prosecutor and the accused agreeing to adduce some but perhaps not all of the evidence before the new judge in a jury trial.[206] As discussed above, co-operation between the prosecutor and the defence lawyers may be crucial in the successful management and resolution of long trials. Once again, however, the issue is not so much the management of a terrorist trial, but the dangers associated with a mega-trial.

[206] *Criminal Code* section 669.2(5)

PART VI

The Function of Trial by Jury

In this paper, I have, at a few points, touched upon the role of the jury in criminal trials. In this Part, I will step back a bit, and examine the fundamental principles underlying the system of trial by jury in a democratic state.

I do this for two reasons: first, it is evident that some changes to the jury system need to be considered in relation to terrorist trials, particularly those of a "mega" nature. Second, if change is considered, it is important to have a clear understanding of what the central elements of trial by jury are, so that any reforms will be compatible with the guarantees described in s.11 (f) of the *Charter of Rights and Freedoms*. In other words, it is important to know where the constitutional boundaries lie, so that change can occur within them, and not outside.

The modern jury is intended to be a representative cross-section of society, honestly and fairly chosen.[207] Through its collective decision-making, the jury is an excellent fact-finder.[208] The process of deliberation is the genius of the jury system.[209] Due to its representative character, it acts as the conscience of the community.[210] The jury can, and does, act as the final bastion against oppressive laws or their enforcement.[211] Significantly, it also provides a means by which the public increases its knowledge of the criminal justice system—which, in turn, through the involvement of the public, increases

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[207] *R v Sherratt* (1991), 63 CCC (3d) 193 (SCC) at 203 [5-0 on this point]; Law Reform Commission of Canada, Working Paper 27, "The Jury in Criminal Trials" (Ottawa: 1980) at page 5; Law Reform Commission (New South Wales), Report 48 (1986)- Criminal Procedure: The Jury in a Criminal Trial, par. 2.1; *Williams v Florida*, 399 U.S. 78 at 100.

[208] *R v Sherratt*, *supra*; Law Reform Commission of Canada, *supra*; Law Reform Commission (New South Wales), *supra*; *Williams v Florida*, *supra*; *R v Pan* [2001] 2 SCR at par. 43

[209] *R v Sims*, [1992] 2 SCR 858; *R v G* (RM), [1996] 3 SCR 362 at par. 17

[210] *R v Sherratt*, *supra*; Law Reform Commission of Canada, *supra* at page 8; Law Reform Commission (New South Wales), *supra*; *Williams v Florida*, *supra*

[211] *R v Sherratt*, *supra*; Law Reform Commission of Canada, *supra* at page 11; Law Reform Commission (New South Wales), *supra.* There is, however, an important nuance here: because the jury is asked for a general verdict of guilty or not guilty, it has the power to bring in a verdict of acquittal, which is perverse in the sense that it "flies in the teeth of the facts and the law". That does not mean, however, that defence counsel can ask the jury to nullify a law passed by Parliament, by refusing the apply the law that the trial judge has instructed them to apply: *R v Morgentaler* et al (1985), 22 CCC (3d) 353 (Ont. C.A.) at page 431 *et seq.* Quite recently, the Supreme Court of Canada confirmed that juries are not entitled *as a matter of right* to refuse to apply the law—but they do have the *power* to do so where their consciences permit no other course: *R v Krieger*, 2006 SCC 47 at par. 27

societal trust in the justice system as a whole.[212] Put simply, "12 members of the community have worked together to reach a unanimous verdict".[213]

The Supreme Court of Canada put the matter quite succinctly in 2001 in a unanimous (9-0) judgement:[214]

> In acting as fact-finders in a criminal trial, jurors, like judges, bring into the jury room the totality of their knowledge and personal experiences, and their deliberations benefit from the combined experiences and perspectives of all of the jurors. One juror may remember a detail of the evidence that another forgot, or may be able to answer a question that perplexes another juror. Through the group decision-making process, the evidence and its significance can be comprehensively discussed in the effort to reach a unanimous verdict.

Appellate courts in Canada, the US and Australia have emphasized that "the incidents" of jury trial are not immutable: they can change to meet contemporary needs and adapt to modern circumstances and conditions.[215]

That said, there is an emerging consensus that there are a number of irreducible minimum characteristics of a trial by jury. Among those characteristics which have been held to be "essential" and "irreducible elements" are:[216] the independence of the jury; its representativeness; the randomness of selection; measured group deliberation; challenges to jurors; and, at least in Australia, and possibly in Canada, a unanimous verdict.[217]

However, a number of characteristic features (as distinct from the essential attributes) of the jury have not been, and could not have intended to be, immutable. Such characteristics include, for instance: that only men can be jurors; more specifically, only male property holders can be empanelled; the jury needs to be sequestered throughout the course of the trial; and twelve jurors must remain throughout, failing which a mistrial must be ordered.[218]

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[212] *R v Sherratt, supra*; Law Reform Commission of Canada, *supra* at pages 13-17; Law Reform Commission (New South Wales), *supra*; *Ng v The Queen* [2003] HCA 20, per Kirby J. at footnote 75; *Williams v Florida, supra*

[213] *R v G* (RM), *supra* at par. 13; *R v Pan, supra* at par. 41

[214] *R v Pan, supra* at par. 43. There, the court observed at par. 99 that "the requirement of a unanimous verdict is a central feature of our jury system." The court fell short of concluding that the unanimity rule is constitutionally guaranteed although the implication may well be there. In Part VII, *infra*, my discussion of a possible movement to majority verdicts is predicated on the assumption that the issue is open for reform.

[215] *R v Genest* (1990), 61 CCC (3d) 251 (Que.C.A); *Williams v Florida, supra*; *Ng v The Queen, supra*; "The Constitutional Jury- 'A Bulwark of Liberty'?" , by James Stellios, 27 Sydney L. Rev. 113 (2005).

[216] *R v Sherratt, supra*; "The Constitutional Jury- 'A Bulwark of Liberty'?", *supra* at page 8; *Ng v The Queen, per Kirby, J. supra; Brownlee v The* Queen (2001) 207 CLR 278; *Williams v Florida, supra*; *Cheatle v The Queen* (1973) 177 CLR 541; *Colorado v Burnette*, 775 P. 2d 583 (1989); *R v Ronen et al*, 2004 NSWSC 1294 (2005); and some would add, with some force, the sanctity and privacy of jury deliberations: *Stokes v Maryland*, 843 A.2d 64 (2004)

[217] *Cheatle v The Queen, supra; Brownlee v The Queen, supra; R v Pan, supra*

[218] *Ng v The Queen, supra*; Law Reform Commission Report (New South Wales), *supra*; *Brownlee v The Queen, supra; Williams v Florida*; "The Constitutional Jury- 'A Bulwark of Liberty'?", *supra; Cabberiza v Moore*, July 11, 2000, United States Court of Appeals, 11th circuit:

Lengthy criminal trials run a clear risk of losing jurors for a variety of reasons. In Part V, I described Canada's relatively modest attempt to deal with trial by jury in a mega-trial context. It is, I think, helpful at this stage to examine the ways in which other jurisdictions ensure that a case will not collapse because the jury drops below an acceptable number of jurors.

1. United States

In the US, all federal criminal courts use a twelve-person jury model, [219] though some states, notably Florida, allow a jury of six. A twelve-person jury need not be unanimous, but if the jury consists of six persons, unanimity is required.[220] And in a landmark decision, the Supreme Court of the United States has, adopting a functional analysis, rejected the proposition that the quality of the decision-making and the results reached are not affected by the size of the jury (at least in a twelve v six context):[221]

> …the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of layman, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury. To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community. But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers twelve—particularly if the requirement of unanimity is retained. And, certainly the reliability of the jury as a fact finder hardly seems likely to be a function of its size.
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> What few experiments have occurred—usually in the civil area—indicate that there is no discernable difference between the results reached by the two different-sized juries. (footnotes eliminated)

The court's use (or misuse) of social science research to justify a departure from the twelve-person criminal jury sparked outrage in the social science community. One

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http://laws-findlaw.com/11th/974592man.html

[219] In USCS Fed. Rules Crim. Proc. R. 23 (b) (1), it is provided that "a jury consists of twelve persons unless this Rule provides otherwise".

[220] American Judicature Society, "Juries in-Depth Jury Decision Making", http://www.ajs.org/jc/juries/jc_decision_alternate.asp; *Williams v Florida*, *supra*; "Six of One is not a Dozen of the Other: A Re-examination of Williams v Florida and the Size of State Criminal Juries", by Robert H. Miller, 146 U. PA. L. rev. 621 (1998)

[221] *Williams v Florida*, *supra* at page 100

author was prompted to say that "the quality of social science scholarship displayed would not win a passing grade in a high school psychology class".[222]

Nonetheless, to ensure that a trial can continue despite the discharge of a juror, most state laws, and the Federal Rules governing federal courts, permit "alternate" jurors to be empanelled. At the federal level, up to six alternate jurors can be directed by the trial judge.

At the state level, three basic alternate juror models exist: in some jurisdictions, alternates are chosen at the beginning of the trial, and are told that they are "alternate jurors". In other jurisdictions, the alternates who are chosen at the beginning are known by the judge and counsel as "alternates", but the jurors themselves are not told on the theory that they may not be as fully engaged in the case if they knew their status. In the third model, the alternates are chosen by random selection before the jury retires to deliberate.[223]

One of the key issues that has arisen in the United States is this: is substitution by an alternate juror confined to the period before the jury commences its deliberation, or can a substitution take place after the case has been submitted to the jury?

Pre-submission substitutes generally raise no problems, as jurors are instructed not to discuss the case amongst themselves before the deliberation. There is, therefore, really no difference between regular and alternate jurors as they retire to deliberate.[224]

Post-submission substitution can raise difficulties, because at the point of substitution the regular juror has been a part of the deliberations while the alternate juror has not. The rationale underlying the principle that substitutions should only take place before deliberation—and, indeed, the prejudice that can arise with a post-submission substitution was best articulated by the Supreme Court of Colorado in a widely-followed decision:[225]

> The potential for prejudice occasioned by a deviation from the mandatory requirements of Crim. P. 24 (e) is great. Where an alternate juror is inserted into a deliberative process in which some jurors may have formed opinions regarding the defendant's guilt or innocence, there is a real danger that the new juror will not have a realistic opportunity to express his views and to persuade others.

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[222] "Six of One is Not a Dozen of the Other", *supra*, at pages 621 and 678

[223] American Judicature Society, "Use of Alternate Jurors", http://www.ajs.org/jc/juries/jc_decision_alternate.asp

[224] A good example is the state of Maryland, where Rule 4-312 (b)(3) provides that: "a juror who, before the time the jury retires to consider its verdict, becomes or is found to be unable or disqualified to perform a juror's duty, shall be replaced by an alternate juror in the order of selection. An alternate juror who does not replace a juror shall be discharged when the jury retires to consider its verdict": see *Stokes v Maryland*, 843 A.2d 64 (2004).

[225] *People v Burnette*, 775 P.2d 583 (1989), followed in *Carrillo v People*, 974 P.2d 478 (1999); *Plate v State*, 925 P.2d 1057 (1996); *Hayes v State*, 720 A.2d 6 (1998), rev'd on other grounds: 355 Md. 615 (CA); *Commonwealth v Saunders*, 454 Pa. Super. 561 (1996)

> Moreover, the new juror will not have been part of the dynamics of the prior deliberations, including the interplay of influences among and between jurors, that advanced the other jurors along their paths to decision. Nor will the new juror have had the benefit of the available jurors' views. Finally, a lone juror who cannot in good conscience vote for conviction might be under great pressure to feign illness in order to place the burden of decision on an alternate. (citations omitted)

Federal Rules and the California Penal Code, for instance, both allow post-submission substitution, but state laws require the trial judge to "instruct the jury to begin its deliberations anew".[226] Quite apart from the use of alternates, however, the trial judge can permit a jury of eleven persons to return a verdict if *during deliberations* the court finds good cause to excuse a juror.[227]

2. Australia

In the first few decades after the arrival of the First Fleet in New South Wales, the only "juries" used in criminal trials consisted of six military officers chosen by the Governor.[228] By 1833, twelve member juries became the norm, and by the end of the 19th century each of the other four Australian colonies (Queensland, South Australia, Tasmania and Western Australia) had firmly established trial by a twelve person (male) jury.[229] Under s. 80 of the Australian Constitution, established at the time of Federation in 1901, the trial of an indictable offence under Commonwealth (i.e., federal) law must take place before a jury.[230] This provision has generally been read down by the High Court, to amount to little more than a procedural provision:[231]

However, the requirement is confined to Commonwealth offences. The bulk of criminal offences in Australia arise under the common law or under state or territorial statutes.[232]

All of the State and Territorial governments have empowered the courts to rely on supplementary jurors and to allow the number of jurors to fall below twelve during the

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[226] USCS Fed. Rules Crim. Proc. Rule 24 (c) (3); Cal. Pen. Code, section 1089 (2006). In the case of California, while the Rule expressly provides that an alternate may be substituted "before or after the final submission of the case to the jury", the requirement to begin deliberations anew flows from case law, not statute: *People v Odle*, (1998) 754 P.2d 184; *People v Burnette*, 775 P.2d 583 at note 7 (1989). New Jersey has crafted an instruction that is particularly helpful when an alternate has been empanelled after deliberations have begun*: State v Corsaro*, 107 N.J. 339 (1987), discussed in: "Substitute Jurors: The Weakest Link", by Christopher Johns, 38 Az Attorney 16 (2002).

[227] USCS Fed. Rules Crim. Proc. Rule 23 (b) (3)

[228] Michael Chesterman, "Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy", 62 Law & Contemp. Prob. 69 (1999) at page 70 ("Chesterman")

[229] *Ibid* at page 71

[230] *Ibid*

[231] *Spratt v Hermes*, (1965) 114 C.L.R. 226 (H.C.) at 244; Chesterman, *supra* at page 75

[232] Chesterman, *supra* at page 72-3

course of the trial.[233] There are essentially two models for the use of "supplementary" jurors.[234] The first involves the use of *additional* jurors, and is best exemplified by legislation in the State of Victoria. There, up to fifteen persons can be sworn in for a long trial on the basis that a balloting process will take place to reduce the number to twelve immediately before the jury retires to deliberate. The trial judge can discharge jurors during the trial for good cause, providing that the numbers do not fall below ten.[235] There is, in my view, much to be said for this approach in lengthy trials.[236]

The second model involves the use of reserve jurors, and is best illustrated by legislation in the Northern Territory. There, twelve jurors are empanelled, but up to a maximum of three persons can be chosen and returned as reserve jurors.[237] The reserve jurors can be discharged at any point in the trial, and, commonly, one is held until the jury is about to retire, at which point, if the twelve-person jury has remained intact, the final reserve juror is discharged. This process allows twelve jurors to enter the jury room to commence deliberations. Under this approach, there is no provision for balloting out from amongst the whole body of jurors.[238]

These legislative schemes are, for the most part, constitutionally secure. Adopting a functional[239] rather than an historical analysis of the issue, the High Court of Australia has held that: while twelve persons may be the starting point for a jury, it may initially begin at a higher level, then reduce to twelve before deliberations commence;[240] and it may properly drop below twelve during the trial, as long as it does not go below ten at the time of verdict.[241] Noting that jury trials in Australia typically last longer than they did at the time of Federation (1901) or, indeed, until the latter part of the 20th century, Kirby, J. of the High Court said in 2001, repeated in 2003:[242]

> Contemporary trials, particularly of federal offences, can be extremely complex and lengthy. The inconvenience to the community, to jurors and the cost to parties should not needlessly be incurred by unnecessary termination and re-litigation of jury trials where (as will inevitably happen from time to time) jurors die, fall ill or are otherwise incapable of continuing to act. If it is acceptable to treat a jury of *fewer* than twelve as constitutionally valid in order to sustain the *system* of jury trial and the continued "involvement of the public" and "societal trust" implied in the mode of trial referred to section 80, it is also acceptable, exceptionally, for

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[233] James Stellios, "The Constitutional Jury—'A Bulwark of Liberty'?", 27 Sydney L. Rev. 113 (2005) at page 124

[234] Stellios, *supra* at p.124

[235] *Juries Act 2000* (Vic.), sections 22, 23 (additional jurors) and 48 (balloting to reduce); considered in *Ng v The Queen* (2003) HCA 20

[236] I will have more to say on this issue in Part VII, *infra*.

[237] The range is from 2-6 reserve jurors in the other jurisdictions in Australia: Chesterman, *supra* at page 78

[238] Under this model, the "Reserve Juror" knows his or her status from the outset. (NT) *Juries Act 1962*, sections 6, 37 and 37a, considered in *Fittock v The Queen*, (2003) 197 A.L.R. 1 (HC)

[239] *Stellios, supra* at page 122 *et seq*

[240] *Ng v The Queen* [2003] HCA 20, per Kirby, J.

[241] *Ng v The Queen, supra; Brownlee v The Queen* (2001) 207 CLR 278; *Chesterman, supra* at 124; *Stellios, supra* at page 1-4

[242] *Ng v The Queen, supra; Brownlee v The Queen, supra*

> *supplementary* jurors to be introduced to the jury to guard against a failure of the trial caused by the death, illness or absence of jurors.

On this basis, he continued, the Victorian model of "additional" jurors was properly intended to guard against the complete failure of the criminal trial process:[243]

> Applying the test of functionality to the Victorian law, its purpose is clearly to protect and uphold the jury's function. Its design is intended to prevent the failure of a trial. Such failure can work hardship on the accused, on witnesses, on jurors and on the community. What is involved in a jury trial today is in some ways different from what was involved when the Constitution was written. The word ("jury") remains the same. But the concept adapts to the contemporary features of jury trial.

The High Court has also emphasized the role that twelve jurors could play alongside *reserve* jurors. With the appropriate discharge of reserve jurors, a full jury of twelve can then retire to consider its verdict.[244]

For the sake of completeness, I should note a few further safeguards that exist under Australian law. First, like Canada, the venue of a trial may be moved to an area where the public has had less attention to the crimes alleged.[245] Most crimes in Australia are prosecuted by state or territorial prosecutors pursuant to a state or territorial criminal statute, so venue changes generally occur within the local jurisdiction. The Commonwealth has, however, enacted some penal statutes, and federal legislation does contemplate state-to-state venue changes, albeit in extremely limited circumstances.[246] Second, the court may order the severance of the trials of two or more co-accused.[247] Finally, state legislation permits jurors to be identified by numbers, rather than names, to prevent jury tampering and to instil greater confidence that the jury is going to receive the benefit of legal anonymity throughout the trial process.[248]

3. The United Kingdom

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[243] *Ng v The Queen*, *supra* at page 21; *Chesterman*, *supra* at page 125
[244] *Fittock v The Queen*, (2003) 197 A.L.R. 1 (HC)
[245] *Chesterman*, *supra* at page 88, especially the authorities referred to in footnote 109; More recently, see *R v Gojanovic*, 2005 VSC 9.
[246] For instance, under section 14 of the *War Crimes Act 1945* an accused can apply to the Court for an order that charges being prosecuted in one state be held in another state or territory.
[247] *Chesterman*, *supra* at page 88, especially footnote 107; *Murphy v The Queen* (1989) 167 C.L.R. 94 at page 99 (HC)
[248] *R v Ronen*, 2004 NSWSC 1294, revised on April 26, 2005. The result of this case seems to be at odds with section 631(3.1) of the *Criminal Code* of Canada

In England and Wales there is no constitutional (or indeed any) right to trial by judge and jury.[249] Indeed, in practice, only about 1% of criminal cases in the UK result in trial by jury.[250]

Over the years, a number of significant changes have been made to the jury trial process: in 1967, majority verdicts were introduced; in 1972 the eligibility for jury service was greatly increased from certain landowners to everyone on the electoral roll; and in 1988 peremptory challenges were abolished.[251]

During the past decade, there has been some discussion about the size of the jury in the UK, particularly in the context of lengthy and complex fraud cases. The Roskill Fraud Trials Committee considered the matter in 1986, but felt that the issue was not sufficiently serious to warrant changes to the law.[252]

In 1998, the UK Court Services Agency conducted a survey and found that no case had failed because the number of jurors had fallen below the minimum number of nine.[253] It was, however, noted that during one fraud trial that had lasted ten months, the jury was reduced to nine *during the course of their deliberations*. That prompted Lord Justice Auld in his 2001 Report on the UK courts to say that such a state of affairs at a critical stage in a lengthy trial "must have caused much anxiety to all concerned, including the remaining jurors."[254]

The Auld Report recommended a system of trial without jury in long and complex frauds,[255] Auld further recommended adopting a more broadly-based system of alternate or reserve jurors in lengthy cases:[256]

> I recommend the introduction of a system enabling judges in long cases, where they consider it appropriate, to swear alternate or reserve jurors to meet the contingency of a jury otherwise being reduced in number by discharge for illness or any other reason of necessity.

These proposals have not yet been implemented in the UK. In the *Criminal Justice Act 2003*[257] Parliament made provision for judge-alone cases involving threats and intimidation of juries, and paved the way for judge-alone trial in exceptionally long, complex serious fraud cases.[258] And despite growing opposition,[259] Lord Goldsmith, the

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[249] Review of the Criminal Courts of England and Wales, by the right Honourable Lord Justice Auld (September 2001), found at http://www.criminal-courts-review.org.uk/auldconts.htm, at par. 137 ("Auld Report")
[250] *Ibid*
[251] *Ibid* at page 135-6
[252] Fraud Trials Committee Report (Chairman: Lord Roskill) (HMSO, 1986), at par. 7.41
[253] Auld Report, *supra* at page 142
[254] *Ibid* at page 142
[255] *Ibid* at par.s 73-206
[256] *Ibid* at page 143
[257] Royal Assent was given on November 20, 2003
[258] *Criminal Justice Act* (2003), Chapter 44 (see the explanatory note to the original Bill, at pars. 3-5)

Attorney General, announced on the 24th of July 2006 that "the government is pursuing a co-ordinated approach to tackling fraud… and will bring forward a standalone Bill to allow for non-jury trials in a limited range of serious and complex fraud cases.[260]

Against this backdrop, the judiciary in England has also taken steps to deal with the challenges posed by lengthy and complex jury trials. On March 22, 2005 the Lord Chief Justice of England and Wales issued a Practice Direction called "Control and Management of Heavy Fraud and Other Complex Criminal Cases".[261] It commences in the following way:

> There is a broad consensus that the length of fraud and trials of other complex crimes must be controlled within proper bounds in order:
>
> i) to enable the jury to retain and assess to evidence which they have heard. If the trial is so long that the jury cannot do this, then the trial is not fair either to the prosecution or the defence.
>
> ii) To make proper use of limited public resources: see *Jisl* [2004] EWCA Crim. 696 at [1313]- [121].
>
> There is also a consensus that no trial should be permitted to exceed a given period, save in exceptional circumstances; some favour three months, others an outer limit of six months. Whatever view is taken, it is essential that the current length of trials is brought back to an acceptable and proper duration.

Noting that "the best handling technique for a long case is continuous management by an experienced Judge nominated for the purpose", the Practice Direction requires the judge to "exert a substantial and beneficial influence by making it clear that, generally speaking, trials should be kept within manageable limits:"—three months is the target outer limit, though in extreme cases six months or more may be required.

The practice direction issued in the UK is similar in many respects to the Report recently prepared by the Advisory Committee on Criminal Trials in Ontario. In 2002, section

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[259] Most recently, see: "The Guardian Profile: Lord Goldsmith, Labourer's Attorney General is Preparing for Another Battle Over Fraud Trial Juries", November 10, 2006: http://politics.guardian.co.uk/print/0,,329623948-111381,00.html

[260] News Release, July 24, 2006, "Package of Measures to Reduce Fraud Unveiled—Final Fraud Review Report Published", http://www.islo.gov.uk/pressreleases/final_fraud_review_release_24_07_06; and see the Law Society Gazette, July 27, 2006. The government's announcement also called for a public consultation, with responses requested by the 27th of October, 2006. By late 2006, Lord Goldsmith still intended "to launch a third attempt to push through a Bill providing for a judge alone, without a jury, to decide guilt or innocence in about a dozen of the most complex fraud trials each year": Guardian Unlimited, November 10, 2006, "The Guardian Profile: Lord Goldsmith", by Clare Dyer.

[261] This direction can be found at: http://www.dca.gov.uk/criminal/procrules_fin/contents/pd_protcol/pd_protocol.htm; To the same effect, in Canada, see "The Report of the Chief Justices Advisory Committee on Criminal Trials in the Superior Court of Justice", located on the website on the Superior Court of Justice: http://www.ontariocourts.on.ca/scj.htm

482.1 of the *Criminal Code* was amended to permit courts to establish rules for case management. As a result of the Advisory Committee's work, Criminal Proceedings Rules, effective October 16, 2006 are now in place in Ontario. Standardized, formal pre-trial conferences now form an important feature of these revised Rules.[262]

Whether the UK practice direction will work, or whether it amounts to nothing more than a pious hope, remains to be seen. A couple of points should, however, be made. The direction had, of course, to stay within the framework of the law. It attempts a strategy of "avoidance"—but if the policy does not in an individual case avoid a mega trial, jury problems will almost certainly arise. As well, the document focuses on fraud trials only, although that is understandable in light of the controversies in the UK at the time. In my view, however, there is a much broader issue, and energies would be much better spent dealing with the approach to all lengthy, complex trials rather than attempting to fix one type of proceeding that arises from a political controversy. Current UK terrorist proceedings, expected to be protracted in nature, may force this issue. Another benefit of dealing with the problems of mega-trials in a comprehensive fashion is that it diminishes the possible perception of unfairness to those accused of a particular category of offences, whether they be fraud or terrorist attacks.

[262] Both the Report of the Advisory Committee as well as an executive summary of the Report can be found on the website maintained by the Superior Court of Justice in Ontario: http://www.ontariocourts.on.ca/superior.

PART VII

Terrorist Trials in The Future—Reform Options

a) General Observations

Future terrorist trials face three overarching challenges: first, they need to be manageable in terms of length and complexity. Second, the process and result need to be seen as fair and legitimate, both domestically and in the eyes of the international community. Finally, any new criminal trial process cannot increase the risk of convicting persons who are innocent of the crimes charged.

This trilogy of key challenges intersects at several levels and, in turn, engages the seven fundamental principles underlying this study which I described in Part II. A process that is seen to be fair, open and manageable will, through an international lens, be more likely to be viewed as legitimate and effective, and the political desire to "legitimize" a domestic criminal justice system process will be more likely lead to a procedure that is manageable in size, easily understood, and be consistent with internationally-recognized principles of fairness. Perceptions of legitimacy and fairness are further enhanced where reforms are anchored on existing and well established justice structures and processes. And a trial process that is fair, manageable in size and easily understood is less likely to result in wrongful convictions, and enhances the truth-seeking function of criminal trials.

It is important to recognize that these challenges, especially manageability, are not confined to terrorist trials. They extend to gang prosecutions, complex cases of fraud, criminal conspiracies and virtually any substantive offence involving multiple accused and multiple charges that are said to have occurred over an extended period of time. The problem is not, therefore, the new face of terrorism; it is, instead, the emergence in virtually all Anglo-based systems of criminal justice of the so-called mega-trial. It is important to observe, as well, that a strong response to mega-trials of this nature will not have the disadvantage of isolating out terrorist trials for special treatment.

For that reason, the reforms discussed in this Part are not "terrorism-specific". Rather, they focus on three broad objectives: rein in mega-trials; make sure that an appropriate trier of fact is in place to consider the case fairly and fully; and ensure that, even in protracted proceedings, the matter can actually proceed to verdict in accordance with the laws and processes applicable to all criminal cases. In the pursuit of these objectives, it is critically important that proposed reforms respect individual rights and, at the same time, take into account the broader interests of the public.

Canadians are not known to be dogmatic or inflexible in their approach to problem-solving. We tend to be practical, drawing on successes elsewhere, often seeking a compromise or "middle ground" that recognizes the reality that we are a large country with a sparse population that is often dominated by our neighbour to the south. We also

recognize that we are a product of two founding nations, but that our criminal justice system is derived, almost exclusively, from Great Britain.

We are, in a word, flexible, although we do recognize the need to place ourselves within our own, modern constitutional framework and within the broader community of nations. I note this for one simple reason: Canada has, at various times in its history, resorted to or at least flirted with, many of the structural forms now discussed at the international level: we have had a flexible jury size, down to six in sparsely-populated regions of Canada; we presently empower trial judges to empanel "alternate" jurors; pre-Victorian trials of serious crime are known to have used a panel of three judges sitting with a jury; "special juries" were available in the criminal courts pre-confederation, and Canada was one of the first Commonwealth countries to allow trial by judge alone on a widespread basis in cases of serious crime.

Despite this level of flexibility, we now face the prospect of trials collapsing under their own weight, and not reach any verdict on serious charges. Indeed, that has already occurred. The following recommendations are intended to avoid that prospect, and to instil a sense of confidence in Canada's criminal justice system, both domestically and internationally.

b) Trial by Judge and Jury: The Centre of the Reform Vortex

Of necessity, the jury is at the centre of just about all of the structural reforms proposed to deal with lengthy and complex trials. The reasons are not surprising.

In earlier days, when the traditional jury model was developed, trials were relatively short: as many as 25 cases could be heard by a single judge and jury in a twelve- hour period. Most would last 15 to 20 minutes; a complex case may require a half an hour. Jurors were generally taken "as is", with few challenges; there were no *voir dires*; the accused was often unrepresented; instructions to the jury were mostly perfunctory, and the deliberations were brief.[263]

As a result, justice was "quick". Juror's memories of the evidence were fresh. There was almost no need for instruction on the facts of the case, and there was certainly no need to take notes. Mistrials due to the loss of a juror were virtually unheard of. The facts of the case were simple, the issues obvious, and juror reaction was almost instantaneous.[264]

All of that changed as we moved into the second half of the 20th century. Protracted proceedings now plague the criminal justice systems in Canada, the US, Australia and the

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[263] John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press: Oxford, 2003) at pages 16-23 [John Langbein is Sterling Professor of Law and Legal History at Yale Law School. He has written extensively on trials, juries, and their origins]; Douglas G. Smith: "The Historical and Constitutional Contexts of Jury Reform", 25 Hofstra L. Rev. 377 (1996) at page 405.
[264] *Ibid*

UK.[265] Anglo-based criminal justice systems are facing the same basic question: is the traditional model of the jury the best mechanism to hear lengthy and complex cases, or are changes required? What follows are the main options available to government and the judiciary.

c) Jury Size: Twelve v Six

The criminal jury in Canada has traditionally had twelve members. But why twelve? Why not ten, or eight? Or even six? History affords little insight into the question. In 1970, the Supreme Court of the United States concluded that the empanelling of twelve jurors was an "historical accident", unnecessary to effect the purposes of the justice system and wholly without significance "except to mystics".[266] Over the years, Law Reform Commissions and scholars have reached similar conclusions.[267]

In practice, the number of jurors varies widely between jurisdictions. In Canada, the norm is twelve. In Scotland, fifteen constitute a jury.[268] In the US and Australia, the norm at the federal level is twelve, although at the State level in both countries six-person juries are constitutionally permissible and are, in fact, used.[269]

The critical question is whether the size of the jury ought to be reduced in Canada—likely to six. Some argue that the costs of the criminal justice system are becoming increasingly burdensome, and that the reduction of the size of the jury is an essential step towards savings and efficiency. There are, however, relatively few jury trials and the

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[265] On March 22, 2005 the Lord Chief Justice of England issued a Practice Direction entitled "Control and Management of Heavy Fraud and Other Complex Criminal Cases". It is a protocol intended to ensure "that the current length of trials is brought back to an acceptable and proper duration". As well, in 1997, the Director of Public Prosecutions for the Commonwealth of Australia noted that complex fraud trials have escalated litigation in Australia to the level of "mega-trials of unreasonable proportion": "The Adversarial Model in the Criminal Justice System: What Change is Happening?", B. Martin, delivered at the Heads of Prosecuting Agencies in the Commonwealth Conference, 23-26 September, 1997 at Wellington, New Zealand. In *Ng v The Queen* [2003] HCA 20, Kirby, J. noted that "jury trials typically last longer than was the case in 1900 or, indeed, until the latter part of the 20th century". As early as 1961 in the United States, it was noted that four alternate jurors may not be enough for certain lengthy criminal trials: USCS Fed. Rules Crim. Proc. R.24 (from the note of the Advisory Committee on the 1996 amendments).

[266] *Williams v Florida*, 399 U.S. 78 at 102 (1970); For a contrary view, see Robert H. Miller, "Six of One is Not a Dozen of the Other: A Re-examination of *Williams v Florida* and the Size of State Criminal Juries", 146 U.P.A.L. Rev. 621 (1998) at page 632 *et seq*.

[267] Douglas G. Smith, *supra*, at page 396; Sir Patrick Devlin, *Trial by Jury* (London: Stevens and Sons, 1956) at page 8-9; *Review of the Criminal Courts of England and Wales*, by the Right Honourable Lord Justice Auld (September 2001) at page 142; Law Reform Commission (New South Wales), "Report 48" (1986)—Criminal Procedure: The Jury in a Criminal Trial, "Avoiding the Diminution of the Jury", at par. 10.12

[268] The Auld Report, *supra*, at page 142; Law Reform Commission (New South Wales), *supra*, "The Size of The Jury, footnote 27

[269] Michael Chesterman, "Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy", 62 Law and Contemp. Prob. 69 (1999) at 78; *Williams v Florida, supra; Cabberiza v Moore*, 217 F.3d 1329, cert. denied 531 US 1170; Law Reform Commission (New South Wales), *supra*, at par. 2.22; Law Reform Commission (Victoria), Final Report Volume 3, chapter 2—*Juries and Complex Trials* by Mark T. Cowie: http://www.parliament.vic.gov.au/lawreform/jury/jury5/chap2.html; *Ballaw v Georgia*, 435 US 223 (1978); Robert H. Miller, *supra*, at page 645 *et seq*.

available data tends to suggest that a reduction in size would not have a noticeable effect on provincial budgets. The Law Reform Commission of Canada concluded that 1% of the administration of justice budget goes to funding juries. And, as noted elsewhere in this paper, less than 1% of cases in both UK and Australia involve trial by judge and jury.

In 1980, the Law Reform Commission of Canada concluded that "the apparently haphazard, trial-and-error development of the jury may have led to a jury size that embodies more wisdom than after-the-fact explanations would suggest".[270]

The arguments on the issue tend to favour retaining a jury of twelve. Verdicts of twelve-member juries are more likely to reflect the opinion of a representative cross-section of the community, since a random selection of twelve will clearly lead to a more representative group than a random selection of six.[271] Significantly, especially in a multicultural environment such as Canada, the views of minorities are more likely to be represented and woven into the deliberations in a twelve-member jury.[272]

As the Law Reform Commission for New South Wales put it in 1986:[273]

> A particular bias or prejudice is far less likely to gain prominence in a twelve member jury than it might have in a smaller group. It is improbable that the individual prejudices of such a large number of jurors will all point in the same direction. It is more likely that any existing prejudices will tend to cancel each other out.

A larger jury is also more likely to be a more accurate fact-finding body: it is more probable that someone in the jury will remember important pieces of information, and there is a greater likelihood that there will be a broader range of life and work experiences with which the jury can evaluate evidence and submissions.[274]

Put another way, there is a "preference for the collective common sense of the jury".[275] And a Law Reform Commission in Australia has concluded that, based on empirical evidence, "the verdicts of six member juries are less predictable than those of a full sized jury".[276]

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[270] Law Reform Commission of Canada, Working Paper 27, "The Jury in Criminal Trials" (Ottawa: 1980) at page 33.
[271] Law Reform Commission of Canada, *supra* at page 35; Law Reform Commission (New South Wales), *supra*, at par. 2.23; Law Reform Commission (Victoria), *supra*, at par. 2.215; Robert H. Miller, *supra*, at page 664
[272] *Ibid* (all)
[273] Law Reform Commission (New South Wales), *supra*, at par. 2.23
[274] Law Reform Commission of Canada, *supra*, at page 35; Law Reform Commission (Victoria), *supra*, at par. 2.212; Nonetheless, the Supreme Court of the United States seems to have arrived at a different conclusion: *Williams v Florida*, 399 US 78 (1970)
[275] Law Reform Commission (Victoria), *supra*, at par. 2.220
[276] Law Reform Commission (Victoria), *supra*, at par. 2.215; generally, see Robert H. Miller, *supra*

It seems reasonable to assume, as well, that a twelve member jury is less likely to be influenced by an "oddball" or "rogue" juror.[277] Likewise, a larger jury will likely have more robust and searching discussions with a view to discovering the truth, thus reducing the risk of wrongful conviction.

On the other hand, extremely lengthy trials could cause great inconvenience and the disruption of lives for some jurors. That prospect can, however, be mitigated through the jury selection process in individual cases. Those who object or feel they could not cope with a lengthy trial may be culled administratively beforehand, or they could raise the issue in court once summonsed.[278] And, as I emphasize later in this Part, there should be no mega-trials in the first place: both counsel, the trial judge and the managing judge bear responsibility to ensure that the case is focused and manageable.

In my view, the case for reduction has not been made out. There is no basis to conclude that a reduction in size from twelve to six jurors would enhance the efficiency or effectiveness of jury trials. Indeed, there is an argument to be made that quite the contrary is true.[279] It seems to me that the criminal jury in Canada should continue to be composed of twelve persons.

d) Additional or Alternate Jurors: Managing the Diminution of the Jury

In Part V, I noted that in 2002 the *Criminal Code* was amended to provide for the selection of "alternate jurors".[280] It was a significant development in our criminal procedure, but was accompanied with little fanfare, and, surprisingly, has received little or no attention in Canadian literature since then.[281]

The Canadian alternate jury scheme is problematic and of little value for two basic reasons. First, only one or two alternate jurors are permitted. That will not likely suffice in the event of a terrorist mega-trial. Second, the safeguards respecting jury numbers are built into the front-end of the trial process, *not during the course of the trial* where they are needed most. In other words, the 2002 amendments were intended to ensure that the

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[277] Probably for historical reasons, Australian literature tends to focus on the so-called "rogue" juror. In Canada, the bizarre case of Gillian Guess comes to mind: *R v Guess* (2000), 150 CCC (3d) 573 (BCCA)—although Ms. Guess is probably more accurately described as a corrupted juror rather than an oddball or rogue. In this context, reference can also be made to *Vezina and Cote v The Queen*, [1986] SCR 2.

[278] Section 632 *Criminal Code; R v Walizadah*, [2003] O.J. No. 284 (S.C.J.)

[279] I do not rest my view on a constitutional footing; rather, I am of the opinion that the case for reduction has not been demonstrated at this stage of history. Also, note that later in this Part I reach the conclusion that trial by judge alone may be preferable where the interests of justice, especially the right to a fair trial, are truly imperilled by a trial of immense proportions.

[280] SC 2002, c.13, s.52; see *supra*, footnote 186 and accompanying text. The use of twelve person juries with two alternates can be traced back as far as the 1864 reforms in Russia: John C. Coughenour, "Canary in the Coalmine: The Importance of the Trial Jury", 26 Seattle Univ. L. R. 399 (2003) at 401.

[281] This legislative scheme was, however, considered by Ewaschuk, J. in *R v Walizadah* [2003] O.J. No. 284 (SCJ) where the trial judge noted that the amendments were of limited value. Interestingly, the practice of selecting two alternate jurors was a part of the jury empanelment practice used for decades in Alberta well before these amendments came into place. The Court of Appeal in that province ruled that this practice did not result in jurisdictional error: *R v Cruickshank*, 2002 Alta. D. Crim. J. 2148.

trial *starts* with twelve jurors. The alternates are then immediately discharged. If the trial lasts 18 or 24 months, for example, only 2 jurors can be discharged throughout all of the tendering of the evidence, the submissions of counsel and the jury's deliberations. If, for whatever reason, three jurors need to be discharged, a trial judge has no alternative but to declare a mistrial. After 18 months of evidence or more, that is nothing short of catastrophic for all concerned, including the public.[282]

There should, I believe, be two objectives in this area of the law.[283] First, a new legislative scheme needs to ensure that the trial starts with at least twelve jurors. Second, legislation needs to ensure, or at least maximize the prospect, that twelve jurors will go into the jury room to deliberate on the fate of the accused at the end of the trial.[284]

As I noted earlier, legislation in the state of Victoria in Australia provides a sensible model that achieves both of these objectives.[285] There, a jury consists of twelve persons.[286] The trial judge has a broad discretion to order the empanelment of up to three additional jurors.[287] The trial can, therefore, proceed with up to fifteen jurors. There are no "second class" alternate jurors: all have full status, and they continue throughout the trial and hear all of the evidence. During the trial, the trial judge has authority to discharge a juror on the basis of illness, lack of impartiality, incapacity or other good reason.[288] The size of the jury, however, can not be reduced below ten.[289] If more than twelve jurors remain at the time the jury is about to retire, a ballot is conducted to select the twelve jurors who will actually begin deliberations. If the foreperson is selected on the balloting process for exclusion, it is disregarded, and the foreperson remains on the jury.[290]

There are several advantages to this model. The trial starts with twelve, probably more. It avoids the spectre of some persons being "real jurors" while others are "alternates". All are "jurors" until the end of the evidence.

The Law Reform Commission for the state of New South Wales considered the various models for additional jurors, and concluded as follows:[291]

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[282] In this respect, reference can be made to: Law Reform Commission (New South Wales), *supra*, at par. 10.24
[283] *Ibid* at par. 10.15
[284] *Ibid* at par. 10.12
[285] *Juries Act* 2000 (Vic.), Act number 53/2000; also, reference can be made to the Law Reform Commission Report (Victoria), *supra*, at par. 2.212 *et seq*.
[286] *Juries Act* 2000, *supra* at section 22
[287] *Ibid* at section 23
[288] *Ibid* at section 43
[289] *Ibid* at section44
[290] *Ibid* at section 48; the foreperson has, by this point, assumed a leadership role in the jury, and was picked by the enlarged jury at the beginning of the trial: see the discussion of this issue in the Law Reform Commission Report (New South Wales) at par. 10.20. Additionally, reference can be made to *Ng v The Queen* [2003] HCA 20 where, as it happened, the card of the foreperson was the first one drawn for exclusion, and the trial judge directed that the foreperson retire with the jury to consider its verdict.
[291] Law Reform Commission (New South Wales), *supra*, at par. 10.18

> In our view the "additional juror" is the more desirable of the two alternatives. The American Bar Association makes this comment on the advantage of the "additional juror" system.
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> > A preference for the additional juror system has sometimes been stated on the ground that it is undesirable to give a juror who may be involved in deciding the case second class standing during some or all of the trial. That is, one who is labelled an alternate at the outset might not take his job as seriously as the regular jurors as the chances of substitution are not great. On the other hand, where one or two additional jurors are selected each member of the thirteen or fourteen man group knows that even if no juror is excused for cause he nonetheless has a very substantial chance of being involved in the deliberations.

The Right Honourable Lord Justice Auld expressed a similar view in his Report to the UK Government in 2001. To avoid a potential "lack of commitment" to the case, he expressed the view that all of the jurors should be sworn and treated in exactly the same way throughout the trial.[292]

The jury model in place in Victoria, as well as the ones recommended by the New South Wales Law Reform Commission and Lord Justice Auld maximize the prospect that a full jury of twelve will eventually retire to deliberate. Even then, the Victorian legislation provides a safeguard of two reductions post-submission to the jury. Even in the most protracted mega-trial, it is doubtful that the deliberations would last more than two weeks or so, so the "insurance" of two seems not unreasonable.

Even the Victorian model can be enhanced. Additional jurors may be required in a wide variety of circumstances—the Air India trial, for instance, could have lasted three years.[293] It may be preferable to empower a trial judge to allow more than just three additional jurors—perhaps four or even six, as in the United States, in circumstances where the trial is expected to last more than three months or so.[294] At the other end of the trial spectrum, it may be advisable to reaffirm that the numbers can drop to ten, but that there is a discretion on the part of the trial judge to allow a further diminution, if, in an individual case that has lasted more than six months, such an order seems necessary in the interests of justice.[295] Beyond a reduction to nine, or, arguably, to eight, however, it seems to me that the jury starts to lose its fundamental character as a representative and effective fact-finding body.[296]

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[292] Auld Report, *supra* at page 142

[293] Michael Code and Robert Wright, Q.C., "Air India Trial: Lessons Learned", *supra*, page 3 .

[294] The Law Reform Commission of New South Wales recommended that additional jurors be made available where the trial is estimated to take in excess of three months: see the Report, *supra* at the recommendation immediately following par. 10.15

[295] Nine is the base minimum in the UK: see Auld Report at page 142

[296] The Law Reform Commission for New South Wales recommended a base level of eight jurors, although the commissioners were split on the issue: Report, *supra*, at par. 10.24. It should also be noted that a Canadian Bill tabled in Parliament in 1984 proposed a base level of eight where the trial had continued for

The combination of these potential reforms— four additional jurors and a reduced minimum jury size— greatly reduces the risk that a lengthy trial will fail because the jury numbers dropped to an unacceptable level.[297] The trial can start with a significantly enhanced jury base; everyone is on an equal footing; the objective is to have twelve jurors retire to the jury room; the jury can drop to ten, and in extreme circumstances less than that. But that would require the discharge of a significant number of jurors— something that is highly unlikely, even in a lengthy trial.[298]

In summary, it seems to me that Canada needs new structural tools to manage the diminution of the jury. In my view, the trial judge should be empowered to empanel up to sixteen jurors, including four additional jurors, in cases expected to last a significant amount of time. The trial judge should continue to have authority to discharge jurors on the basis of section 644(1) of the *Criminal Code*. If more than twelve jurors remain at the end of the evidence, a balloting process ought to be undertaken to determine the twelve jurors that can enter the jury room to commence deliberations, with the balance discharged from further duty in the case. It also seems to me that we should retain the current scheme in the *Criminal Code* under which the jury can be reduced to ten—but confer on the trial judge a discretion to allow the numbers to reduce to nine or perhaps even eight if the trial has lasted an extended period of time and such an order is necessary in the interests of justice.

e) An Alternate Judge in Trial by Judge and Jury

In Part V, I noted that the *Criminal Code* provides for a substitute judge to be appointed where the original trial judge dies or cannot continue the trial. However, in a judge alone case the evidence needs to be tendered again, and in trial by judge and jury, the substitute judge may either continue the trial or start all over again.[299] In the context of a terrorist mega-trial, the financial cost, as well as the toll on the parties, witnesses and jurors, and the impact on the public could be immense if the trial has to commence anew.

In virtually all lengthy criminal trials, the Crown is represented by a team of Crown attorneys, one of whom is the "quarterback". The same usually applies to the defence. If a system of additional jurors is implemented, the trial judge clearly becomes the "weak link" in a process that could, without warning, result in the premature demise of a very lengthy trial.

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more than 30 days. The Bill was criticized, and did not pass: Law Reform Commission (New South Wales), *supra* at par. 10.26

[297] See Law Reform Commission (Victoria), *supra*, at par. 2.218

[298] A Canadian Bill tabled in Parliament in 1984 proposed a baseline of eight. It was significantly criticized. See Law Reform Commission (New South Wales) at par. 10.26; In 2005, a national Canadian group consisting of defence counsel, Crown attorneys and the judiciary prepared a Report entitled "Justice Efficiencies and Access to the Justice System", suggested that the number could drop to nine or eight, subject to further study on the constitutional framework: http://www.justice.gc.ca/en/esc-cde/mega_r.html

[299] See supra, footnote 200 *et seq* and accompanying text.

First, some legal context. Alternate judges were appointed in the post-World War Two Nuremberg Trials—but since then there have been few instances of legally-sanctioned judicial "back-ups". They are not used in the criminal justice systems in the US, UK, Australia or New Zealand. They have, however, been considered or used in international fora, and in tribunals specially set up to hear certain issues that are expected to be lengthy.

The Nuremberg trial model of alternate judges was adopted in the Statute of the International Court of Justice, established by the Charter of the United Nations.[300] The International Court of Justice is a body of independent judges that considers issues referred to it by parties to the International Statute, particularly the interpretation of a treaty, questions of international law and alleged breaches of international obligations.[301]

Likewise, alternate judges have been advocated for Circuit Courts of Appeal in the United States.[302] And they have been adopted in South Africa to implement The Rome Statute of the International Criminal Court[303] and in the Iraqi Special Tribunal established to adjudicate the crimes alleged against the former dictatorship in Baghdad.[304]

Facially, the appointment of alternate judges in a lengthy trial makes sense. However, what are the arguments against alternate judges, and why have so few legislative schemes embraced them?

Undoubtedly, the major impediment is resources. What government or judicial body has the capacity to appoint an alternate, "side" judge to sit in a two year trial, in the *off chance* that the principal judge dies or cannot continue? And in a small jurisdiction, sidetracking a judge on a contingency basis is virtually impossible: for instance, Prince Edward Island, the Northwest Territories, Nunavut and the Yukon only have between two to five Superior Court Judges to begin with.[305] Some of these jurisdictions rely extensively on the use of "deputy" judges from southern Canada, but is it realistic to believe that even deputy judges could act as alternate judges in protracted proceedings?

Alternate judges make sense in lengthy, individual cases, but there are significant, practical issues that need to be addressed.

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[300] Article 29, which provides that the court annually shall form a chamber composed of five judges, which may hear and determine cases by summary procedure, and two additional judges shall be selected for the purpose of replacing judges who find it impossible to sit: http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm.

[301] *Ibid*, articles 2 and 36; and see Larry D. Johnson, "Ten Years Later: Reflections on the Drafting", 2004 Oxford University Press ICJ 2.2 (368)

[302] R Mathew Pearson, Duck Duck Recuse? Foreign Common Law Guidance and Improving Recusal of Supreme Court Justices, 62 Wash. & Lee L. Rev. 1799 (2005)

[303] Implementation of the Rome Statute of the International Criminal Court Act, 2002 SA Criminal Law 27, which provides in article 74 (1) that one or more alternate judges are to be present at each stage of the trial and may replace a member of the Trial Chamber if that member is unable to continue attending.

[304] Salvatore Zappala, "The Iraqi Special Tribunal's Draft Rules of Procedure and Evidence—Neither Fish nor Fowl?", 2004 Oxford University Press ICJ 2.3 (855)

[305] PEI has five, the NWT and Nunavut have three, with the Yukon having two.

In the result, it seems to me that the Government of Canada should consider amending the *Criminal Code* to provide for alternate judges in trials by judge and jury that are expected to last more than one year and, in the consideration of that issue, government should first consult with the Canadian Judicial Council, the Canadian Bar Association and all Ministers responsible for justice in Canada

f) Trial by a Panel of Three Judges Without a Jury

Paragraph b (vi) of the Terms of Reference for the Air India Inquiry asked for advice on "whether there is merit in having terrorism cases heard by a panel of three judges". The question raises two separate and fundamental issues: is mandatory trial by a judge alone possible; if it is, can or should a panel of judges hear the case? I will deal with both issues.

At the outset, it should be recognized that terrorist trials will almost certainly involve offences which carry a maximum punishment of five years imprisonment or more. Section 11(f) of the *Charter of Rights and Freedoms* will therefore be engaged, requiring a jury trial unless the charges were laid under military law and are heard before a military tribunal.

There are, in my view, only two pathways that would allow a "bench trial" in a terrorist case that is being heard in the normal courts. First, Parliament could invoke the "notwithstanding clause" provided in section 33(1) of the *Charter of Rights and Freedoms,* to override the right to a jury trial in s.11(f). Under subsection 33(3) resort to the override power would only be valid for a maximum of five years, after which it would cease to have effect.

The second reform option is, in my opinion, more viable. The section 11(f) right to a jury trial is subject to limits *prescribed by law* that can be demonstrably justified in a free and democratic society.[306]

The Supreme Court of Canada has described the test to be applied on a section 1 analysis in a series of decisions, although the seminal statement can be found in *R v Oakes*:[307] to establish that a limit is justified under this section, two central criteria need to be satisfied. First, the objective which the measures responsible for a limit on a *Charter* right or freedom must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; secondly, the party invoking this section, in this instance likely the Crown, must show that the means chosen are reasonable and demonstrably justified. The first criterion requires, at a minimum, that the objective relates to concerns which are pressing and substantial in a free and democratic society. The second requirement requires a form of proportionality test and while the nature of the test can vary, depending on the circumstances, in each case the courts will be required to balance the interests of society with those of the individual and of groups.

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[306] Section 1 *Charter of Rights and Freedoms*

[307] *R v Oakes*, [1986] 1 SCR 103; *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713; *R v Lyons*, [1987] 2 SCR 309; *Irwin Toy Ltd v Quebec*, [1989] 1 SCR 927; *RJR-MacDonald Inc. v Canada*, [1995] 3 SCR 199

There are three important components of the proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. The measures must not be arbitrary, unfair or based on irrational considerations, but rather must be rationally connected to the objective. Second, the means, even if rationally connected to the objective, should impair as little as possible the right or freedom in question. Finally, there must be a proportionality between the effects of the measures, which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of sufficient importance.

Disentitling an accused to trial by judge and jury in the *Charter* era is not without parallel in Canadian criminal law. Section 598 of the *Criminal Code* provides that an accused effectively forfeits that right where he or she fails to appear or remain in attendance at their trial. That provision was ruled constitutionally secure by the Supreme Court of Canada on the basis that it constituted a reasonable limit on the right to a jury trial. For the majority, Lamer, J. said this:[308]

> The rationale for this section lies in the "cost" to potential jurors and to the criminal justice system in terms of economic loss and of the disaffection created in the community for the system of criminal justice, especially through the first jury panel. The section was enacted, as Wilson J. notes in her reasons, to protect the administration of justice from delay, inconvenience, expense and abuse, and to *secure the respect of the public for the criminal trial process*. (Emphasis by Lamer, J.) The expense, it should be noted, is not only to the system. Persons summoned to serve on a jury panel have little choice but to obey the summons, and as such, individuals who are selected as potential jurors often forgo for a substantial time their daily livelihood… all of this leads to an erosion in public confidence and a frustration with the system when the accused fails to appear for his trial and the assembled jury panel has to be sent away. This is the mischief the section attempts to minimize.

Three points should be made in relation to this decision. First, it was the accused's *conduct*, itself an offence under section 145(2) *Criminal Code* [failure to appear], that caused the accused to lose the right to a jury trial. Second, where that right is lost, the accused is deemed to have elected trial by a judge alone in accordance with the election-deeming scheme in the *Criminal Code*.[309] The charges, therefore, stay within the framework of the normal criminal laws and do not go to a newly-created tribunal set up for that purpose.

Finally, the principal issue in the analysis of s.598 involved balancing the restriction on the right to a jury trial against the "cost" to individuals and society because of the non-appearance of accused persons for their trials. That cost, the court continued, must be assessed "in the sense of economic loss and disruption to lives and in the sense of

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[308] *R v Lee* (1989), 52 CCC (3d) 289 (SCC) at page 293d
[309] Section 598 (2) *Criminal Code*

confidence and respect for the system, to the individual selected for jury duty and to society as a whole".[310]

Would any of these factors arise in support for the notion of a bench trial in the case of an extraordinarily long terrorist trial? The first one involves disentitling the right of an accused to a jury trial based on his or her own conduct. In my view, that would not serve as a proper basis given the presumption of innocence and the perception if not reality that this would take Canada into a policy of "Diplock courts" (i.e., if you are accused of being a terrorist, you can't have a jury trial). The second rationale (no new structures) flows from the first. The third rationale concerns costs to individuals, including jurors, and to society as a whole. Elements of this rationale may be relevant, although it seems to me that the question of costs to the jurors can best be addressed through less drastic means such as a more liberal exemption for jurors because of hardship, and increased compensation for serving on the jury. These are, I think, more proportional responses, rather than simply denying an accused the right to a jury trial. It seems to me that an entirely different rationale will need to be relied upon—if, indeed, any exists at all.

Two separate trial models seem to exist, assuming the existence of a compelling rationale for disposing with the need for a jury in terrorist cases. First, trial by a single judge, with or without an alternate judge. Second, trial by a panel of judges.

A trial by a panel of judges is not presently available under Canada's criminal law. They are not, however, unheard of. As I outlined in Part V, a panel of three judges and a twelve-man jury heard serious cases in early, pre-confederation Canada.[311] And References on issues of miscarriages of justice that had some of the trappings of a normal criminal trial took place before a panel of judges in the Supreme Court of Canada in *Reference Re Regina v Truscott*[312] and *Reference Re Milgaard*.[313] These were not, however, criminal trials—nor were they intended to be. They involved the tendering of *viva voce* evidence before a panel of judges, but the similarity ends there: the issues were different, as was the burden of proof, procedural and evidentiary rules, and the order sought. They just *looked* like a trial.

Internationally, trial by a panel of judges is considered desirable on the basis that a panel sitting together (usually three) would reduce the strain on a single judge, and the resulting decision would have greater credibility than a judge sitting alone.[314] In the inquisitorial style of criminal justice in the Netherlands, the concept of a bench of three judges is considered both highly satisfactory and flexible.[315] A Special Criminal Court is activated and deactivated by proclamation of the government in the Republic of Ireland when it is satisfied that special measures are required (or no longer required) to ensure public safety. The court consists of three members: a High Court judge, a County Court judge

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[310] *R v Lee*, supra at page 293-4
[311] See *supra*, footnote 164 and accompanying text
[312] [1967] 2 CCC 285 (SCC) [nine judges heard a large body of evidence, including the *viva voce* evidence of the defendant].
[313] [1992] 1 SCR 866 [five judges heard *viva voce* evidence over several weeks.]
[314] Law Reform Commission (Victoria), *supra*, at par. 2.97
[315] *Ibid* at par. 2.98

and a magistrate, who sit without a jury.[316] In 1988, a scholar from the University of Leicester suggested that: "the most feasible suggestion for change in decision-maker is, it is submitted, that for trial by a multi-judge court, a common model where jury trial has been abandoned or temporarily put aside. The model could be a two-judge court, with unanimity required for conviction, or a three-judge court, where a majority verdict might suffice, although unanimity would be the preferable requirement."[317] Finally, it should be noted that the recently established International Criminal Court assigns three judges from the Trial Chamber to hear the case and, in the event of an appeal, five judges from the Appeals Chamber are assigned.[318]

In 1978, a Report tabled in the New South Wales Parliament recommended that trial by jury no longer be mandatory in certain types of commercial crime cases. Rather, it said that the Attorney General ought to be able to direct, in individual cases, that such offences be heard by a superior court judge without a jury. The proposal was not adopted.[319]

Similar legislation was proposed for Hong Kong in 1984. Under this scheme, the jury would be replaced by a judge and two adjudicators in complex commercial prosecutions. The main justification for this legislation was said to be the inability of a lay jury to avoid being confused by the complex evidence presented in cases of this kind.[320]

In the United Kingdom, the Fraud Trials Committee chaired by Lord Roskill recommended in 1986 that trial by judge and jury be abolished on the basis that cases of this nature could not be prosecuted effectively because the random selection of a jury of lay persons was an inappropriate tribunal for the trial of complex and lengthy fraud cases. Later that year, the New South Wales Law Reform Commission called this recommendation "flawed", and the proposal ultimately was not implemented.[321]

The proposal to eliminate UK juries in complex fraud cases has recently been revived. Despite widespread and vocal opposition,[322] the Attorney General of England, Lord Goldsmith, announced on the 24th of July, 2006 that the UK government will bring in sweeping changes to deal with lengthy and complex fraud cases, including: a standalone

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[316] *Ibid* at par. 2.98
[317] David Bonner, *ibid*
[318] http://www.icc-cpi.int/about/ataglance/works.html
[319] Law Reform Commission (NSW), *supra*, at par. 8.29
[320] *Ibid*
[321] *Ibid* at par. 8.25
[322] "Outrage at Fraud Trial Plans", June 22, 2005, Financial Times: http://www.ft.com/cms/s/64f91aeo-e2bb-11d9-84c5-00000e2511c8.html; "It Should not be Lightly Swept Away: Should Judges be Left to Rule in Lengthy Fraud Cases?", June 23, 2005, The Guardian: http://www.guardian.co.uk/jury/article/0,,1512291,00.html; "Goldsmith Fights to Save Plans for No-Jury Fraud Trials", November 26, 2005, The Guardian: http://www.gaurdian.co.uk/print/0,,5342275-103556,00.html; "Enron Shows Why We Should Keep Fraud Juries", May 29, 2006, The Guardian: http://www.guardian.co.uk/jury/article/0,,1785045,00.html. It is widely believed that the British plans flow directly from the collapse of a fraud trial in 2006, said to have had jury problems, that cost 25,000,000 pounds: "25,000,000 Pounds Tube Trial Lacked Strategy", BBC News, June 27, 2006: http://news.bbc.co.uk/1/hi/england/5121626.stm

Bill to allow non-jury trials in a limited range of serious and complex fraud cases; creation of a Financial Court with specialist judges to hear the cases; allow plea bargaining as an alternative to a full-scale trial; and extend sentencing options available to the court.[323]

There are strong arguments both for and against the elimination of juries in favour of a bench trial (or judge sitting alone) in certain types of cases.

Those favouring the elimination of juries argue that many jurors are out of their depth when trying to follow the evidence presented in complex and lengthy cases. They contend that the verdict of the jury may not rest on a firm grasp of the evidence, but upon an "overall impression of guilt or innocence in the minds of jurors".[324] Most people, they add, do not usually discuss complex issues as a matter of daily life. Sometimes, they are doing it for the first time in the jury room, when the liberty of someone is at stake. "After a few days in that room, there is no logical discussion—it becomes psychological warfare, when people start thinking of tactics to change other people's minds".[325] It should be observed, however, that these criticisms tend to focus on the weaknesses of individual jurors, ignoring the strength of a twelve person jury—the "collective wisdom" of a group.

Some have argued, perhaps with more force, that in a lengthy and complex trial the jury must listen to, understand and remember details from extended presentations of information that may be complex, unfamiliar and sometimes conflicting. Are jurors capable of absorbing huge amounts of information over an extended period of time? In the US, it has been found through empirical study that "jurors in long trials find the evidence to be more difficult than did jurors in short trials".[326] And one Law Reform Commission in Australia has made this observation:[327]

> While not the first to do so, the Law Reform Commissioner of Tasmania raised the issue of juror memory and has suggested that the trial process is "a real test of memory for them [the jury] to recall and give proper weight to all the evidence. All things considered, it is not difficult to appreciate that jurors will have forgotten a significant amount of the evidence by the time they retire to consider their verdicts. This is supported by research findings in the United States, which indicate that protracted trials may interfere with retention and as the volume of exhibits and testimony increases, comprehension levels will drop. In other words, the more difficult it is to comprehend the information, the more rapid the rate of forgetting.

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[323] News Release, Attorney General's Office, 24 July 2006: http://www.islo.gov.uk/pressreleases/final-fraud-reviews-release-24-07-06.doc. At the time of writing, this initiative remains outstanding.
[324] Law Reform Commission (NSW), *supra*, at par. 8.26; P.J. Meitl, "Blue Collar Jurors in White Collar Cases: The Competence of Juries in Complex Criminal Cases": http://law.bepress.com/expresso/eps/931
[325] Law Reform Commission, (Victoria) at par. 2.17.
[326] Law Reform Commission (Victoria) at par. 2.19
[327] Law Reform Commission (Tasmania) quoted in Law Reform Commission (Victoria), supra at par. 2.21

The debate on jury capacity and comprehension raises two separate, but interrelated issues: the complexity of the trial, and its length.

The "complexity" issue is anchored on the notion that a randomly selected group of twelve persons will not be able to follow the evidence. The proposition is speculative and probably wrong. It means that a US jury that could follow the intricate commercial transactions and deception in the Enron and WorldCom cases, but a Canadian jury could not.

The case of Kenneth Lay and the collapse of Enron provides a compelling illustration of the dilemma that arises here.

Former Enron executive Ken Lay and Jeff Skilling faced an array of charges related to a massive fraud. After listening to 56 witnesses over 15 weeks of trial, 8 men and 4 women in a jury in Houston, Texas decided unanimously that the accused were guilty on a total of 25 charges. Lay, the former CEO and chairman, was convicted on all six counts he faced, including a charge of conspiracy. Former CEO Skilling was convicted on 19 of the 28 counts against him. On October 23, 2006 he was sentenced to 24 years in prison.

The fraud was massive. Three of Canada's six-largest banks suffered huge losses. CIBC lost $32,000,000.00 in 2005. It cut 900 jobs. The loss was the biggest in the banks 138-year history. The firm's auditor, Arthur Andersen, was forced out of business following the collapse of Enron, as it was seen as having colluded in the fraudulent accounting practices.

The jury spent nearly six days of deliberations to reach their verdicts, and followed it up with an extraordinary press conference to explain their reasons. Simply put, the jury contended that the Enron case was an example of a jury trial at its best. Jury members noted that even a complicated fraud can be reduced to a simple question, well within a juror's capacity to answer: "was the accused dishonest"?

The juror's press conference, which no doubt would be contrary to law in Canada, provides an interesting insight into how jurors react to a lengthy and complex case. First, the jurors spoke emotionally about the tremendous sacrifice made by themselves, their families and their co-workers to allow them to sit through the case for 15 weeks. Juror Wendy Vaughan, a business owner, said that they had been given "a puzzle with about 25,000 pieces dumped on the table". The jury rejected the notion that there was a conspiracy of government informants to lie in court. On the contrary, jurors were satisfied that the defendants had lied on the witness stand. Jury forewoman Debra Smith, who worked in Human Resources at an Oil Services Company, said the jurors came with a variety of life experiences, but a mutually high level of endurance. "I think the balance we had on this jury was very effective. We got to know each other, respect each other and listen to each other", Smith said.[328]

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[328] Ex-Enron Bosses Closer to Prison, Houston Chronical, May 26, 2006: http://www.Chron.com/cs/CDA/printstory.mpl/special/enron/3898754

Commentators that followed the case emphasized two things: a jury can follow a complex case; and it is important for the prosecution to outline the evidence in a straightforward manner. Ellen Podgor, a professor at Stetson University, College of Law, who has written books on white-collar crime, said the prosecution did a "wonderful job keeping it simple".[329] It is important to remember, however, that this was a 15 week trial, not a three year trial as was possible in the Air India tragedy, and twelve months as is expected in the Pickton trial.

The complexity argument to support eliminating juries has been criticized by many,[330] and the following passages from a 1986 Report of the Law Reform Commission (New South Wales) best captures the consensus of most authorities:[331]

> We consider that the argument which has been put forward in support of the abolition of trial by jury in complex cases, particularly commercial and "white collar" crimes is not compelling. It is invariably based on the assertion that jurors are incapable of understanding the evidence upon which prosecutions of this kind depend. We question the validity of that assertion. There is, in fact, very little evidence to show that jurors, or more accurately juries, do not have an adequate grasp of the relevant material on which their verdicts should be based. There is a strong body of opinion which holds that juries generally reach acceptable verdicts in these cases.
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> The arguments in favour of retaining trial by jury in these cases are based on preserving the traditional role of the jury in the criminal justice system. In our view, the fundamental principles of criminal justice are best served by the jury system. Community participation, the determination of guilt by reference to the standards of the general community, accountability and public acceptance of the criminal justice system are all features which would be lost if the jury were to be abandoned. Accordingly, we are not satisfied that the case against the jury system in complex cases has been made out.

A recent empirical study tends to support these conclusions. Six researchers in the United States, two from university law schools and four from the National Centre for States' Courts undertook an analysis of the voting behaviour of over 3000 jurors in felony cases in several states. Although the focus of the study was to assess whether and to what extent the "first vote" of the jury was affected by race, this 2004 study concluded that the

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[329] *Ibid*

[330] For example, see Lord Patrick Devlin, "Trial by Jury for Fraud", (1986) 6 Oxford Journal of Legal Studies 3, 311; Law Reform Commission (Victoria) at par.s 2.0 and 2.219; The Honourable Hugh H. Bownes (a judge of the US Court of Appeals for the First Circuit), "Should Trial by Jury be Eliminated in Complex Cases?": http://www.piercelaw.edu/RISK/voll/winter/bownes.htm

[331] Law Reform Commission (New South Wales), *supra*, at par.s 8.30 and 8.32

"primary determinant" of the jury's conclusions related to the strength of the evidence against the accused:[332]

> …the "primary determinant" of jury verdicts in criminal trials is neither the attitudes of the jurors, nor their demographic profile, but the strength of the evidence against the defendant.
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> **********
>
> Overall, we find, consistent with prior research, that the strength of the evidence against a defendant is strongly and consistently related to how a juror casts his or her first vote. The stronger the evidentiary case against the defendant, the more likely the juror is to convict.
>
> **********
>
> First, we find that in criminal jury trials, the evidence matters. Prior studies have reached the same conclusion… in virtually all the models reported here, the trial judge's assessment of the strength of the evidence against the defendant is powerfully associated with a juror's first vote. We emphasize this link to highlight the fact that despite many differences between them, *judge and jury tend to agree on the strength of the evidence.* [emp. added]

A study by the Federal Judicial Centre in 1987 provided a unique look at juror performance in a number of complex trials in comparison with shorter and less complex cases. While the trials were civil in nature, parallels can be drawn. "The survey showed that jurors in both long and short trials took their task extremely seriously and, for the most part, found the material interesting. The academics who conducted the study concluded that their findings negate "the image of bewildered, inattentive juries overwhelmed with complex evidence."[333] The Centre's Report concluded:[334]

> Not surprisingly, jurors in lengthy civil trials reported the evidence to be more difficult than did jurors in short trials. 46% of jurors in long trials rated the evidence as difficult or very difficult, as opposed to 29% of jurors in short trials. Two aspects of this finding require emphasis. First, in the shorter, more typical cases where few question juror competence, a sizable minority of the jurors reported encountering difficult evidence. Second, a majority of jurors in the lengthy trials believed that the evidence fell within their ability to comprehend it. This finding suggests that, at least from the juror's perspective, more overlap than divergence exists in their reactions to simple and complex trials.

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[332] Stephen P. Garvey et al, "Juror First Votes in Criminal Trials", Journal of Empirical Legal Studies, Volume 1, no. 2, 372, 2004. Available at SSRN: http://ssrn.com/abstract=558163, at page 372, 373 and 396
[333] P.J. Meitl, *supra*, at page 14
[334] *Ibid*

In Canada, an appellate court acts on the assumption that juries are capable of following the instructions of the trial judge, even complex ones. For that reason, an appellant may not call into question the capacity of juries to complete the task assigned to them by law.[335]

The issue of the length of the trial raises further, difficult considerations. Even an attentive, dedicated and focused jury can still be expected to forget details, perhaps important ones, after the passage of an extended period of time. As one writer put it:[336]

> Doubtless to say...the complexity of massive detail of some cases must throw an intolerable burden onto the powers of concentration of any jury. As a former justice of the Victorian Supreme Court concluded: "no judge, sitting alone, is required to perform the feats of memory and comprehension required of a jury in a long trial involving complex issues".

Longer trials obviously involve more testimony and more evidence—in short, more facts for the jury to consider, sort out, and evaluate. The Chief Justice of the United States made the following observations at a meeting of the conference of federal chief district judges in 1979:[337]

> It borders on cruelty to draft people to sit for long periods trying to cope with issues largely beyond their grasp… even Jefferson would be appalled at the prospect of a dozen of his yeomen and artisans trying to cope with some of today's complex litigation in trials lasting many weeks or months.

Trials of six, nine, and twelve months, and more, have emerged in Canada during the past decade. Many were heard by a judge alone, but some proceeded before a jury. At some point in the "length continuum", the right to a fair trial in a jury trial may be placed in jeopardy. By "fair trial" I mean that both the Crown and defence are able to have the trial considered fairly and fully, and that the length of the process does not place an unacceptable burden on the community, including the jury. A jury trial lasting two years or more, with any degree of complexity (as most of them will) is, in my view, overloaded and presumptively unfair to the parties and to the community.

Legislation precluding trial by jury based primarily on the length of the trial breaches section 11(f) of the *Charter of Rights and Freedoms*, and, absent resort to the "notwithstanding" clause, will need to be saved, if at all, by section 1 of the *Charter*. As I noted earlier, the *Oakes* test will cause a reviewing court to consider whether the objective is sufficiently important to warrant overriding a constitutionally protected right. In this instance, the objective is a right guaranteed by sections 7 and 11(d) of the *Charter*—namely, the right to a fair trial. The court will also need to consider whether the means are reasonably, proportionately and demonstrably justified.

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[335] *R v Eng* (1999), 138 CCC (3d) 188 (BCCA); *R v Corbett*, [1988] 1 SCR 670 at page 692-3
[336] Law Reform Commission (Victoria), *supra*, at page 2.28
[337] *Ibid* at page 6

It seems to me that where the right to a jury and the right to a fair trial are on a collision course, and cannot be reconciled in a particular case, the need for a fair trial becomes the overriding objective. The accused, it seems to me, cannot implicitly "waive" the right to a fair trial by electing trial by judge and jury and then strategically plan, in essence, to raise "reasonable confusion" in the minds of the jurors based on the protracted nature of the proceedings, rather than arguing that a reasonable doubt arises upon a fair consideration of all of the evidence.

In my view, the case has been made to dispense with the jury in extraordinarily lengthy proceedings where, due to length (primarily) and complexity (secondarily), the trial court is satisfied that a fair trial cannot be held before a court composed of a judge and jury.

There is one final—but important—issue. If a case can be made to dispense with the jury in a particular case, should the matter proceed before a judge alone, or before a panel of three judges?

In a long trial, an alternate judge could be appointed to sit alongside the trial judge, without a jury. That will provide a reasonable level of assurance that the trial will proceed to verdict. A panel of three judges sitting without a jury, however, raises considerably more difficult issues.

Is unanimity required amongst the three judges? Or would a majority of two suffice? What happens if one of the three judges has to drop out? And if one drops out, what happens if the other two are split 1-1 on the issue of guilt? Should a fourth "alternate" judge be appointed to cover that possibility? What about the resource implications of four trial judges hearing a trial?

More fundamentally, on what basis do the individual judges in a panel decide the case? Through a deliberation process, as juries do? Or through individual research and consideration, resulting in the equivalent of a "vote", as appellate judges do? How are the facts in the case determined?

In my view, replacement of a judge and jury with a panel of three judges in a terrorist case is not a good policy choice for three reasons. While these factors are analytically separate, they are closely linked.

First, it seems to me that the conclusions of a panel would have to be unanimous on all essential issues of fact and law. Otherwise, almost by definition, a reasonable doubt exists in the case and an acquittal must be entered. The reasonable doubt standard at trial is so ingrained in out system of criminal justice that nothing more need be said of it in this paper. I simply note that while Canada has considerable experience in the assessment of reasonable doubt through the lens of a judge alone or a court composed of a judge and a jury, we have absolutely no experience in the determination of that issue through a panel of three trial judges sitting alone. In addition, the "reasonable doubt" filter is unique to the trial stage in our criminal justice system, when we are attempting to find out what the facts are and, to use the vernacular, we are "trying to get to the bottom of what occurred".

We only rely on a panel of judges when appeals are taken from those trial decisions—but by that point, the issues for consideration have shifted significantly.[338] Put simply, while a judicial panel may work well when it comes to assessing issues of law, and in the determination of questions of mixed fact and law on appeal, it is far from clear to me that a panel would enhance the quality of justice in Canada in the assessment of the basic facts of the case at trial.

In this context, one factor is critical: at trial, when reasonable doubt is the key issue, twelve persons resolve the issue through a unique process of group deliberation. As the Supreme Court put it in 2001, "Through the group decision-making process, the evidence and its significance can be comprehensively discussed in the effort to reach a unanimous verdict."[339] The Court put a finer point on the issue when it said that "…an essential part of (the) process is listening to and considering the views of others. As a result of this process, individual views are modified, so that the verdict represents more than a mere vote; it represents the considered view of the jurors after having listened to and reflected upon each other's thoughts".[340] Judges, on the other hand, have no such mandate. While appellate panels in Canada are entitled to confer in individual cases, they are not required to do so, and individual judges can feel secure in their independence from the views of the other judges on the panel.[341] As a result, the group deliberation and dynamic that is so important in jury fact-finding may be absent in trial by a panel of professional judges. There is reason to believe, therefore, that a panel of three trial judges will actually be a less effective fact-finding body than a jury of 12 randomly-selected jurors drawn from the general population.

There is a second reason why the substitution of a three judge panel for trial by judge and jury is not a good policy choice. Quite simply, it is not responsive to the problem that exists. As I have argued throughout this paper, the real challenge with terrorist trials is to ensure that they proceed fully to verdict after a complete and fair assessment of all the evidence. The twin demons, as Justice Moldaver recently said, are prolixity and complexity. Creation of a three-judge bench trial will not solve that problem. In fact, it may create more problems. In a lengthy trial, a judicial panel could lose one of the judges just as easily as a jury could lose one of its jurors. What then? Do you proceed with just two judges? And what happens if your panel is reduced to one? At what stage do you declare a mistrial? Or do you "load up" at the front end with three judges and an alternate? Facially, that seems like a good solution, but it seems plain to me that few if any jurisdictions in Canada could afford the resource burden of routinely assigning four judges to hear lengthy terrorist trials.

The third factor tending to point to the conclusion that a panel is not appropriate concerns the issue of legitimacy—both domestically and internationally. Even assuming that the

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[338] On appeal, the issues typically relate to whether the trial judge erred in law, whether the trial judge misdirected the jury on an issue of law and whether, despite errors at trial, a substantial miscarriage of justice occurred.

[339] *R v Pan*, [2001] 2 SCR 344 at par. 43

[340] *R v Sims*, [1992] 2 SCR 858

[341] Concerning the breadth of judicial independence, see *Valente v The Queen* (1985), 23 CCC (3d) 193 (SCC) at pages 202-3

"fair trial" criterion is met in an individual case, and that a panel is available to all cases meeting this criterion—not just terrorist trials, Canadian law would divert the case out of the mainstream and into a tribunal that is unique, unparalleled in Anglo criminal justice systems and without precedent in Canadian history. The temptation to ascribe a political agenda to the proceedings is almost overwhelming. At the international level, proceedings would be vulnerable to even meritless allegations of "show trial", as occurred in Lockerbie. In my view, Canada ought not to be placed in the position of saying internationally: "oh, we expect that this will be a lengthy terrorist trial. We have a special court for those". For a multitude of reasons, there is much to be said for keeping even protracted proceedings within the mainstream of Canadian criminal law and procedure, and to avoid the creation of a unique and unprecedented tribunal that could immediately become a lightening rod for partisan political attacks.

In the result, it seems to me that the *Criminal Code* should be amended along the following lines:

- where the trial is expected to be lengthy—perhaps 18 months or more—the Crown or the accused may apply to the court for an order that the matter proceed without a jury;

- an order dispensing with the need for a jury should be available where the court is satisfied that because of the length (primarily) and complexity (secondarily) of the case, it is clear that the right to a fair trial is in jeopardy if heard by a court composed of a judge and jury;

- in determining the issue, the court may take into account the full circumstances of the case, including the expected length of the trial, the nature of the charges, the nature of the evidence, the proposed manner of its presentation before the jury and whether the trial can be managed in such a way that the right to a fair trial will not be jeopardized;

- where the court is satisfied that the trial ought to proceed without a jury, it should additionally be able to order that the case proceed before a judge sitting alone, with or without an alternate judge; and

- it seems to me, for the reasons outlined above, that a panel of three judges, sitting without a jury, is inadvisable.

g) Trial by Judge and Lay Assessors or a Special Jury

Increasingly complex and lengthy trials have spawned calls for the use of two or three "lay assessors" who have expertise in the area under consideration, or a "special jury" that draws from segments of society having specific qualifications, education or

expertise. Both groups, it is contended, will be able to follow the evidence more easily than twelve randomly-selected jurors coming from the general community.

For two reasons, I will deal with these two options together, rather summarily. First, neither really addresses the real challenge in terrorist trials—length, not technical complexity. Second, both options seem, for the same reasons, to be at odds with basic democratic values, and neither has really taken root in Anglo-based jurisdictions, at least in modern times.

i) Lay Assessors

Lay assessors find their origins in very early times when it was felt that the community was not sufficiently developed to support a jury.[342] Trial judges, often on their own initiative, retained specially qualified persons such as fishmongers, merchants or physicians to sit with them and assess the case.

In England, Lord Hailsham suggested in 1974 that complicated financial frauds would be more fairly tried before a commission consisting of a High Court judge and two distinguished lay persons who, together, could give well-reasoned written judgements.[343] Later, the Roskill Committee recommended that the jury be replaced by two experts versed in forensic science, financial transactions and corporate structures.[344] Neither recommendation was implemented.

Two to four lay assessors presently sit with a judge of the Crown Court in appeals against decisions of the magistrates' court. Recent commentators have observed that "their participation at Crown court level is a remnant of their earlier role at the abolished Quarter Sessions, where, apart from hearing summary trials, in all but the most serious indictable cases, benches of two to nine magistrates presided over trials by jury".[345]

Lay assessors also raise serious constitutional questions. Depending on the model chosen, they would not necessarily have security of tenure. And in terrorist cases accused persons could reasonably be expected to object to proceeding on the basis of a reasonable apprehension of bias where national security experts were asked to assist the judge to determine critical facts in issue.

ii) Special Juries

"Special" or "blue ribbon" juries are in some respects similar to the lay assessor model. They draw on the collective wisdom and judgement of a small group of people having a certain qualification, education or experience which, it is argued, makes it more likely

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[342] Law Reform Commission (Victoria) at par. 2.101
[343] *Ibid* at par. 2.105
[344] *Ibid*
[345] Michael Bohlander, "Take It From Me…--The Roles of the Judge and Lay Assessors in Deciding Questions of Law in Appeals to the Crown Court", 2005 Jo CL 69.

that they will better understand the evidence to be presented. "Special juries", however, have a lengthy and established pedigree in Anglo-based criminal justice systems.

In 1768, Blackstone noted that "special juries were originally introduced at trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders". [346] The UK special jury transformed into a social elite, moving from persons of a particular trade or technical qualification to jurors holding a high social status, in the belief that they were people of intelligence who would have the most knowledge and expertise of the matter in dispute.[347] The right to be tried before a special jury was confirmed in legislation by the *Special Juries Act 1898*.[348] Their popularity waned in the 20th century, and were finally abolished in 1949.[349]

In pre-confederation Canada, a Special Jury of 16 could be empanelled on the basis of a list of persons assessed 20 pounds sterling and upwards.[350] In the US, "blue ribbon" juries were often used in the early 20th century[351] and their use was approved by the Supreme Court of the United States in 1947.[352] In New Zealand, Special Juries were common in civil cases where the court was of the opinion that difficult questions concerning science, technology, business or professional matters were likely to arise in the case,[353] and Special Juries were used in both criminal and civil cases in Australia until their abolition in the mid 20th century.[354]

iii) Analysis

The lay assessor and Special Jury models both have the advantage of a professional bench of jurists: shared responsibility, a collective-decision making process, and expertise in respect of the issues under consideration. However, in my view, the arguments against these options are strong, and ought to prevail. There are four of them.

a) The Case Has not Been Made that Juries Cannot Comprehend Difficult Cases

In "Trial by a Panel of Three Judges Without a Jury", *supra*, I traced the arguments for and against elimination of the jury in lengthy and complex cases, and concluded that,

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[346] William Blackstone, Solicitor General to Her Majesty, *Commentaries on the Laws of England*, Volume 3 (Oxford: Clarendon Press, 1768) at page 357-8
[347] Law Reform Commission (Victoria) at par. 2.116
[348] J. C. Oldham, "The Origins of the Special Jury", (1983) 50 The University of Chicago Law Review 137.
[349] *Juries Act 1949* (UK), s.18(1)
[350] For a discussion of this, see, *supra*, footnote 163 and accompanying text.
[351] P.J. Mitl, Blue Collar Jurors in White Collar Cases—The Competence of Juries in Complex Criminal Cases (2006): http://law.bepress.com/expresso/eps/931
[352] *Fay v New York*, 332 US 261 (1947); and see J. C. Oldham, *supra*
[353] P.T. Burns, "A Profile of the Jury System in New Zealand" (1973) 11 Western Australia Law Review 110; Michele Powles, "A Legal History of the New Zealand Jury Service—Introduction, Evolution and Equality?", Victoria University of Wellington Law Review [1999] VUWL Rev. 19
[354] Law Reform Commission (Victoria) at par. 2.118; Law Reform Commission (New South Wales) at par. 8.34 *et seq*

subject to fair trial considerations based primarily on the length of proceedings, there is an insufficient basis to believe that juries are performing poorly in their role.

I would simply add two points. First, the Supreme Court of the United States said this in a leading decision in 1968:[355]

> The most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.

Second, counsel bears a special responsibility to ensure that the case is presented in an organized and intelligible way, with the key issues clearly identified for the assistance of the jury. A lengthy and complex case cannot simply be thrown at the jury. Indeed, the Criminal Bar Association of the UK has itself argued that adequate preparation by counsel and effective presentation of the evidence in court are the best ways to secure the comprehension of the jury in complex cases. I would add, as well, that careful preparation and streamlined presentation are important in the avoidance of wrongful convictions.[356]

There may be a touch of irony here. Some may argue—with force, but only intuitively—that competent counsel in a *jury* trial may take pains to sharpen the focus of the evidence, and collapse the evidence into a manageable and organized body of information to ensure that the jury sees the case through the parties' lens. With a professional judge hearing the case alone, there may be more of a tendency—perhaps unconscious—to "load up" the evidence before the court, on the basis that the judge does nothing but hear cases, has lots of time available, and in any event counsel can sort out the real issues during final argument.

b) Assessors and Special Juries May not Even Meet the Test of Being a Constitutional "Jury"

There are several essential characteristics of a jury.[357] Central amongst them are the randomness of selection and the representative nature of a jury. Special Juries, on the other hand, involve persons who have been specifically selected because of their background or expertise. This amounts to deliberately "loading the dice" in the selection process, as well as being somewhat elitist, and runs, in my view, the clear risk of not amounting to a "jury" as contemplated by section 11(f) of the *Charter of Rights and*

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[355] *Duncan v Louisiana*, 391 US 145 (1968) at 157
[356] Law Reform Commission (New South Wales), *supra*, at par. 8.33; P.J. Mitl, *supra*, at page 16
[357] I have discussed this at some length in Part VI.

Freedoms[358] and failing to meet the standard of an "independent and impartial tribunal" as guaranteed in section 11(d) of the *Charter*.[359]

c) The Role of the Expert is to Testify in the Witness Box, not Decide the Case

The main purpose of a jury is to sort out the true testimony from the false, the accurate from the inaccurate, the important matters from the unimportant, the linkages between various parts of the evidence and, when faced with the issue, to assess the weight to be given to "duelling experts".[360] In a word, the main task is fact-finding.

Expert witnesses are expected[361] to help the jury in resolving the case. Jurors are not expected to have a command of every technical aspect of the case. In fact, the fundamental role of expert testimony is to help jurors assess information about which they lack sufficient knowledge or experience.[362]

There are four serious problems that arise when, in this context, experts are placed into the role of decision-makers in a specific case.

First, there will be a concern that assessors, or a special jury, will act on or provide the judge with hidden and untested theories which have neither been the subject of cross-examination nor even been drawn to the attention of the accused. [363] Second, in the case of assessors in particular, it has been said that "it would be virtually impossible to ascertain the extent of formal and informal input to a judgement".[364] Third, because the expert has moved from witness to decision-maker, the key issues will be analyzed and decided upon through the lens of an expert rather than being evaluated against the backdrop of community life experiences. This runs the risk of imprisoning someone for ten or fifteen years, or life, for reasons that could not be made clear to the average citizen. The point was made powerfully in a recent report on the jury system in Australia:[365]

> The jury not only represents the public at the trial, its presence ensures a publicly comprehensible exposition of the case. There is the danger in trial by experts that

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[358] A committee set up in Australia four decades ago rejected the notion of a Special Jury, "maintaining that a jury should represent a cross-section drawn at random from the community and that any other procedure is inconsistent with this principle: Law Reform Commission (Victoria) at par. 2.123

[359] *R v Genereux*, [1992] 1 SCR 259

[360] *Barefoot v Estelle*, 463 US 880, 902 (1983)

[361] Expert witnesses are expected, and may become *necessary* due to their technical expertise, to form a correct judgement on a matter where ordinary persons are unlikely to do so without the help of those with special knowledge: *R v D*, [2000] 2 SCR 275

[362] *R v D*, supra; *R v Mohan*, [1994] 2SCR 9; *R v McMillan* (1975), 23 CCC (2d) 170, affd. [1977] 2SCR 824; *R v K* (a) (1999) 137 CCC (3d) 225 (Ont.C.A.); M. Neil Brown et al, "The Epistemological Role of Expert Witnesses and Toxic Torts", 36 Am. Bus. L. J. 1, 49 (1998)

[363] Law Reform Commission (Victoria) at par. 2.112 and par. 2.128

[364] *Ibid* at par. 2.112

[365] Law Reform Commission (New South Wales), *supra*, at par. 8.27 [Quoting a Commissioner reporting in dissent]; Lord Devlin made precisely the same point: Law Reform Commission (Victoria), *supra*, at par. 2.129.

> the public dimension will be lost. I do not think that the public would or should be satisfied with a criminal justice system where citizens stand at risk of imprisonment for lengthy periods following trials where the state admits that it cannot explain its evidence in terms commonly comprehensible.

Finally, there is the issue of the legitimacy of the proceedings. Should the liberty of an individual be debated and decided in secret by a group of "experts", or should that fall to a group of peers representative of the community? Michael Hill, Q.C. and David Winkler, Q.C. considered the issue in a paper on juries prepared for the International Society for the Reform of Criminal Law in 2000. With reference to the proposed Fraud Trials Tribunal which would have consisted of a judge and qualified experts, they said this:[366]

> In the end it came to this: "experts" are not infallible, their views may be contentious and, in any event, only trial by jury, with all its imperfections, would satisfy the public's proper insistence that the administration of criminal justice in fraud cases, like all other major offences calling for trial on indictment, should be fair, transparent and independent.

d) Assessors and Special Juries May Increase the Risk of Wrongful Conviction

This is really an extension of the previous points. The risk of wrongful conviction may increase with: the loss of a randomly-selected body that has a clear track record for solid fact finding; trial by experts in secret; and decisions where reasons for conviction are not necessarily intelligible to the average person.

The risk of wrongful conviction may increase even more when the expert moves directly into a decision-making position.[367] Recent experiences in the UK illustrate the dangers with over-reliance on experts in court, especially when their views are conflicting and changeable. In a startling series of cases, experts strayed from witness to advocate on the witness stand, and ended up being the direct cause of terrible miscarriages of justice in that country.

e) Reforms that May Assist

Quite apart from the issue of lay assessors and special juries, there is much that can be done to assist the jury in understanding the evidence in a lengthy and complex case. I have dealt with some, *infra*, "Containing Lengthy Trials" and "Assisting the Jury to Consider the Case" so I will not repeat them here.

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[366] Michael Hill, Q.C. and David Winkler, Q.C., "Juries: How Do They Work? Do We Want Them?" [December 2000, unpublished].

[367] *R v Clark*, [2003] EWCA Crim. 1020; *R v Cannings*, [2004] EWCA Crim. 1; *R v Kai-Whitewind*, [2005] EWCA Crim. 1092; *R v Harris*, [2005] EWCA Crim. 1980.

There is one initiative that could assist in evaluating the evidence of expert witnesses. It involves the tendering of a *panel* of experts to give group evidence. Each witness would be sworn separately, and counsel would be able to question the expert individually, or pose a question to the group as a whole. This approach would allow areas of agreement or disagreement to emerge and become clear, and would allow experts to comment on the views of the others. It would, I believe, allow the issues to be crystallized in a relatively focused environment. In Canada, this approach has been used, with considerable success, in public inquiries, and was tried in 1985 in Australia:[368]

> … an initiative utilized in New South Wales of using a group of expert witnesses requires some further evaluation. In 1985, the New South Wales Supreme Court allowed five experts to provide expert evidence. Each witness was sworn and by consent questions were asked of the witnesses by both parties and by the presiding judge. The witnesses were able to comment on and dissent from each other's testimony, enabling the issues to be drawn out and explored. The judgement noted that the technical problems were successfully addressed by these techniques and the hearing was substantially reduced because of this method. In the end, it is argued that this style of approach to hearing expert testimony can only make the task of the jury easier.
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> This initiative, although it intrudes at the edges of the traditional approach to the adversary system, is to be commended because its informality makes it much more likely that the courts' and the experts' time will be spent on the issues that are genuinely in dispute. As well, it makes it more likely that the experts' testimony will be less stilted and inhibited by the unwanted atmosphere of the courtroom.

In the result, I have reached two conclusions. First, neither lay assessors nor special juries ought to be adopted in Canada. Second, trial judges should permit expert panels to testify at trial in the form of group evidence.

h) Change of Venue

Terrorist attacks are intended to strike fear into the hearts of the persons targeted. In some instances, the target group is small and can be defined with precision. In others, an entire community is devastated—as in the 1995 Okalahoma City Bombing.[369] Some scholars have argued, with force, that the planning of 9/11 and its subsequent devastation victimized an entire nation—including all potential jurors and everyone else associated with the case.[370]

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[368] Law Reform Commission (Victoria), *supra*, at par. 2.127

[369] For a discussion of this point, see Part III, section 5.

[370] Neil Vidmar, "When All of Us Are Victims: Juror Prejudice and 'Terrorist' Trials", 78 Chi-Kent L. Rev. 1143 (2003); James Curry Woods, "The Third Tower: The Effect of the September 11th Attacks on the American Jury System", 55 Ala. L. Rev. 209 (2003); Bennett L. Gershman, "How Juries Get It Wrong—Anatomy of the Detroit Terror Case", 44 Washburn L. J. 327 (2005).

In this section, I will consider whether and to what extent the location of a terrorist trial can be moved to another part of Canada to ensure that an accused faced with allegations of an horrific terrorist act can receive a fair trial.

At the outset, I should observe that in 2001 the *Criminal Code* was amended to empower a court in one province to hear a terrorist case originating in another. The provision is, however, narrow in scope, and not really a "change of venue" provision in its normal sense. Section 83.25 provides that the federal government can commence proceedings involving a terrorist offence "in any territorial division in Canada." However: the provision is limited to federal proceedings, not those brought at the instance of a province; its operation is confined to a "terrorism offence" (defined under s.2) or an offence under s. 83.12 (various terrorism-related offences) and not other types of crime that may have been committed by a terrorist group; it is unclear whether the provision is triggered at all if the indictment contains a "mix" of terrorist and other offences; and the accused has no standing to bring an application to move the case.

Generally, under the common law, the trial of a criminal offence is heard in the neighbourhood where the crime took place. In this context, "neighbourhood" means the county or district where a court ordinarily sits.[371]

The *Criminal Code* has extended the jurisdiction of the courts to other territorial divisions in a variety of circumstances.[372]

Under section 599 (1) *Criminal Code* the Crown or the accused can apply for a change of venue from the territorial division in which the accused is scheduled to be tried, on the ground that the accused cannot get a fair trial in that territorial division.

The burden rests on the applicant to show that a full and impartial trial cannot be held in the area where the offence was committed.[373] If there exists a fair and reasonable probability of prejudice against the accused to the point that challenges will not assure an impartial trial, a change of venue is supportable.[374] Indeed, there is authority supporting the proposition that the interests of justice *require* a change of venue where the trial judge concludes that, despite the protective mechanisms available under the law, the accused cannot receive a fair trial in the location where the offence occurred.[375]

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[371] *R v Spintlum* (1913), 15 DLR 778 (BCCA) at 786

[372] For instance, see sections 465, 470, 476 and 599 (1). As well, note the section 2 definition of "territorial division".

[373] *R v Adams* (1946) 86 CCC 425 (Ont.HCJ); *R v Boucher* (1955), 113 CCC 221 (Que.SC); *R v Collins* (1989), 48 CCC (3d) 343 (Ont.C.A.); *R v Charest* (1990) 57 CCC (3d) 312 (Que.C.A.); *R v Suzack* (2000) 141 CCC (3d) 449 (Ont.C.A.), at par. 43, lv. ref. 152 CCC (3d) v1

[374] *R v Beaudry* [1966] 3 CCC 51 (BCSC); *R v Alward* (1976), 32 CCC (2d) 416 (NBCA); and to the same effect: *Sheppard v Maxwell*, 384 US 333 (1966)

[375] *R v Suzac*, *supra*, at par. 42

However, on the basis of existing law, there is no power to change the trial venue in respect of an offence committed entirely in one province to another province, regardless of how great the prejudice against the accused may be in the "originating province".[376]

The principal issue is this: where a terrorist act was so horrific that it effectively victimizes an entire region of Canada, and the trial judge is satisfied that the accused cannot have a fair trial in that area, can the trial be moved to another province or territory? Facially, the answer is "no", although two pathways to resolution may presently exist.

First, if a conspiracy is alleged, any Canadian court has jurisdiction if: an overt act in furtherance of the conspiracy took place within its jurisdiction; the effects of the conspiracy were felt within its jurisdiction; or one of the objects of the conspiracy was to produce harm within the jurisdiction of the court.[377]

Second, a superior court trial judge may be able to craft a section 24 (1) *Charter* remedy, by removing the case to another province on the basis that confining the trial to an area where the accused cannot have a fair trial violates the accused's rights under section 7 and 11(d) of the *Charter*.[378]

There are two potential problems with the last option. First, the "receiving" jurisdiction may be completely overwhelmed by the case, and lack the resources necessary to handle it fairly and fully. Second, it is quite doubtful that a superior court in one province could direct officials in another province, over their objections, to assume responsibility for a case for which they have no constitutional responsibility simply by reliance on section 24(1) of the *Charter*, although such remedial powers could be given to the court under the *Criminal Code.*[379]

One last, practical issue. One ought not to underestimate the resource implications of a removal order, especially if the case is a large one. Costs for the "receiving" jurisdiction and, potentially, the Government of Canada, will include huge travel and accommodation costs for all witnesses, counsel and the court party.

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[376] *Criminal Code* s.478 (1); *R v Threinen* (1976), 30 CCC (2d) 42 (Sask.Q.B.) [a pre-Charter attempt to move a trial from Saskatoon, Saskatchewan to Winnipeg, Manitoba on the basis of intensive pre-trial publicity].

[377] Section 465 *Criminal Code*; *R v Libman* (1985), 21 CCC (3d) 206 (SCC); *DPP v Doot* [1973] AC 807 (HL); *R v Sanders* [1984] 1 NZLR 636 (CA); *R v Latif* [1996] 1 All ER 353 (HL); *R v Smith* [2004] 2 Cr. App. R. 17

[378] *Doucet-Boudreau v Nova Scotia*, [2003] 3 SCR 3; and, in the context of bail in wrongful conviction cases, see*: R v Phillion*, [2003] O.J. No. 3422; *R v Driskell*, 2004 MBQB 3

[379] Of course, under s.91 (27) of the *Constitution Act, 1867*, the federal government has responsibility for the criminal law and procedure on a national basis. Provinces have responsibility for the administration of justice *in the province* pursuant to s.92 (14) of the *Constitution Act, 1867*. In *Doucet-Boudreau v Nova Scotia*, [2003] 3 SCR 3 at par. 33 and 34, supra, the Supreme Court of Canada discussed the circumstances in which a section 24 (1) remedy is appropriate, but cautioned that the courts must be sensitive to their role as judicial arbiters and avoid remedies that usurp the role of the other branches of governance.

In conclusion, I am of the opinion that the *Criminal Code* should be amended to permit a superior court of criminal jurisdiction hearing an indictable offence to direct that the trial be heard in another, specified province or territory where: a) the court is satisfied that the accused cannot receive a fair trial in the originating jurisdiction; and b) the Attorney General in the proposed receiving jurisdiction has been consulted, and has been provided with an opportunity to provide submissions to the court on the issue.

I am also of the view that the Attorney General of Canada ought to assume a leadership role in the development of a network of Memoranda of Understanding to deal with various administrative and resource implications flowing from the removal of cases from one jurisdiction to another—including appropriate funding arrangements between Canada and the provinces, having regard to the constitutional responsibility of the Government of Canada for criminal law and procedure, and the provinces for the administration of justice in the provinces.

There is one further possibility. Most modern anti-terrorism laws assert universal jurisdiction. For instance, a case similar to the Air India prosecution could be prosecuted in the UK and the Lockerbie tragedy, which occurred in the region of the UK, could be prosecuted in Canada.[380]

i) Majority Verdicts in Jury Cases

i) The Current Legal Framework

In Canada, all members of a jury hearing a criminal case must be unanimous in the decision to either acquit or convict the accused.[381] Where there are a number of charges, the "unanimity rule" applies to each count individually. If the jury is unable to reach a unanimous verdict (usually referred to as a "hung jury"), a mistrial is declared,[382] the jury is discharged, and the matter is put over for re-trial before another judge and jury. Alternatively, the Crown may decide not to proceed further, and can enter a stay of proceedings.[383]

i) Origins of the "Unanimity Rule"

The rule requiring unanimity can be traced back to at least the 14th century.[384] In earlier days, the judiciary exerted a degree of pressure on the jury to reach a unanimous verdict. Lord Devlin, in his classic book entitled *Trial by Jury*[385] notes that at one time the non-

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[380] Section 7 (3.73-3.75) *Criminal Code*
[381] *R v Sims*, [1992] 2 SCR 858; *R v G* (R.M.) [1996] 3 SCR 362; *R v Pan*, [2001] 2 SCR 344
[382] Section 653 (1) *Criminal Code*; and see *R v Pan*, supra, at par. 28
[383] Alternatively, the Crown may decide to technically commence the trial, offer no evidence, then invite an acquittal. This issue was before Commissioner LeSage in the Driskell Public Inquiry in Winnipeg, Manitoba, at least in the context of cases where the Minister of Justice for Canada has concluded that a miscarriage of justice may have occurred in a case: Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell (Winnipeg, 2007) at pp.123-145.
[384] *Anonymous Case*, [1367] 41 LIB, referred to in *Cheatle v The Queen* (1993), 177 CLR 541 at 550 (HC)
[385] London: Stevens and Sons, (1956, reprinted 1971) at 51

conformist jurors were imprisoned; later, for centuries, the entire jury was confined until they reached a verdict. If the assize was over, but the jury had not yet reached a verdict, the judge would "take the jury with him to the next town in a cart". And from early days well into the 20th century, jurors were "kept without meat, drink, fire or candle" until they reached an agreement.[386] Times, fortunately, have changed considerably and the Supreme Court of Canada has recently confirmed that "it is beyond question that no measure of coercion will be acceptable".[387]

ii) The International Picture

Majority verdicts (10 to 2) were introduced into the United Kingdom in 1967,[388] and a "true" majority verdict (8 to 7) has been allowed to support a verdict of guilty in Scotland for decades.[389]

The situation in the US and Australia is virtually identical. Unanimity is constitutionally guaranteed at the federal level in the US[390] and at the national (Commonwealth) level in Australia,[391] but state legislatures—the level at which most prosecutions are brought in the US and Australia—are free to provide for majority verdicts in both countries, and several have in fact done so.[392] New Zealand law continues to require a jury to return a unanimous verdict in criminal cases.[393]

iii) The Arguments for and Against Retaining a Unanimous Verdict

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[386] Devlin, supra at 50; and see *R v G* (RM), *supra* at par. 18, and most recently see *R v Krieger*, 2006 SCC 47. Section 647(5) of the *Criminal Code* makes it clear that the judge shall direct the sheriff to provide the jurors with suitable and sufficient refreshment, food and lodging while they are together until they have given their verdict. United States Courts have the same understanding: *US v Piancone*, 506 F. 2d 748 (1974)

[387] *R v G* (RM) at par. 18. For an excellent review of this issue, reference can be made to a law reform paper prepared by the Law Reform Commission for New South Wales (Report 111-2005), which recommended maintaining the unanimity rule. Despite this, majority verdicts were authorized in that State in 2006. The President of the Law Society of New South Wales immediately said that "the introduction of majority verdicts in criminal trials would be remembered as a sad day for justice in New South Wales". She continued that "innocent people now run the risk of being convicted with the introduction of 11-1 juries in criminal jury trials": http://www.lawsociety.com.au/page.asp?Partid=18228. In the US, the Arizona Supreme Court established a committee on juries in 1993. In 1996 the committee decided, by a fourteen to one vote, that there should be no change in the unanimity rule: http://www.supreme.state.az.us/jury/Jury2/jury20.htm.

[388] *Criminal Justice Act 1967*, 1967 (U.K.), c. 80, s.1; in this respect, see *R v G* (RM), *supra*, at par. 22

[389] Devlin, *supra* at 56; Law Reform Commission of Canada, "Criminal Law: the Jury in Criminal Trials" (working paper 27) (Ottawa: 1980) at page 155 (footnote 35); Law Reform Commission (New South Wales), *supra* at par. 2.16 and 2.17

[390] The US Supreme Court has consistently ruled that the US Constitution guaranteeing trial by jury carries with it the requirement of unanimity in federal courts: *Thompson v Utah*, 170 US 343 at 351 (1898); *Hawaii v Mankichi*, 190 US 197 at 211 (1903); Patton v US, 281 US 276 at 287 to 290 (1930); *Andres v US*, 333 US 740 at 748-9 (1948); *Swain v Alabama*, 380 US 202 at 211 (1965)

[391] *Cheatle v The Queen, supra*

[392] In this respect, reference can be made to the authorities set out in footnote 387, *supra.*

[393] *Siloata v R*, [2004] NZSC 28

There are good arguments both for and against keeping the unanimity rule. The arguments in favour of its retention are, in my view, principled in nature, and more persuasive. The contrary view, which favours a majority verdict, tends to be speculative in nature, and has a slight *in terrorem* flavour to it.

I. The Arguments in Favour of Majority Verdicts

There are four main arguments in support for majority verdicts.[394]

a) Hung Juries

First, it is argued that majority verdicts will result in fewer hung juries than unanimous verdicts, and will therefore save the time and expense of retrials. But how often do hung juries actually occur? In an early Law Reform Commission of Canada study, only 14 of 1,370 jury cases, or about 1.02%, resulted in a hung jury. In the same study, it was found that only 8% of trial judges surveyed felt that hung juries posed a serious problem in Canada.[395] These figures can usefully be compared to the situation in other countries. In the US, roughly 5% of jury cases result in a hung jury, and in England, before the move to majority verdicts, about 3.5-4% of jury cases resulted in disagreement.[396] A recent study in Australia led to the same conclusion: roughly .4% of all cases were prosecuted before a jury and, of that, around 8% of juries could not agree.[397]

Two further points should be made in relation to the "hung jury" argument. First, one ought not to conclude that a deadlocked jury is necessarily bad. Often, that is a sign of a real and legitimate concern about the case.[398] Second, the adoption of majority verdicts will not eliminate hung juries. There will always be cases where, for good reason, a jury cannot agree.

b) The Problem of the Unreasonable or "Rogue Juror"

On occasion, a juror who has pre-judged the case will stubbornly refuse to participate in the deliberations of the jury or listen to the evidence or the views of the other jurors. This can range from unreasonableness through to eccentricity and, sometimes, corruption. The "rogue" juror argument is clearly one of the strongest of those advanced by those in favour of majority verdicts.[399]

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[394] These are the arguments that have been developed and distilled over the past several decades: Lord Devlin, *Trial by Jury, supra*; Law Reform Commission of Canada, *supra*; Law Reform Commission (New South Wales), Report 111 (2005) "Majority Verdicts"; *Cheatle v The Queen* (1993), 177 CLR 541 (HC)

[395] Law Reform Commission of Canada, *supra* at pages 21-2 and page 156

[396] Law Reform Commission of Canada, *supra* at page 21 *et seq*

[397] Law Reform Commission (New South Wales 2005), *supra* at par. 3.10

[398] Law Reform Commission (New South Wales 2005), *supra* at par. 3.44 and 3.48; Law Reform Commission of Canada, *supra* at pages 23-4

[399] The spectre of the "rogue juror" looms heavily in the debate in Australia: Law Reform Commission (New South Wales 2005) at par. 1.22

Once again, however, the available statistics and studies tend to suggest that while in theory this could be a problem, in practice it is not.[400] And as the Law Reform Commission for New South Wales (Australia) observed in 2005: "even if majority verdicts were to be introduced, there is no guarantee the "rogue" juror element would be eradicated completely".[401]

c) The Unanimity Rule Actually Leads to Compromise Verdicts

Some argue that the unanimity rule is a sham: while seeming to have full concurrence, the verdict either represents a compromise, or a decision reached because a minority "caved in" due to pressure or the formulation of a coalition within the jury.[402]

There are two separate aspects to this argument: a "compromise" or "negotiated" verdict, to avoid a mistrial; or, alternatively, the "yielding" by a minority to the predominant views of the majority.

On the first point, the existence of "compromise" or "negotiated" verdicts does not lead logically to the conclusion that one should have majority verdicts. One of the strengths of the jury system arises from the fact that the verdict is the product of the interaction of twelve individuals. As the Supreme Court of Canada has consistently noted, "it is the process of deliberation which is the genius of the jury system".[403] As the High Court of Australia observed in a unanimous (7-0) judgment delivered in 1993, "the necessity of a consensus of all jurors, which flows from the requirement of unanimity, promotes deliberation and provides some insurance that the opinions of each of the jurors will be heard and discussed".[404]

Studies have confirmed that a degree of "bartering" or "horse trading" does occur in the jury room, particularly where all jurors agree that the accused is guilty of *something*, but disagree on what the "something" is.[405] A study in New Zealand involving post-trial interviews of jurors showed that some jurors:[406]

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[400] Law Reform Commission of Canada at pages 24-26; University of Chicago Jury Project—Law Reform Commission of Canada at page 24; Law Reform Commission (New South Wales 2005), *supra* at par. 1.12-1.23. And, in this context, reference should be made to the bizarre and quite disturbing case of Gillian Guess, who as a juror in a murder case entered into a sexual relationship with the accused during the trial: *R v Guess* (2000) 148 CCC (3d) 321 (BCCA); *R v Guess* (2000) 150 CCC (3d) 573 (BCCA). Even there, however, Guess was convicted of attempted obstruction of justice, and was sentenced to 18 months in jail. The accused charged with murder was acquitted at his trial, but was directed on appeal to go through a second trial once the relationship with the juror was uncovered: *R v Budai* (2001) 154 CCC (3d) 289, lv. ref. 160 CCC (3d) vi

[401] Law Reform Commission (New South Wales 2005), *supra* at par. 2.23. The Supreme Court of Canada has observed, as well, that the unanimity rule may actually reduce the effect that a biased juror may have in a case: *R v Pan* at par. 99

[402] In saying this, I use the word "minority" in a generic way, and am mindful of the caution expressed by the Supreme Court of Canada in terms of the use of this word during a charge to the jury: *R v G (RM)*, *supra* at par.16

[403] *R v Sims*, [1992] 2 SCR 858; *R v G (RM)*, *supra* at par. 17

[404] *Cheatle v The Queen*, *supra*, at page 553

[405] Law Reform Commission (New South Wales 2005), *supra* at par. 3.24

[406] The Law Reform Commission (New South Wales 2005), *supra* at par. 3.25

> …felt uneasy about the unprincipled nature of the decision, but most simply saw it as a pragmatic and sensible solution to the problem they confronted: they all thought that the accused was guilty of something; they differed as to the nature and extent of that guilt; and they therefore decided that "guilty" verdicts on some of the charges would dispense justice, albeit perhaps rough justice, and avoid the expense of a re-trial.

On the second point, intuitively, one suspects that on occasion the minority does yield to the majority. Once again, however, this does not lead to the conclusion that the unanimity rule ought to be abandoned. As the Law Reform Commission of Canada has pointed out: "this phenomenon (yielding) would also be present in majority verdicts".[407]

d) Unanimous Verdicts are Inconsistent with Democratic Principles

It is often argued that the requirement of unanimity is inconsistent with decision-making in almost any other area of public life: legislative bodies, appellate courts and administrative tribunals all decide on the basis of some form of majority vote. Why are juries different?

There are several fallacies underlying this argument. First, the jury decision-making bears no resemblance to the role played by other decision-making bodies.[408] The differences are obvious: as I will discuss shortly, the unanimity rule in the criminal justice system is inextricably linked to the principle that the Crown must prove guilt beyond a reasonable doubt. Additionally, the jury must confine its consideration of the issues to the evidence presented, and make findings of fact without straying into areas of law or public policy. This role is quite different from that played by other public sector decision-making bodies.

The argument misunderstands the role of the jury in a second important way. The jurors do not simply listen to the evidence, then vote. Their deliberation, and the discussions in the jury room form a critical part of the jury system. The Supreme Court of Canada put it this way in the context of the purpose of an exhortation to the jury:[409]

> …the focus of the exhortation is the process of deliberation which is the genius of the jury system. An essential part of that process is listening to and considering the views of others. As a result of this process, individual views are modified, *so that the verdict represents more than a mere vote*; it represents the considered view of the jurors after having listened to and reflected upon each other's thoughts. (emp. added)

II The Arguments in Favour of Maintaining the Unanimity Rule

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[407] Law Reform Commission of Canada, *supra* at page 28
[408] Law Reform Commission of Canada, *supra* at page 26
[409] *R v Sims*, [1992] 2 SCR 858

There are six basic arguments in favour of maintaining the unanimity rule.

a) The Unanimity Rule is Inextricably Linked to the Burden of Proof on the Crown

The criminal verdict is based on the absence of reasonable doubt. If a jury, acting reasonably, has a dissenting view on the issue of guilt, that, in itself, tends to suggest the existence of a reasonable doubt.[410]

Sir James Fitzjames Stephen put the matter this way in 1883:[411]

> …no one is to be convicted of a crime, unless his guilt is proved beyond all reasonable doubt. How can it be alleged that this condition has been fulfilled so long as some of the judges by whom the matter is to be determined do in fact doubt?

b) The Unanimity Rule Protects Against Wrongful Conviction

The burden of proof beyond a reasonable doubt performs at least two critical functions in the criminal justice system: it greatly reduces the risk of convicting the innocent; and it promotes the moral acceptability and legitimacy of the verdict. The unanimity verdict furthers both of these important goals.[412] It follows, therefore, that the acceptance of majority verdicts in jury trials may increase the risk of wrongful conviction and, at the same time, may decrease public confidence in the verdicts reached by a majority only.[413]

c) Unanimous Verdicts Based on a Process of Deliberation in a Collective Decision-Making Process Are the Genius of the Jury System

A jury is effective[414] because it builds into the decision-making process two critical features: the collective experience and recollection of twelve persons; and a process of deliberation that encourages a give-and-take by which ideas and arguments are tested, refined, confirmed and rejected.[415]

The unanimity requirement is necessary to ensure that these decision-making features are present. As the Law Reform Commission of Canada noted:[416]

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[410] Law Reform Commission of Canada, *supra* at page 28; Law Reform Commission (New South Wales) at par. 3.3; *Cheatle v The Queen*, *supra* at pages 553-4; Lord Devlin, "Trial by Jury", *supra* at page 56; Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (London: 1883), vol. I, at page 304-5

[411] *Ibid* at pages 304-5, quoted with approval by Lord Devlin, *supra*

[412] *R v Pan*, *supra* at par. 99; *Cheatle v The Queen* at page 551; Law Reform Commission of Canada, *supra* at page 28-29

[413] *Cheatle v The Queen*, *supra* at page 553; Law Reform Commission (New South Wales 2005), *supra* at par. 3.15 and 3.16; Lord Devlin, *supra* at page 56

[414] It may be more accurate to say that a jury is *believed* to be effective, because of the lack of research on the subject.

[415] Law Reform Commission of Canada, *supra* at page 29

[416] Law Reform Commission of Canada, *supra* at page 29

> Empirical research relating to the jury's deliberative process suggests: first, that minority views are more likely to be expressed and considered under the unanimity rule, and second, that the quality of discussion is superior. From these findings, the greater likelihood of an accurate decision under the unanimity rule can be inferred.

d) The Unanimity Rule Promotes Public Confidence in the Criminal Justice System

The strength of a jury's verdict lies not in the evaluation of the evidence by each juror individually, but rather in the unanimity of the conclusion reached by the jury as a group.[417] Studies have shown that jurors, themselves, prefer the unanimity requirement[418] and that the public in Canada supports the unanimity requirement, at least for serious charges.[419] The few available studies do suggest as well that the public feels that verdicts based on unanimity are "safe ones" – important because juries are not required to outline reasons for their verdict.[420]

Some argue that while unanimity promotes public confidence, hung juries flowing from the unanimity requirement tends to undermine public confidence. There are two responses to this argument. First, as I noted earlier, there is no evidence to support the notion that hung juries are widespread in Canada or indeed elsewhere throughout the Commonwealth with the possible exception of Australia. Second, hung juries will occur whether the rule requiring unanimity or a majority verdict scheme is in place.

e) There May Be Good Reasons for Jurors to Disagree

The simple fact that from time to time juries hang, is not, in itself, sufficient reason to think that the system of trial by jury is not working, or that it is in need of reform. Sometimes, perhaps often, disagreements occur because the case is a difficult one, not because one or two of the jurors are perverse.

A study of an admittedly small number of hung juries in New Zealand (5) is helpful if not instructive.[421] In three of the cases, the jurors "provided a clearly articulated and reasoned basis for their dissent".[422] In the other two, the dissent was seen as well-founded: in one, the researchers concluded that the *majority* position would have actually led to a perverse verdict; and in the second, the merits were balanced, and the judge shared the view of the minority.[423] In these types of cases, a hung jury seems not unreasonable.

Parenthetically, it should be noted that this type of data is not available in Canada due to the secrecy provisions in s.649 of the *Criminal Code*. In a rare move, the Supreme Court of Canada recommended in 2001 that the *Criminal Code* be amended to permit the

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[417] *R v Pan*, *supra* at par. 99
[418] Law Reform Commission of Canada, *supra* at page 30
[419] *Ibid* at page 31
[420] Law Reform Commission (New South Wales 2005), *supra* at par. 3.15 and 3.16
[421] Law Reform Commission (New South Wales 2005), *supra* at par. 3.14
[422] Law Reform Commission (New South Wales 2005), *supra* at par. 3.14
[423] *Ibid*

scientific community to conduct empirical research respecting the work of juries in the Canadian judicial environment. This would avoid relying on assumptions and extrapolations based on studies in other countries.[424] Thus far, the Government of Canada has not acted upon this recommendation.[425]

f) Majority Verdicts May Not Be Constitutionally Secure in Canada

Quite apart from the policy rationale for maintaining the unanimity rule, or moving to majority verdicts, there is, in my view, a significant constitutional issue here: does the "jury" requirement in s.11(f) in the *Charter of Rights and Freedoms*, include, as a core element, a unanimous verdict? Not surprisingly, there are no authorities directly on point in Canada.[426] In my view, there is a significant risk that, if the Government of Canada moved to majority verdicts in respect of, at least, "serious offences"[427] such as murder, the Supreme Court of Canada would strike the legislation down pursuant to s.52 (1) of the *Constitution Act, 1982*.

In *R v Pan* the Supreme Court of Canada (9-0) said this:[428] "the requirement of a unanimous verdict is a central feature of our jury system".[429] While the language of the Supreme Court falls short of characterizing unanimous verdicts as constitutionally required, it is clear that unanimity is an important feature of the current Canadian jury system.

In summary, I have reached the conclusion that: there are strong policy reasons for keeping unanimous verdicts; no convincing reasons have been shown for changing the law; the "weaknesses" that are attributed to unanimous verdicts would still exist in a majority verdict system, and there is a significant risk that if the Government of Canada moved to majority verdicts, the legislation would be ruled unconstitutional. For all of these reasons, I am of the view that the unanimity requirement in jury trials should be

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[424] *R v Pan, supra* at par. 100 *et seq*. At an early stage, some work was done in Canada with simulated juries: Valerie Hans and Anthony Doob, "Section 12 of the *Canada Evidence Act* and the Deliberations of Simulated Juries", (1975), 18 C.L.Q. 235. Internationally, some research has been done, but it seems apparent that the efforts thus far have been insufficient: "A Future for Jury Research?", by Dr. Paul Robertshaw, Cardiff Law School, UK, in an article first published under another title in *The Times* on the 23rd of October, 2001.

[425] I have been advised that the "Justice Efficiencies and Access to the Justice System" Steering Committee, composed of Canadian judges, Crown and defence lawyers, is presently considering this issue: www.doj.ca/en/est-cde-rep.html. As well, retired Chief Justice Lamer commented on the issue in his report on Newfoundland miscarriages of justice (http://www.justice.gov.nl.ca/just/lamer/lamercontent page 3-9, recommendation 16); and see: "A Future for Jury Research?", by Dr. Paul Robertshaw: http://www.isrcl.org/otherpapers/robertshaw.pdf. Michael Hill, Q.C. (of England) and David Winkler, Q.C. (of Canada) made similar recommendations in a paper that they prepared for the International Society for the Reform of Criminal Law in 2000: "Juries: How Do They Work? Do We Want Them?" at pages 31 and 35-6. Despite these entreaties, the law remains unchanged.

[426] Reference can, however, be made to *R v Bryant* (1984), 16 CCC (3d) 408 (Ont.CA); *R v Brown* (1995) 26 CRR (2d) 325 (CMAC); *R v Pan, supra*

[427] As defined in s. 2 of the *Criminal Code*

[428] *R v Pan, supra* at par.99

[429] *R v Pan, supra* at par. 99

maintained and that the *Criminal Code* ought not to be amended to permit majority verdicts.

However, it seems to me that the Government of Canada ought to amend s. 649 of the *Criminal Code* to permit empirical research into the decision-making process of juries in Canada to assist in future law reform. This change should only occur after consultation with the social science community, the judiciary and the bar, to ensure that there is clarity on the principles and methods by which jury deliberation research might be conducted, including the safeguards that will be necessary.

j) Some Non-Structural Considerations

Certain structural issues, especially those involving the jury, currently increase the risk that lengthy terrorist trials will not reach verdict. Earlier in this Part, I outlined a series of reform options which, individually or cumulatively, will reduce that risk.

While structural reforms can reduce the risk, it has become clear to me that a number of *non-structural* reforms are also necessary to ensure that even a lengthy and complex terrorist trial is heard fairly, in a timely way, and that it does proceed to verdict.

Non-structural reforms, however, fall outside the scope of this paper. For that reason, but to ensure completeness, I will refer to them briefly and, hopefully, with sufficient clarity to ensure that their importance is understood.

There are two principal non-structural reforms: the containment of lengthy trials, and the assistance that can be provided to the jury to fully consider the case. In combination, these two elements will go a long way toward ensuring that proceedings are manageable in length, with well defined issues that can be considered fully and fairly by the trier of fact.

A) Containing Lengthy Trials

i) The Crown Should not Overload the Indictment

While many factors contribute to the length and complexity of a criminal trial, the indictment tends to define the overall "shape" of the proceedings. The Crown should avoid overloading the indictment with dozens of accused and dozens (or hundreds) of counts, as occurred in some of the failed gang mega-trials. As the Advisory Committee to the Chief Justice of the Ontario Superior Court of Justice noted in its 2006 Report: "why proceed on a sixteen-count indictment if a four-count indictment, covering the most serious allegations, would better focus the trial?"[430]

[430] New Approaches to Criminal Trials: the Report of the Chief Justice's Advisory Committee on Criminal Trials in the Superior Court of Justice (Ontario), dated May, 2006 but released October, 2006: http://www.ontariocourts.on.ca/superior_court_justice/reports/ctr/ctreport.htm (at par 239)

Concerning the number of accused, authority exists in both Canada and the US supporting the proposition that, in general, at least in trials expected to be lengthy, the number of accused on a single indictment ought not to exceed around eight.[431] This can usually be accomplished by: grouping the principal defendants together; proceeding against peripheral players in separate, shorter proceedings, and exercising a discretion *not* to proceed against those whose role was very limited.[432]

Concerning the counts, it must be remembered that separate verdicts are required on each count. That involves sorting out which accused are charged on which counts, what evidence applies to which count, and to which defendant. In *R v Pangman*,[433] the case, as originally framed, would have required the jury to deliver *240 discreet verdicts.*[434]

I wish to comment in particular on conspiracy counts. There is a longstanding and persistent myth that by charging conspiracy the rules of evidence are widened. That is not accurate. The so-called co-conspirator exception to the hearsay rule applies to *both conspiracy and substantive counts* where the evidence establishes that the accused were acting in concert and in furtherance of the common design.[435] This is important for two reasons. First, the mixing of conspiracy counts is often unnecessary, and has the effect of lengthening the trial and making the charge to the jury incredibly complex if not incomprehensible.[436]

Second, the strategy of charging conspiracy to "widen" the rules of evidence is questionable, given the reality that substantive counts can usually be proven more easily and in a shorter period of time. Indeed, the practice of charging conspiracy where the underlying substantive offence can be proven has been criticized by the highest courts in the US, UK and Australia.[437]

ii) Judicial Control Over and Management of Lengthy Trials

Virtually every study on the problem of lengthy criminal trials has emphasized the need for judicial leadership and control of the process within an adversarial framework.[438]

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[431] *R v Pangman* (2000) 149 Man. R. (2d) 68 (QB) at par. 30; *US v Casamento*, 887 F2d 1141 (2nd Circuit Court of Appeal), cert. den. 493 US 1081 (1990); *US v Gambino*, 729 F. Suppl. 954 (SDNY); Ewaschuk, *Criminal Pleadings and Practice in Canada*, 3rd ed. (2006) at par. 9.13015 and 9.13230

[432] There is, of course, always a prosecutorial discretion to decline prosecution despite evidence demonstrating the commission of an offence: *R v Catagas* (1977), 38 CCC (2d) 296 (Man.C.A.)

[433] *R v Pangman, supra*

[434] *Ibid* at par. 3

[435] *R v Koufis* (1941), 76 CCC 161 (SCC) at page 168; and see MacFarlane, Frater and Proulx, *Drug Offences in Canada*, 3rd ed. (Toronto: 2006) at par. 8.920 *et seq* for a discussion of the principles and cases in this area.

[436] MacFarlane , Frater and Proulx, *ibid* at par. 8.1000

[437] *Krulewitch v US*, 69 S. Ct. 716 (1949); *Verrier v DPP*, [1967] 2AC 195 (HL); *R v Hoar* (1981), 56 ALJR 43 (HC).

[438] *New Approaches to Criminal Trials, The Report of the Chief Justices Advisory Committee on Criminal Trials in the Superior Court of Justice, supra*; *Review of the Criminal Courts of England and Wales*, by the Right Honourable Lord Justice Auld (London: 2001), especially chapter 6; *Control and Management of Heavy Fraud and Other Complex Criminal Cases* (A protocol issued by the Lord Chief Justice of England

Two issues, in particular, have arisen: pre-trial applications, and *voir dires*. Concerning the former, Mr. Justice Moldaver of the Ontario Court of Appeal has recently observed that "pre-trial motions regularly last 2-3 times longer than the trial itself".[439] An Advisory Committee on criminal trials in Ontario, consisting of experienced judges, Crown and defence lawyers agreed with Justice Moldaver when he said that, "the growth in pre-trial applications is the greatest cause of trials being longer".[440]

During the past few years, the bench, bar and government in both Canada and the UK have undertaken a number of studies with a view to regaining control over increasingly protracted criminal trials. They include: a January, 2004 Federal/Provincial/Territorial Heads of Prosecution Report; a February, 2004 Report of the Barreau du Quebec; a 2004 Steering Committee on Justice Efficiencies Report; the March 2005 UK Rules and Practice Direction issued by the Lord Chief Justice of England and Wales; and, finally, the May, 2006 Ontario Advisory Committee Report and Recommendations.

A common theme emerges from these Reports: the need for a greatly enhanced pre-trial case management system. In my view, the need for a stronger pre-trial management process has clearly been made in Canada. Indeed, several mega-trials have already broken down at the pre-trial stage because of a lack of effective case management. In this context, it seems to me that two mechanisms are critical to reign in protracted proceedings:

a) The pre-trial judge needs to have clear statutory powers to case manage these cases. The various Reports referred to above tend to suggest that there is a degree of cynicism about pre-trial case management because there are no real enforcement mechanisms. Helpful enforcement models are discussed in detail in these Reports;

b) Where the trial court has severed an otherwise overloaded indictment with a view to better managing the trial, it strikes me that it would be in the interests of justice to ensure that rulings on pre-trial motions applied across all of the severed trials. For example, where the investigation yielded a significant number of intercepted private communications, it makes sense that the rulings on admissibility should apply to all of the trials. That would mean that a lengthy wiretap *voir dire* need only be undertaken once.

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and Wales- 22 March, 2005, *supra*; David Kirk, "Fraud Trials: A Brave New World", Jo CL 69 6 (2005); Jury Service in Victoria (Australia), Victoria Parliament Law Reform Commission, Final Report- Volume 3 (1997), at par. 2.211; *Justice Efficiencies and Access to the Justice System*, A Final Report on Mega-Trials of the Steering Committee on Justice Efficiencies and Access to the Justice System (Released by Canadian Ministers of Justice in 2005).

[439] New Approaches to Criminal Trials, Ontario Advisory Committee Report, *supra* at par. 307; Justice Moldaver repeated his concerns one year later, urging the bench and bar to address "the twin demons of complexity and prolixity". His speech can be found on the Ontario Courts website: http://www.ontariocourts.on.ca/court_of_appeal/speeches/state.htm

[440] *Ibid* at par. 307

As Justice Moldaver said in his 2006 speech, the proliferation of pre-trial *Charter* motions is virtually out of control and is starting to have an impact on the public's faith and confidence in our criminal justice system. The twin demons of complexity and prolixity continue to plague the system and "pose a threat to its very existence". For these reasons, I am of the view that the Government of Canada ought to look carefully at the various recommendations that have been made in these Reports, and assess how best to ensure that they actually find expression in law and in practice.

Voir dires raise separate, but similar issues. The principal question focuses on the basis for the decision—should the evidence be *viva voce*, or should decisions be made on the basis of counsel's submission? The difference could amount to months of evidence and court time. On that point, the Supreme Court of Canada in 2005[441] quoted with approval the following comments from an earlier decision of the British Columbia Court of Appeal:[442]

> Generally speaking, I believe that both the reasons for having, and not having a *voir dire* and the conduct of such proceedings, should, if possible, be based and determined upon the statements of counsel.[443] I suggest that judges must be more decisive in this connection than they have been in the past because far too much judicial time is consumed by the conduct of these kind of inquiries.

In my view, both the reasons for having, and not having, a *voir dire* and the conduct of such proceedings, ought to be based and determined upon the statements of counsel.

iii) Effective Disclosure

Lengthy and complex cases often involve a large amount of documentary evidence. This can involve tens of thousands of pages and, on occasion, hundreds of thousands of pages. Management of the documents becomes critical at two levels: disclosure to the defence,[444] and efficient use in court. Both can be achieved through reliance on technology.

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[441] *R v Pires*, [2005] 3 SCR 343 at par. 34 (7-0); whether and to what extent the judgement in *Pires* can withstand the decision in *R v Khelawon*, 2006 SCC 57 remains to be seen. *Khelawon* seems to emphasize the importance of calling evidence during a *voir dire* although Charron, J., who delivered the judgment for the court, did not refer to the earlier decision in *Pires*.

[442] *R v Vukelich* (1996) 108 CCC (3d) 193 (BCCA)

[443] This is the most expeditious way to resolve these problems: see *R v Dietrich* (1970), 1 CCC (2d) 49 (Ont.C.A.) at 62; *R v Hammill* (1984), 14 CCC (3d) 338 (BCCA); and *R v Kutynec* (1992), 70 CCC (3d) 289 (Ont.C.A.) at 301.

[444] *R v Trang*, 2002 ABQB 744 at par. 397 (disclosure duty in the context of a massive investigation); *R v Rose*, 2002 Canlii 45358 (Q.C.S.C.) par. 13, 14 and 27 (surely we need to move from hard copy disclosure to electronic disclosure); *R v Lam*, 2004 ABQB 101 (electronic disclosure provided, defence application for another format dismissed); *R v Bigge*, (2004) SKQB 500 (hard copy disclosure ordered); and note that in the Final Report on Mega-trials of the Steering Committee on Justice Efficiencies and Access to the Justice System, released by Ministers of Justice in 2005, the Steering Committee which consisted of judges, Crown and defence counsel, recommended at par. 5.16 the use of electronic disclosure, if circumstances allow it.

I am of the view that where the police and Crown are in a position to determine the timing of the laying of charges, disclosure in large cases ought to be organized and prepared during the investigative phase of the case, and be provided to the accused at the time charges are laid, or very shortly afterward. Additionally, in my view, the Government of Canada ought to consider amending the *Criminal Code* to specifically permit electronic disclosure, subject to oversight by the trial court.

B) Assisting the Jury to Consider the Case

There are a number of reforms that could assist the jury in understanding the case presented by the Crown, defence as well as the instructions provided by the trial judge on the law. Four, in particular, ought to be considered.

i) Mandatory Model Jury Instructions

Model instructions have been in place in the United States for several decades. They were adopted in that country for several reasons. First, trial judges, especially new ones, were spending too much time drafting individual instructions instead of concentrating on the evidence. Second, even when trial judges managed to produce legally correct instructions, they seldom possessed the time or the ability to explain the law in a simple, intelligible fashion. Finally, and most importantly, appeals alleging instruction errors were clogging that country's appellate court system. With the adoption of model instructions, these three problems subsequently abated.[445]

The benefit of model jury instructions has been debated in Canada since the Law Reform Commission first proposed them in 1980.[446] The Commission concluded that there are five major advantages to the use of jury instruction guidelines. They are: timesaving, promote accuracy, ensure uniform treatment, promote impartiality, and enhance intelligibility.[447]

Three sets of well-thought-out, albeit informal, model jury instructions exist in Canada. Despite the ease with which they are available, they have not yet played a significant role at the appellate level in Canada.[448]

The Supreme Court of Canada has also established model instructions in three separate areas of the law. However, the court noted that variations on the themes suggested by it may be acceptable. Rather than minimizing appeals, one author has argued forcefully that these non-mandatory court developed models have spawned a huge amount of appellate litigation. That author concludes as follows:[449]

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[445] Jordan Hauschildt, "Deadlocked: The Case for Mandatory Pattern Instructions in Criminal Jury Trials", (2005), 50 CLQ 453 at 459.
[446] Law Reform Commission of Canada, Working Paper 27, "The Jury in Criminal Trials" (1980), pp. 78-87
[447] *Ibid* at page 81
[448] Jordan Hauschildt, *supra* at page 460
[449] *Ibid* at page 480

> When a trial judge fails to incorporate the exact words of a model into their final charge, an automatic ground of appeal arises. Appellate litigation becomes necessary in order to determine whether the individually created charge satisfies the standards set out in the model. As a result, the current system of providing jury instruction requires trial judges to draft individual charges, which then require appellate review to confirm their sufficiency. This glaring inefficiency clearly illustrates the need for reform. Instituting a set of officially sanctioned mandatory jury charges would significantly reduce the frequency of jury charge challenges.

Mandatory model jury instructions will benefit the public in at least two ways. First, they use plain language and will be better understood by the jury. Second, they will reduce or eliminate the number of lengthy terrorist trials (and, in fact, any lengthy trial) where verdicts are reversed because of faulty instructions to the jury.

I am of the view that the Government of Canada ought to amend the *Criminal Code* to allow for the establishment of a Commission composed of judges, defence counsel, Crown attorneys, legal academics, lay persons and communication experts. The mandate of the Commission would be to develop model jury instructions that are mandatory in their use and in their terms. The project ought to be modest in its initial stages, focusing on areas of jury instructions that are particularly problematic—such as unsavoury witnesses, burden of proof, assessment of credibility, conspiracy law and terrorism offences. They ought to be placed in Regulations pursuant to the *Criminal Code*, to permit rapid response to evolving case law within these areas.

ii) Note-Taking by the Jury

As an aid to jury recollection in lengthy cases, trial judges ought to be encouraged to allow jurors to take notes of important points in the evidence. Note-taking is allowed in some provinces,[450] although the jury should be instructed that their task is not simply to "take notes".[451] Notes on important points will later assist the jury in its deliberation as a collective body.

iii) Providing Context on The Law Before the Charge to the Jury

Traditionally, the trial judge instructs the jury on the law at the end of the trial. That works well in short cases, but jurors' comprehension on the issues and facts for determination will be assisted greatly if the trial judge provides assistance on the legal framework throughout the course of the trial.

Current authorities support the proposition that basic law, even unannotated excerpts from the *Criminal Code,* can be provided before the charge so that later instruction will

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[450] In British Columbia: *R v Bengert* (No.3) (1979) 48 CCC (2d) 413 (BCCA); in Ontario: *R v Andrade* (1985), 18 CCC (3d) 41 (Ont.C.A.)

[451] *R v Codina* (1995), 95 CCC (3d) 311 (Ont.C.A.), at page 331

be better understood,[452] and where basic law such as the *Criminal Code* is replete with technical jargon, the trial judge should explain its meaning and significance to the jury in plain English.[453]

The orientation process should, however, start at the beginning of the process. Research in cognitive psychology suggests that advising a person on how to frame information he or she is about to receive enhances later recollection, aids in the interpretation of complex material, and leads to a greater level of juror satisfaction.[454]

In my view, *prospective jurors* ought to be provided with information on the adversarial system, their role as fact finders, and what is expected of them during deliberations. Jurors, *once empanelled*, should be instructed at an early stage on fundamental trial issues that will allow them to be "integrated into the fabric of the trial",[455] so that they can focus on the issues as they emerge in the evidence. That instruction can continue throughout the case, as the evidence may require.

iv) Jurors Asking Questions of Witnesses

The present practices with respect to a juror asking a question of a witness varies widely from place to place and from judge to judge.[456]

In general, there has been a tendency not to allow questions to be asked. Several reasons have been cited: questions may disrupt the orderly flow of counsel's line of questioning; the questions may seek inadmissible evidence; counsel on the case are in the best position to determine what questions should be posed; questions will slow the case down; and questions of this sort will negatively impact the fairness of criminal trials.

It is arguable that, traditionally, the criminal justice system has treated juries as passive receptors of information, yet in a judge-alone trial the trier of fact (i.e. the trial judge) is clearly entitled to ask questions of a witness to clarify points of evidence. Why, then, is there a difference?

Studies in Canada, the United States and Australia have shown that the fears generally advanced by opponents have not materialized and lack foundation.[457] Field experiments in the US have shown that jurors do not abuse questioning privileges,[458] and 80% of

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[452] *R v Siu* (1992), 71 CCC (3d) 197 (BCCA)
[453] *R v Coghlin* (1995), 32 Alta. L. R. (3d) 233 (CA)
[454] V. L. Smith, *The Psychological and Legal Implications of Pre-Trial Instruction in the Law*, Stanford University Press, Stanford, 1987; Jury Service in Victoria, *supra* at par. 2.138
[455] *Ibid* at par. 2.134
[456] Law Reform Commission of Canada, *supra*, at page 1118; Law Reform Commission (Victoria), *supra* at par. 2.116; Elissa Krauss, "Jury Trial Innovations in New York State: Improving Jury Trials by Improving Jurors Comprehension and Participation", *Journal*, May 2005
[457] *Ibid* (all authorities); in the US, jurors are permitted to submit written questions at the trial judge's discretion in 31 states. Only 5 states prohibit the practice; no Federal Circuit prohibits the practice; Elissa Krauss at page 24.
[458] Law Reform Commission (Victoria) at par. 2.166

jurors afforded the opportunity found it helpful to obtain relevant information which, in turn, allowed them to better understand the evidence in the case.[459] Despite initial scepticism, lawyers involved in the US cases were pleasantly surprised at how smoothly the procedure worked and how insightful most of the questions were.[460]

US judges, likewise, were pleased with the ease of procedure and the questions from jurors. Sixteen judges in New York state "generally agreed that permitting juror questions was helpful to jurors in paying attention, understanding the evidence, and reaching a decision. Most also felt that juror questions had a positive effect on the fairness of the trial".[461]

Other studies have likewise found that jurors permitted to ask questions had significantly higher levels of confidence in their role, greater ease in reaching a verdict, saw counsel in a more favourable light, and were more confident about the correctness of their verdict.[462]

Law reform bodies have generally favoured allowing jurors to ask questions of witnesses. The Law Reform Commission of Canada recommended it in 1980[463], as did an Australian Law Reform Committee in 1997.[464] A 2003 Standing Jury Committee in Colorado endorsed the practice in a majority report for that State,[465] and, following field experiments by 51 judges in New York State in which jurors were allowed to submit written questions for witnesses, the Jury Trial Project Committee of that State released a report in 2004 concluding that the experiment was, overall, quite positive.[466]

Despite the apparent advantages of juror questioning, criminal trials in Canada continue to rest within an adversarial framework, and safeguards are needed to ensure that the roles of counsel and juror are not blurred or confused.

A trial judge allowing questioning should advise the jury at the beginning of the trial that, in general, the questioning process rests in the hands of counsel, and that questions from the jury should be exceptional. The jury should also be told that they should wait until all questioning by counsel is complete before even considering whether a question is required. To avoid uncertainty, the question should be reduced to writing and given to the trial judge. It should then be provided to counsel, who can then make submissions on the propriety of asking the question. The final say on whether the question should be posed rests with the trial judge and, if the ruling is in the affirmative, the trial judge should pose the question to the witness.

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[459] Elissa Krauss, *supra* at page 25
[460] *Ibid* at page 24
[461] *Ibid* at page 24
[462] L. Heuer, "Increasing Jurors' Participation in Trials", (1982) 20 *American Criminal Law Review* 1.
[463] Law Reform Commission of Canada, *supra*, at p. 118
[464] Law Reform Commission (Victoria), *supra* at par 2.170
[465] Carrie Lynn Thompson, "Should Jurors Ask Questions in Criminal Cases? Minority Report" (unpublished)
[466] Elissa Krauss, *supra*

PART VIII

Summary and Concluding Observations

a) The Realities

Terrorist trials have several important realities. They are usually lengthy and very complex. Crown disclosure obligations often raise difficult national security issues. Those accused of terrorism, at least in Canada, have the right to choose trial before a trial and jury, or a judge sitting alone. The acts charged are usually horrific in nature, enraging the public and placing extraordinary pressure on the police and prosecutors to convict those responsible. And politicians sometimes wade into the case, making fair trial requirements even more difficult to meet.

b) The Risks

These realities can place a terrorist trial at risk. For a variety of reasons, an unmanageably long trial may never reach verdict: a mistrial may be required where more than two jurors have to be discharged; the trial may abort where the trial judge cannot continue with the case; Crown mismanagement or the simple reality of its disclosure obligations may force a judicial stay; defence demands for disclosure of security-sensitive information may, if successful, force the Crown to terminate the case to protect the information; and, if the case reaches "mega" proportions, the simple passage of time can lead to the evidentiary collapse of the Crown's case, prompting a Crown stay with no determination on the merits of the evidence. Accused persons, as well, face the risk of not being able to have a fair trial where the acts alleged are so horrific that their simple allegation has had a direct impact on the fabric of society—potentially tainting the pool from which jurors are chosen, and altering normal decision-making by police, prosecutors, scientists and, some would argue, the judiciary.

c) The Challenges, and the Objectives

Future terrorist trials face three overarching challenges: first, they need to be manageable in terms of length and complexity. Second, the process and result need to be seen as fair and legitimate, both domestically and in the eyes of the international community. Finally, any new criminal trial process cannot increase the risk of convicting persons who are innocent of the crimes charged.

This trilogy of key challenges intersects at several levels and, in turn, engages the seven fundamental principles underlying this study which I described in Part II. A process that is seen to be fair, open and manageable will, through an international lens, be more likely to be viewed as legitimate and effective, and the political desire to "legitimize" a domestic criminal justice system process will be more likely lead to a procedure that is manageable in size, easily understood, and be consistent with internationally-recognized

principles of fairness. Perceptions of legitimacy and fairness are further enhanced where reforms are anchored on existing and well established justice structures and processes. And a trial process that is fair, manageable in size and easily understood is less likely to result in wrongful convictions, and enhances the truth-seeking function of criminal trials.

It is important to recognize that these challenges, especially manageability, are not confined to terrorist trials. They extend to gang prosecutions, complex cases of fraud, criminal conspiracies and virtually any substantive offence involving multiple accused and multiple charges that are said to have occurred over an extended period of time. The problem is not, therefore, the new face of terrorism; it is, instead, the emergence in virtually all Anglo-based systems of criminal justice of the so-called mega-trial. It is important to observe, as well, that a strong response to mega-trials of this nature will not have the disadvantage of isolating out terrorist trials for special treatment.

For that reason, the reforms discussed in this Part are not "terrorism-specific". Rather, they focus on three broad objectives: rein in mega-trials; make sure that an appropriate trier of fact is in place to consider the case fairly and fully; and ensure that, even in protracted proceedings, the matter can actually proceed to verdict in accordance with the laws and processes applicable to all criminal cases. In the pursuit of these objectives, it is critically important that proposed reforms respect individual rights and, at the same time, take into account the broader interests of the public.

There are four further challenges to the reform of the structure for terrorist trials. They are really sub-sets of the overarching ones I just described.

First, we should not be afraid that under a new structural framework acquittals may occur in terrorist trials. This paper is not intended to develop a defence strategy to secure an acquittal any more than it is intended to assist the Crown in obtaining a conviction. It simply seeks to ensure that lengthy and difficult cases, perhaps but hopefully not "mega" in nature, will proceed fully through to verdict, and be decided fairly on their merits. Professor Kent Roach made the point powerfully in a 2005 comment on the acquittals entered in the Air India prosecution.[467]

> As demanding as the criminal trial is, we should not be ashamed of acquittals of accused terrorists. Such acquittals are an affirmation of the very high price that democracies are willing to pay in their attempts to ensure that only the guilty are punished. This is one of the qualities that distinguishes the legitimate pain imposed by democracies on guilty criminals from the illegitimate, indiscriminate and terrible pain imposed on the innocent by terrorists.

Second, Canada has always demonstrated a richness in the flexibility of its criminal trial structures, but there is a need to ensure that any future reforms comport with constitutional requirements.

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[467] Kent Roach, "Editorial: The Air India Trial", (2005) 50 C.L.Q. 213 at 215

Canada has, in the past, used "special juries", a panel of three superior court judges sitting with a jury, six-person juries in sparsely population areas of the country, and presently permits judge alone trials, alternate jurors and a substitute judge where the original trial judge cannot continue.

Neither the judiciary nor parliament have unbridled authority to change our criminal trial structures, and the challenges to ensure that changes are constitutionally secure are especially important in view of the section 11(f) *Charter* right to trial by "jury". What amounts to a "jury" at law is left undefined in Canada, but decisions of the Supreme Court of Canada, the High Court of Australia and the Supreme Court of the United States are helpful in determining the core characteristics of a jury in criminal proceedings.

Third, to ensure acceptance and the perception of legitimacy, it is, I believe, important to reform the law in such a way that new structures become a part of the normal fabric of the criminal law applicable to all persons and charges meeting the criteria—regardless of whether the case is a drug conspiracy, gang trial, fraud case or terrorist conspiracy. This avoids the spectre of Canada having to say both domestically and internationally: "oh, this is a terrorist case. We have a special type of trial for that". The experience of the Diplock courts and even the Lockerbie prosecution suggests that special procedures for terrorist trials often raise more problems than they solve.

Finally, for the reasons outlined in Part VII, it seems clear to me that Canada's present alternate juror and substitute judge scheme is woefully inadequate in terms of the management of lengthy and complex criminal trials of any sort. The provisions of the *Criminal Code* with respect to alternate jurors certainly ensure that the trial starts with a full panel of twelve, but there is, in my view, an unacceptable risk that, at least in the context of a lengthy trial, the jury could be reduced below ten, necessitating a mistrial order. Likewise, the substitute judge scheme which invites starting all over again in the case of trial by jury needs to be seriously reconsidered. Again, a strength of such reforms is that they would apply to all lengthy and complex cases, not just terrorist trials.

d) The Reform Framework

When considering reforms to the criminal trial process in Canada, it is important to have some criteria or principles in mind. Sound law reform on fundamental issues cannot be developed on a napkin, over dinner.

In Part II, I outlined seven principles or values which I regard as critical in this area: reforms should enhance the truth-seeking objectives of criminal trials, and not frustrate them; reforms should also promote confidence in the trial process as well as its result, to ensure a sense of legitimacy, both domestically and abroad; structural changes should be fair to persons charged as well as to the prosecution, and respect the rule of law which underpins our entire legal system; that noted, reforms should also promote efficiency in the administration of our criminal justice system, and promote openness in our court system. Future laws also need to balance the rights of the individual with those of the

public at large, especially where terrorists have struck a blow at the state or our democratic system of government. Finally, it is important to consider whether and to what extent changes in fundamental trial structures may raise the risk of miscarriages of justice to an unacceptable level.

In Part III, I took a 57-year, 5 country journey through previous terrorist and mega-trials. In Part IV, I drew together the common elements and lessons learned from those cases. Those lessons are important to remember in the development of any new structures for the trial of terrorist offences. There are three key ones: first, resort to normal laws applicable to all persons, in the usual courts, is clearly preferable as it promotes confidence and a sense of legitimacy; special laws, and reliance on new tribunals, on the other hand, breed cynicism and mistrust in both the trial process as well as the result.

Second, terrorist cases, because they invariably involve acts of incredible violence and brutality, often generate considerable anxiety amongst the public, government officials, police services and forensic professionals. As a result, trial fairness can be placed in jeopardy and new laws such as expanded changes of venue need to guard against this.

Third, suicide bombers and decentralized conspiracies based on ideological or political agendas have changed the face of terrorism. Trials now require immense amounts of time to plan and hear. Twenty-first century terrorist trials are exceptionally complex in nature, and there is a demonstrable need to ensure that they do not collapse under their own weight.

e) Potential Reforms

I will first deal with issues concerning the jury. The procedures respecting jury trials were developed hundreds of years ago, when trials typically lasted fifteen to twenty minutes. There was virtually no risk of losing jurors (or the trial judge) due to illness, incapacity or death.

The emergence of lengthy, complex cases forces a reconsideration of some of the most basic trial structures, and it is not surprising that the jury is at the heart of the reform options.

Twin objectives exist: ensure that the trial starts with twelve jurors, and maximize the likelihood that, even in lengthy proceedings, twelve jurors retire to deliberate at the conclusion of the evidence. The current *Criminal Code* scheme respecting alternate jurors achieves the first objective, but fails to address the second. In my view, the law requires significant reform.

There are, in broad strokes, two models that have been developed in Anglo-based criminal justice systems to deal with juries that are required to hear lengthy trials. The first is a system of “alternate” or “reserve” jurors. A jury of twelve is empanelled in the usual way. They are then augmented by further, “alternate” jurors. From the outset, they know that they are alternates, so the scheme sets up a system of “real” jurors, and

"potential" jurors. In my view, this is not a satisfactory arrangement as second class status may prompt some alternates to pay less attention to the evidence because they do not have a vested interest, nor a sense of responsibility for the case.

The second model is the preferable one. Best illustrated in the state of Victoria, Australia, the trial judge has a discretion to empanel additional jurors who have full status to hear the case from beginning to end. If more than twelve remain at the conclusion of the evidence, the jury is reduced to twelve through a balloting process. The jury then retires to consider the case.

This approach achieves the twin objectives. More than twelve jurors start the trial, and, almost certainly, twelve go into the jury room to deliberate. The trial judge retains a discretion to discharge jurors for good cause, but a significant number of jurors would have to be discharged before a mistrial was required. There may also be room to lower the current critical mass of ten to nine or, perhaps, even eight, based on the trial judge's assessment of the evidence, length of trial, prejudice to the accused, and the public interest. Much below that, however, I am concerned that the jury may start to lose its fundamental character as a representative and effective fact-finding body.

Given these considerations, it seems to me that the *Criminal Code* ought to be amended along the following lines: the trial judge should be empowered to empanel up to sixteen jurors, including four additional jurors, in cases expected to last several months or more; trial judges should continue to have authority to discharge jurors on the basis of section 644(1) of the *Criminal Code*; if more than twelve jurors remain at the end of the tendering of evidence, a balloting or drawing of lots ought to be undertaken to determine the twelve jurors that are entitled to enter the jury room for deliberations, with the balance discharged from further duty in the case; during deliberations, the trial judge should continue to have authority to reduce the jury to ten as presently contemplated by section 644(2) of the *Criminal Code*, but should acquire the discretion to allow the numbers to drop to nine, or perhaps eight, if the trial has lasted, or is expected to last, more than six months or so, provided that such an order is necessary in the interests of justice.

Paragraph b (vi) of the Terms of Reference for the Air India Inquiry asks for advice on "whether there is merit in having terrorism cases heard by a panel of three judges". The question raises two separate and fundamental issues: is trial by a judge alone possible; if it is, can or should a panel of judges hear the case? I will deal with both issues.

Under section 11(f) of the *Charter of Rights and Freedoms*, an accused terrorist will be entitled, at his or her election, to trial by jury. There are, in my view, only two pathways that would mandate a judge alone or "bench trial" in a terrorist case that is being heard in the normal courts. First, if Parliament was prepared to invoke the "notwithstanding clause" provided in section 33(1) of the *Charter of Rights and Freedoms,* to override the right to a jury trial in s.11(f) and effectively set up the equivalent of "Diplock Courts" in Canada. Under subsection 33(3) resort to the override power would only be valid for a maximum of five years, after which it would cease to have effect. It is important to

observe, however, that the available empirical evidence (which is scant) suggests that juries generally do a good job sorting out who did what, and who is guilty of what.

Trials of six, nine, and twelve months, and more, have emerged in Canada during the past decade. Many were heard by a judge alone, but some proceeded before a jury. At some point in the "length continuum", the right to a fair trial in a jury trial may be placed in jeopardy. By "fair trial" I mean that both the Crown and defence are able to have the matter considered fairly and fully, and that the length of the process does not place an unacceptable burden on the community, including the jury. A jury trial lasting two years or more, with any degree of complexity (as most of them will) is, in my view, overloaded and presumptively unfair to the parties and to the community.

Legislation precluding trial by jury based primarily on the length of the trial breaches section 11(f) of the *Charter of Rights and Freedoms*, and, absent reliance upon the "notwithstanding" clause, will need to be saved, if at all, by section 1 of the *Charter*. As I noted earlier, the *Oakes* test will cause a reviewing court to consider whether the objective is sufficiently important to warrant overriding a constitutionally protected right. In this instance, the objective is a right guaranteed by sections 7 and 11(d) of the *Charter*—namely, the right to a fair trial. The court will also need to consider whether the means are reasonably, proportionately and demonstrably justified.

It seems to me that where the right to a jury and the right to a fair trial are on a collision course, and cannot be reconciled in a particular case, the need for a fair trial becomes the overriding objective. The accused, it seems to me, cannot implicitly "waive" the right to a fair trial by electing trial by judge and jury and then strategically plan, in essence, to raise "reasonable confusion" in the minds of the jurors based on the protracted nature of the proceedings, rather than arguing that a reasonable doubt arises upon a consideration of the evidence. It is very much in the public's interest and, ultimately, in the interest of accused persons to have a fair trial based on a full and fair consideration of the evidence and the issues as a whole.

That brings me to the second issue. If a case can be made to dispense with the jury in a particular case, should the matter proceed before a judge alone, or before a panel of three judges?

Several factors need to be considered. In a long trial, an alternate judge could be appointed (without a jury). That will provide a reasonable assurance that the case will proceed to verdict. A panel of three judges raises more difficult questions. Is unanimity amongst the three required? Or would a majority of two be sufficient? Would divided verdicts undermine public confidence and perhaps violate the presumption of innocence and the reasonable doubt standard? What happens if one of the three judges cannot continue and the remaining two judges are split evenly on the issue of guilt or innocence? Should a fourth, "alternate" judge be appointed to cover that eventuality? What about the resource implications for smaller jurisdictions or, indeed, any jurisdictions?

In my view, replacement of a judge and jury with a panel of three judges in a terrorist case would, from a policy perspective, be ill-advised for several reasons.

First, it seems to me that the conclusions of a panel would have to be unanimous on all essential issues of fact and law. Otherwise, almost by definition, a reasonable doubt exists in the case and an acquittal must be entered. In a jury trial, the issue of reasonable doubt is resolved through a unique process of group deliberation. Judges, however, have no such mandate, and would be entitled, in essence, to "vote" on the issue. Because the group deliberation and dynamic that is so important in jury fact-finding will not necessarily be present in a trial by a panel of professional judges, it seems to me that a bench trial could actually be a less effective fact-finding body than a jury of twelve randomly-selected jurors drawn from the general population.

Second, the real challenge for future terrorist trials is, to use the language of Justice Moldaver, prolixity and complexity. Creation of a three judge bench trial is not responsive to that issue. Indeed, a bench trial simply raises new problems. As noted above, in a lengthy trial a judicial panel could lose one of the judges just as easily as a jury could lose one of the jurors. What happens then? Do you proceed with just two judges? What do you do if the panel is reduced to one? At what stage do you declare a mistrial? Or do you "load up" at the front end with three judges and an alternate? In my view, few if any jurisdictions in Canada could afford the resource burden of routinely assigning four judges to hear terrorist trials.

Finally, bench trials are ill-advised in Canada because they will raise significant issues of legitimacy. A panel of judges hearing a criminal case will be unique and without precedent in Canadian legal history. At the international level, terrorist cases would be seen as having been diverted out of the mainstream of Canadian trial procedure, and placed into the hands of a tribunal which has no parallel in Anglo-based criminal justice systems. Such a process would expose the tribunal to allegations of "show trial", as occurred in the Lockerbie experience, and may tend to diminish Canada's reputation for fair justice in the eyes of the international community.

In the result, it is my view that the *Criminal Code* ought to be amended along the following lines: where a jury trial is expected to be extremely protracted, the Crown or the accused may apply to the court for an order that the matter proceed without a jury; an order of this nature should be available where there is a substantial risk that because of the length (primarily) and complexity (secondarily), the accused cannot receive a fair trial; in determining the issue, the court should be able to take into account the full circumstances of the case, including its expected length, nature of the charges, nature of the evidence and the proposed manner of its presentation, and whether the length and complexity of the trial can be managed in such a way that the right to a fair trial will not be jeopardized; where the court is satisfied that the trial ought to proceed without a jury, it may order that the case proceed before a judge sitting alone, with or without an alternate judge (subject to consultation on resources). But, for the reasons that I have outlined above, I am of the view that a panel of three judges, sitting without a jury, would

be impractical and ill-advised in the context of Canada's legal framework, traditions and history.

In Part VII, I also considered the issue of *where* a terrorist trial should be held. Of course, the normal rule is that an offence is tried where it occurred. There are good reasons for that: the immediate community has the greatest interest in the outcome of the case, and the witnesses usually live in the community involved.

However, terrorist attacks are intended to strike fear into the hearts of community members, and in particularly horrific attacks—9/11, for example—it can be argued with considerable force that the entire community (or, indeed, the nation) was victimized—including potential jurors. Should this type of trial be moved to another location or even another province?

Under section 599(1) of the *Criminal Code*, the Crown or an accused can seek a change of venue where justice requires it. Some courts have ruled that the trial *must* be moved if the accused cannot receive a fair trial where the offence took place. In the case of the Oklahoma City bombing, for instance, the trial of Timothy McVeigh was moved from Oklahoma City to Denver, Colorado.

Although under s. 83.25 *Criminal Code* the Attorney General of Canada has authority to prefer an indictment alleging a terrorism offence in any territorial division in Canada, there is no general power to move a trial to another province, regardless of how great the prejudice may be. Even the innovative crafting of a *Charter* remedy would, in my view, be suspect on the basis that it is quite doubtful that a court in one province can, without legislative authority, direct another province, over its objections, to assume responsibility for the trial of a criminal case for which it has no constitutional responsibility.

In my view, it would be desirable to amend the *Criminal Code* to empower a superior court hearing an indictable offence to direct that the trial be heard in another province or territory where it is satisfied that the accused cannot receive a fair trial in the originating jurisdiction, and, because of the significant resource implications, after the proposed "receiving" Attorney General has been consulted and has had an opportunity to provide submissions to the court. I am also of the view that the Attorney General of Canada should assume a leadership role in the development of a network of agreements to deal with the various administrative, resource and funding implications of such changes of venue. These agreements may include the possibility of international changes of venue in cases where another country with similar standards of justice to Canada is willing to assert universal jurisdiction over a terrorism offence that has connections with Canada.

I have also considered several other structural reforms, but have concluded that change in those instances is neither required not desirable.

First, should the size of the jury be reduced from twelve to six? Will a smaller jury be more effective? There is no particular rationale for having twelve jurors, and some state courts in both the US and Australia regularly empanel six person juries to hear criminal

cases. Over the years, law reform commissions in Canada and abroad have recommended against reduction, and it seems to me that the larger jury will inevitably be more representative of the community and will be a more accurate fact-finding body. Quite apart from whether a reduction to six would be constitutionally secure in Canada, it is my view that there is no basis to conclude that a smaller jury would enhance the efficiency or effectiveness of criminal trials, and that the case for reduction has not been made out.

I have also considered whether the unanimity rule in jury trials ought to be abolished in favour of majority verdicts. There are good arguments both for and against maintaining the unanimity rule and in Part VII, I analyzed the principal ones. In the result, I have reached the conclusion that: there are strong policy reasons for keeping unanimous verdicts; no convincing reasons have been shown for changing the law; the "weaknesses" that are often attributed to unanimous verdicts would still exist in a majority verdict system, and there is a significant risk that if the Government of Canada moved to majority verdicts, the legislation would be ruled unconstitutional.

The last structural issue I considered involves the proposed introduction of "special juries" or "lay assessors" in lengthy and complex cases. Proponents argue that expert triers of fact would be able to follow the evidence more easily than twelve randomly-selected jurors coming from the general community. I am of the view that changes of this nature are, for several reasons, both unnecessary and ill-advised: the case has not yet been made that juries are incapable of comprehending difficult cases; the role of experts is to provide assistance to jurors on issues for which they lack sufficient knowledge or experience—not to overtake the role as decision-makers in the case; trial by experts in secret may, I believe, increase the risk of wrongful conviction; and there is, in my view, a significant risk that special juries and lay advisors do not amount to a "jury" under section 11(f) of the *Charter of Rights and Freedoms* because they lack the core characteristics of random selection and representativeness, as well as the guarantees of independence and impartiality provided under section 11(d) of the *Charter.*

Although this paper has focused on potential structural changes to ensure that terrorist trials are heard fairly and fully, there are a number of non-structural reforms that can assist. Although these issues fall outside the intended scope of this paper, I thought that, for the sake of completeness, I ought to briefly highlight a few for consideration. Some seek to curb lengthy trials; others are intended to assist the jury's recollection and comprehension of the case.

i) The Crown Should not Overload the Indictment: The Crown need not include every potential accused and every potential charge on the indictment. To a large extent, the indictment will "shape" the length of the trial, and will start to define the facts in issue as well as the admissibility of evidence required to prove those facts.

Where possible, conspiracy counts should not be mixed with substantive counts, and Crown counsel should note that the practice of charging conspiracy where the underlying substantive offence can be proven has been widely criticized. Canadian and American authority has also urged prosecuting authorities to avoid charging more than around eight

accused on indictments expected to result in protracted proceedings, by: grouping the principal defendants together; proceeding against peripheral players in separate, shorter proceedings, and exercising a discretion not to proceed against those whose role was very limited.

ii) Judicial Control Over and Management of Lengthy Trials: There is a growing sense that the judiciary needs to assume a leadership role in the control over and management of cases expected to be lengthy. The bench and bar would be well advised to read the cautions and the guidelines that have been issued in Canada and the UK in just the last few years.[468] Three mechanisms, in particular, seem critical: the reasons for having, or not having, a *voir dire*, and the conduct of such proceedings, ought to be based and determined upon the statements of counsel; trial courts needs to be provided with statutory authority to case-manage pre-trial applications; and rulings on pre-trial motions ought to be applied across all judicially-severed trials.

iii) **Effective Disclosure:** Where the police and Crown are in a position to determine the timing of the laying of charges, disclosure in large cases ought to be organized and prepared during the investigative phase of the case, and be provided to the accused at the time charges are laid, or very shortly afterward. Additionally, I think that the Government of Canada ought to consider amending the *Criminal Code* to specifically permit electronic disclosure by the Crown to the defence, subject to oversight by the trial court

iv) **Assisting Juror Comprehension (Mandatory Model Jury Instructions):** I am of the view that the Government of Canada ought to amend the *Criminal Code* to allow for the establishment of a Commission composed of judges, defence counsel, Crown attorneys, legal academics, lay persons and communication experts. The mandate of the commission would be to develop model jury instructions that are mandatory in their use and in their terms. The project ought to be modest in its initial stages, focusing on areas of jury instruction that are particularly problematic—such as unsavoury witnesses, burden of proof, assessment of credibility, conspiracy and anti-terrorism legislation. They ought to be placed in Regulations pursuant to the *Criminal Code*, to permit rapid change in response to new case law within these areas.

v) Assisting Juror Comprehension (Note Taking): as an aid to jury recollection in lengthy cases, I am of the view that trial judges ought to be encouraged to allow jurors to take notes of important points in the evidence. The jury should, however, be instructed that their task is not simply to "take notes" in the case. Notes on important points will later assist the jury in its deliberation as a collective body.

vi) Assisting Juror Comprehension (Providing Contextual Instruction as the Trial Unfolds): research in cognitive psychology suggests that advising a person on how to frame information he or she is about to receive enhances later recollection, aids in the interpretation of complex material, and leads to a greater level of juror satisfaction. It seems to me that two initiatives would be of assistance: *prospective* jurors should be provided with information on the adversarial system, their role as fact finders, and what is

[468] This material is discussed at footnote 438 *et seq*, together with the accompanying text.

expected of them during deliberations, before they are empanelled. Second, once the jury is empanelled, the trial judge should provide instructions on fundamental trial issues that will allow the jury to be "integrated into the fabric of the trial", so that they can focus on the issues as they emerge in the evidence.

vii) Assisting Juror Comprehension (Juror Questioning of Witnesses): law reform bodies have generally favoured allowing jurors to ask questions of witnesses. Studies in Canada, the US and Australia have demonstrated that juror's questions were helpful in understanding the evidence and reaching a fair decision. It seems to me that, on an *exceptional* basis, jurors ought to be permitted to pose a question or questions to a witness for the purpose of clarifying the evidence providing that the trial judge makes it clear that the primary responsibility for questioning witnesses rests with counsel and the issue of juror questions, if any, is not raised until all counsel have examined the witness. The questions should be reduced to writing, given to the trial judge and counsel, who then should have an opportunity to make submissions on whether the questions should be posed. If the question is ruled appropriate, it should be posed to the witness by the trial judge.

Two further non-structural reforms respecting the jury are important. First, section 649 of the *Criminal Code* ought to be amended to permit empirical research into the decision-making process of juries in Canada to assist in future law reform. Safeguards will be necessary, including a clear understanding of the principles and methods by which the research may be conducted. Second, trial judges ought to permit expert panels to testify at trial in the form of group evidence. That will, I believe, permit juries to understand the different points of view in the expert's community and, more importantly, will ensure that the jury has a clear and more effective understanding of whether and to what extent a consensus on pivotal issues exists within that community.

In conclusion: at the beginning of this paper, I observed that the criminal justice system must be accountable to the community it serves, and that public confidence in the law and the courts is necessary for the courts to assume any sort of moral authority to decide on the liberty of people. The emergence of terribly protracted and complex trials now threatens that confidence.

There is, in my view, an unacceptable risk that future terrorist trials will collapse under their own weight and will not be drawn to a conclusion. Should that occur, the public can reasonably be expected to withdraw its confidence in a system of criminal justice that has served this country well for centuries.

In my opinion, the various reforms discussed in this paper will help avoid that risk, and will assist in ensuring that, both domestically and internationally, Canada is seen as having a criminal justice system that is fair, effective, and a model for all democratic states.