VI. JURIES

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Clause 171 of Bill C-19[1] repeals sections 554 to 581 of the Criminal Code[2] and substitutes new sections 554 to 581.8. The amendments, in many cases, merely reorganize the present provisions. The new provisions simply codify the common law respecting jury trials and the empanelling of jurors.

Important new developments, however, include equalizing peremptory challenges, making the jury selection process fairer, codifying the challenge for cause procedure, and allowing juries of as few as eight members to return a valid verdict in some circumstances.

The amendments, to some extent, revise the present law respecting non-jury trials as well. The provisions that apply to all trials — jury and non-jury — are grouped together at the beginning of the amendments. The most notable is section 555, which provides for a mandatory pre-trial meeting in jury cases, and permits such a hearing in non-jury proceedings with the consent of all the parties.

Section 556 deals with the right of an accused to be present throughout his trial and the basis upon which he may be excluded. The two subsections of section 556 are essentially the same as the present subsections 577(1) and (2). There are some differences in wording but the substance seems unchanged. Present subsection 577(3), which simply codifies the right of an accused to make his defence personally or by counsel, appears unchanged in proposed section 557. Thus, the present law, as reflected in the leading case of *R. v. Hertrich*[3] remains good law. That authority discusses the obligation of a court to ensure the presence of an accused during his trial, the policy reasons for that important principle, and the limited circumstances in which his physical absence will not violate the rule.

Proposed section 558 provides for the recording of evidence at trials. It will replace present section 575. Section 575 does not include a requirement that the judge's charge to the jury, the submissions of the respective counsel, the process of empanelling the jury, or the matters decided in the absence of the jury be recorded, although this is the standard practice. Proposed section 558 brings the provision's wording in line with present practice.

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[1] Criminal Law Reform Act, 1984, Bill C-19, 32nd Parl., 2d sess., 1983-84 (1st reading 7 Feb. 1984) [hereafter cited as Bill C-19].

[2] R.S.C. 1970, c. C-34.

[3] 67 C.C.C. (2d) 510, 137 D.L.R. (3d) 400 (Ont. C.A. 1982) *leave to appeal to S.C.C. refused* 45 N.R. 629n (1982).

Section 559 is the same as present section 574 with minor changes in wording. Subsection 560(1) is the same as present subsection 574(4). Proposed subsection 560(2) is a new innovation intended to expedite jury trials. It provides that in any case to be tried with a jury, a judge has jurisdiction, before any prospective juror is called "and in the absence of any such juror, to deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it is sworn". This is intended to obviate the necessity of empanelling the jury and then sending them away for long periods of time while *voir dires* are conducted. In some cases, as a result of the *voir dire*, the Crown is left with no admissible evidence and the jury is then instructed to return a verdict of not guilty. Thus, the entire jury service has been a mere formality.[4] While the wide definition of judge in proposed section 554[5] suggests a possible application of the section prior to trial, nevertheless, subsection 560(2) seems to apply only after the plea in view of its wording and placement. Thus, it does not confer a general jurisdiction to decide matters prior to trial nor copy the American practice of extensive pre-trial motions.

The amendments reorganize the Criminal Code sections in an attempt to follow the chronological order of the events that occur during the jury selection process and the subsequent criminal trial. Subsections 561(1) and (2) are the counterparts of present subsection 572(1). It provides for a jury of twelve members, except in the Yukon Territory and the Northwest Territories, where a jury is composed of only six members. Subsection 561(3) is a new provision which directs that at an early stage of the trial, the judge shall instruct the jurors to elect one of their number to speak on their behalf, to be called the President of the jury. Under subsection 561(4), however, a failure to comply with that subsection does not affect the validity of the proceedings.

Subsections 562(1) and (2) are the counterparts of present subsections 554(1) and (3). The balance of section 562, subsections (3), (4) and (5), is the same as present section 555, dealing with mixed juries in the Province of Quebec. Prospective jurors must be qualified by provincial law, in accordance with constitutional requirements. Proposed section 563 deals with challenging the jury panel and replaces present sections 558 and 559. The grounds for the challenge are extended beyond partiality, fraud or wilful misconduct on the part of the officer by whom the panel is returned, to include any substantial failure to comply with the laws respecting juries of the province in which the jury serves.

Proposed section 564 then goes on to outline the procedure for empanelling a jury. Subsections 564(1) and (2) are the respective counterparts of present subsections 560(1) and 567(2). Subsection 560(3)

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[4] *See, e.g.*, R. v. Samson, 37 O.R. (2d) 237, 29 C.R. (3d) 215 (Cty. Ct. 1982).

[5] "Judge" means not only the judge before whom an accused is being tried, but also the judge before whom an accused *is to be* tried. (emphasis added).

is a new provision which allows for a general address by the trial judge to the panel in the presence of the parties, wherein he states the name and address of the accused, the substance of the offence charged, and requests any prospective juror on the panel to indicate if he or she thinks that he cannot fairly and impartially perform his duties as a member of a jury to try the accused and render a true verdict. By subsection 560(4), the judge shall examine any prospective juror who responds to such a request and he may do so in the absence of the balance of the jury panel. If the judge is satisfied that the juror cannot perform his duty properly, he shall excuse the prospective juror from the case.

This provision seems appropriate in principle. The right of the trial judge prior to the selection process to generally direct questions to the panel as a whole was recognized in *R. v. Hubbert*.[6] The Court there also held that following such further inquiries to such jurors as may be appropriate, the trial judge in his discretion may excuse such a person notwithstanding that there is no specific authority for this in the Criminal Code. This decision was later affirmed by the Supreme Court of Canada.[7] One concern regarding this section is whether the amount of information given to the panel is sufficient to achieve its purpose. At present, some judges read a list of the Crown witnesses and ask the panel if any of its members knows those persons or is related to them. The balance of proposed section 564, namely subsections (5), (6) and (7), are the counterparts of present subsections (3), (4) and (5) in section 560. They make cosmetic changes in the wording without changing the substance of the present selection process. The wording also confirms that a juror in his discretion may ask to make a solemn affirmation instead of swearing an oath and that such an affirmation is perfectly valid.

Proposed section 565 is the counterpart of present section 571, which provides for the summoning of other jurors when a panel is exhausted, or as they are called, "talesmen". The present Criminal Code allows talesmen to be summoned "whether qualified jurors or not".[8] The proposed section would allow the summoning of such persons as "appear to have the necessary qualifications as the court directs".[9]

Proposed subsection 565(2) provides that the consent of the prosecutor and the accused is required to summon talesmen where fewer than eight jurors (or in the Yukon Territory and the Northwest Territories fewer than four jurors) are selected from the jury panel.

Proposed subsections 566(1) and (2) are the counterparts of present subsection 572(1). Subsection 566(3) is the same as present subsection 572(2) and would allow a court to try an issue with the same jury in whole or in part that had previously tried or been drawn to try another issue. The present subsection 572(2) permits the prosecutor or the

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[6] 11 O.R. (2d) 464, 29 C.C.C. (2d) 279 (C.A. 1975).
[7] 45 N.R. 460A, 33 C.C.C. (2d) 207n (S.C.C. 1977).
[8] R.S.C. 1970, c. C-34, sub. 571(1).
[9] Sub. 565(1), as proposed in Bill C-19, cl. 171.

accused to object to any such jurors. New subsection 566(4) makes clear that where a prospective juror has previously served on a jury, he is in no different position from any other prospective juror. The present subsection 572(2) indicates that such a juror need not be sworn again. This seems an obsolete holdover from the common law.

The subject of challenges is dealt with in proposed section 567. Subsection 567(1) allows any number of challenges to either side on the grounds that the name of a prospective juror does not appear on the jury panel, the prospective juror has been convicted of an offence for which he was sentenced to death or to a term of imprisonment exceeding twelve months and has not obtained a pardon, the prospective juror is not a Canadian citizen, the prospective juror is physically unable to perform properly the duties of a juror, the prospective juror is not qualified as a juror according to provincial law or, where the accused is required under section 462.1 to be tried in his own official language, the prospective juror is not fluent in that language. A challenge on any one of these grounds is tried by the judge, who may question a prospective juror who is the subject of such a challenge or require that the same procedure be followed as in the case of other challenges for cause, outlined below. Section 567 to the extent just described, therefore, is the counterpart of present paragraphs 567(1)(a), (c), (d) and (e), subsection 567(2), and subsections 569(1) and (2). Proposed section 568 provides for any number of challenges to prospective jurors on the ground that a prospective juror is not impartial between the Queen and the accused. It thus updates the archaic language of indifference found in present paragraph 567(1)(b). Subsection 568(2) requires the accused to first declare such a challenge, while subsection 568(3) provides that the judge may require such a challenge to be in writing as per form 37, a procedure already provided for in present section 568. Subsections 568(4) and (5) are new. They provide that the party challenging shall be required by the judge to state the reasons for the challenge, and the judge may refuse to hear the challenge in the absence of valid reasons. Before allowing the hearing of the issue on such a challenge, the judge may require further particulars or the tendering of evidence concerning the reasons for the challenge. Finally, subsection 568(6) provides, as does the present subsection 568(3), that the opposing party may admit the challenge and then the prospective juror shall be excused; but where the challenge is contested the issue shall be heard. Proposed section 569 sets out the procedure on such a challenge. The party challenging may call the prospective juror as a witness and may, with leave of the judge, do so without first adducing other evidence.

The judge may order that any questioning of a prospective juror take place in the absence of the balance of the jury panel and any jurors already present. The sworn jurors to be excluded must refer to other than jurors who are the triers of fact, since as will be seen, the triers of fact on such a challenge are the last two jurors to be sworn where there are such jurors. The judge may disallow any questioning of a prospective juror that is not relevant, succinct and fair and may require that all questions

directed to a prospective juror be submitted to the judge in writing for his prior approval. Following the questioning of a prospective juror under this proposed section, the opposing party may question the prospective juror and call his own witnesses, and the party challenging the prospective juror may then adduce reply evidence with leave of the judge.

In *R. v. Hubbert*,[10] it was held that there is a presumption that a juror not disqualified by statute will perform his duties in accordance with his oath. Accordingly, the purpose of a challenge for cause of the prospective jurors is to eliminate from the jury those persons who come within the excluded categories and not to find out what type of person the prospective juror is or to aid counsel in deciding whether to exercise its peremptory challenge. The possible basis for a challenge for cause on the ground that a juror is not indifferent between the Queen and the accused would include prior association with the accused, or prejudicial knowledge of the accused, or direct connection with the prosecution or pre-trial publicity surrounding the case. In an extreme case the publication of the facts of a case may give rise to the degree of partiality that should lead to the right to challenge for cause, but the mere fact that the prospective juror has prior information about a case or even that he holds a tentative opinion about it, does not render him partial.

Proposed section 570 provides that the triers on such a challenge shall be the jurors who last took an oath or made a solemn affirmation, or failing any such juror, two persons present whom the court may appoint. Under subsection 570(2), if after a reasonable time the triers cannot agree, the judge may re-try the issue. This is the same provision as the present subsections 569(2) and (4).

Proposed section 571 is the counterpart of present subsection 569(3) and provides that if the ground of challenge is not true, the prospective juror shall be sworn subject to any other challenge that can be made in respect of a prospective juror. If the finding is that the ground of challenge is true, the prospective juror shall be excused.

As if this were not clear enough, proposed subsection 572(1) expressly provides that a prospective juror may be challenged peremptorily whether or not he has been challenged for cause under the previous sections. This confirms the Supreme Court of Canada decision in *Cloutier v. The Queen*.[11] Subsection 572(2) goes on to cover the same ground as present sections 562 and 563, namely, peremptory challenges. The prosecutor and the accused are each given the same number of peremptory challenges, namely, twenty where the accused is charged with an offence for which the minimum punishment is life imprisonment, and twelve in all other cases. In the Territories, the number of peremptory challenges is halved for both sides. Stand asides, as provided

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[10] *Supra* note 6.

[11] [1979] 2 S.C.R. 709, 48 C.C.C. (2d) 1.

for in present subsections 563(1), (2) and section 570, are abolished by the proposed section 573(2). These provisions are similar to the recommendations made by the Law Reform Commmission of Canada.[12]

Subsection 572(4) is new and provides that where two or more counts in an indictment are to be tried together, the accused is entitled to the number of peremptory challenges to which he would be entitled under the most serious count. This confirms the common law rule in *R. v. Taillon*.[13] Finally, subsection 572(5) deals with the case of joint accused and as in present section 565, provides that each accused is entitled to the same number of challenges as he would be entitled to if he were tried alone. However, the prosecutor becomes entitled to the total number of peremptory challenges available to all of the accused. Subsection 572(6) deals with peremptory challenges in the context of mixed juries in Quebec and is the counterpart of present section 564.

Section 573, the counterpart of present subsection 563(3), makes the jury selection process much fairer by providing that the accused is to be called upon first for his peremptory challenge, but thereafter the right to the first peremptory challenge alternates between the prosecutor and the accused. Subsection 574(1) is new and allows the judge to excuse any juror or prospective juror before the commencement of the trial with the consent of both parties or on the ground of personal hardship, relationship with one of the parties or their counsel, conscientious objection to jury service or any other reasonable cause that in the opinion of the judge warrants that the juror be excused. This is, arguably, merely a codification of a common law power and is a useful device to dispense with a juror or prospective juror without utilizing one or other of the parties' peremptory challenges. Subsection 574(2) is the counterpart of present subsection 573(1) and in similar wording, gives the judge during the course of a trial the right to discharge a juror for illness or other reasonable cause rendering him unable to continue to act.[14] Furthermore, subsection 575(1), the counterpart of present subsection 573(2), allows a jury after the discharge of one or more of its members to be reduced to not less than ten jurors or, in the Territories, not less than five jurors. Subsection 575(2), however, is a new provision, allowing the jury, unless the judge otherwise directs, to be reduced to not less than eight jurors or, in the Territories, not less than four jurors, where a trial has continued for more than thirty days. Obviously, the purpose of this provision is to avoid the necessity for mistrials in lengthy criminal cases. However, those are the very cases in which the desirability of a full jury seems the strongest. In such cases, the evidence will be voluminous and the collective recall of as many jurors as possible will be very important.

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[12] LAW REFORM COMMISSION OF CANADA, THE JURY, REPORT 16, at 14-15 (1982).

[13] 33 C.R. 245, 32 W.W.R. 91 (Sask. C.A. 1960).

[14] As to the present law, *see* Gold, *The Jury and the Criminal Trial*, in CRIMINAL PROCEDURE IN CANADA 381, at 401-05 (V. Del Buono ed. 1982).

To allow an accused to have his fate decided in such a case by as few as eight jurors seems to elevate expediency over justice.[15] Surely, a fairer method of achieving the same result would be to allow for the selecting of alternate jurors in lengthy cases, a common procedure in the United States. During the trial, the alternates function just as ordinary jurors, but at the time the jury commences its deliberations, they either drop off as unnecessary or take a place within the jury to replace any jurors who are unable to continue.

Subsection 576(1) codifies the right of a prosecutor to make an opening address to a jury. Subsection 576(2) gives an accused a right similar to that under present subsection 578(2). Section 577 provides that a judge may order a view, as under present section 579. There are some changes. While the present Code makes the presence of the judge and accused mandatory, proposed subsection 578(3) would make the judge's presence mandatory, but allow him to grant permission to the prosecutor and to the accused to be absent. Proposed section 578 replaces present section 576. Subsections 578(1) and (2) deal with the power of a jury to be sequestered or to be separated. There appear to be no major changes in content. New section 579 codifies the common law right of an accused to move for a directed verdict of acquittal on the ground that "no evidence has been adduced to prove an essential element of the offence charged". By subsection 579(2), such a motion shall be made and determined in the absence of the jury after the judge has allowed the parties to make submissions. A judge is not allowed to reserve decision on the motion. If the judge grants the motion, he shall direct the jury to acquit the accused and if he denies the motion, he shall then ask the accused whether he intends to adduce evidence. The decision on the motion is made by subsection 579(4) a matter of law, essentially the manner in which it is being treated now. With regard to a directed verdict, if the jury refuses to accept the judge's direction to acquit, it has been said the judge must accept their erroneous verdict of guilty and leave the Court of Appeal to set it right.[16] That cannot be right, and perhaps the legislation should have expressly dealt with the problem.

Section 580 codifies the right of the parties in the absence of the jury to make oral or written submissions on the law and on the theory of guilt or innocence, as the case may be, and provides that such submissions shall form part of the record. The section does not give the judge a right to require such submissions, but gives the parties an opportunity to make them. Therefore, it appears that if the parties do not wish to make such submissions, they cannot be required to do so. The use of the word "theory" seems ill-conceived as the case law has made clear that it is better to avoid such wording.[17]

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[15] *See, e.g.*, R. v. Samson, 36 O.R. (2d) 719 (Cty. Ct. 1982).
[16] *Supra* note 14, at 406.
[17] R. v. Cavanaugh, 15 O.R. (2d) 173, 33 C.C.C. (2d) 136 (C.A. 1977).

Subsection 581(1) deals with the subject matter of closing addresses by the parties, as does present subsection 578(3). An important departure from the present law is that, under subsection 581(1), the prosecutor must always address the jury first, followed by the accused. Under subsection 581(2), the prosecutor is given a limited right of reply where the accused adduces no evidence *and* in his address under subsection 581(1) raises an issue that, in the opinion of the judge, could not reasonably have been anticipated by the prosecutor. In that case the judge shall grant leave to the prosecutor to address the jury in reply. Note that this right of reply is limited to situations where the accused adduces no evidence. Where the accused presents defence evidence, the section is inapplicable. Section 581.1 codifies the matter of judges' instructions to the jury. It requires the judge to instruct the jury on the law applicable to the facts of the case and to succinctly and impartially summarize the facts, the evidence on the material issues and the theories of the prosecutor and the accused.[18] Under subsection 581.1(2), the judge is prohibited from expressing any opinion on the innocence or guilt of the accused, but may express an opinion as to the credibility of the witnesses. The amendments thus seem to accept the suggestion in the case law that a judge should not comment directly on the guilt or innocence of the accused or state that certain evidence is or is not worthy of belief.[19] The Law Reform Commission elevated this suggestion into a firm recommendation.[20] Undoubtedly issues will arise as to the meaning of this section. Is the accused when he testifies a witness for the purpose of subsection 581.1(2), upon whose credibility a judge may comment? What is the relationship between the subsections? To the extent that the judge expresses an opinion as to the credibility of witnesses, may he thereby violate the requirement of impartiality under subsection 581.1(1)? Subsection 581.2(1) codifies the requirement that the verdict of the jury must be unanimous. Subsection 581.2(2) and subsection 581.2(3) are the same as present subsections 580(1) and (2), and deal with the situation where a jury is unable to agree. Section 581.3 is the same as present section 581, which provides for the taking of verdicts on Sundays or holidays. The balance of the amendments deal with offences respecting juries. Section 581.4 provides for a restriction on publication of matters done in the absence of a jury until the trial is completed, and is the counterpart of present section 576.1. Section 581.5 is the same as present section 576.2, making it an offence for a juror to disclose jury deliberations. However, a new subsection 581.5(2) adds a third exemption for scientific research concerning juries that is approved by the Attorney General of the province in which the research is conducted. Section 581.6 is also a new provision, creating the offence of harassing or intimidating a juror or a member of his family. Section 581.7 prohibits

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[18] *Supra* note 14, at 411.
[19] *Id.* at 415.
[20] *Supra* note 12, at 24.

the publication of information respecting jurors prior to the completion of the sittings or session of the court and section 581.8 makes both of the foregoing matters summary conviction offences.

In summary, most of the amendments are in the nature of rearrangement rather than innovation. Some new provisions merely codify the existing case law. Those that equalize the jury selection process and make it fairer seem non-contentious. The changes in the jury address procedure are innovative, but those that allow for smaller juries in longer trials seem unnecessary and ill-conceived.