

# Criminal Law and The Jury System

Dilraj S. Gosal, BA, LL.M, JD

Holmoka, Gotti, Nuremburg, Ellard, Air India, Louis Riel, OJ, Olson, Kevorkian, Kaczynski. Perhaps no other area of law is as intriguing, and full of human complexities and frailties, as the Criminal Law. Let us take a brief overview of criminal law and procedure in Canada and in particular, the jury system.

## Sources of Canadian Criminal Law:

Canada's criminal law can in much part be traced back to the great Common Law traditions of England and the reign of Henry II, where permanent courts were established at Westminster. Canada also enjoys constitutional rights enshrined in the *Canadian Charter of Rights and Freedoms*, which was one of the legacies of our former Prime Minister Pierre E. Trudeau. The judicial branch - comprising of courts - also "interpret" the law and assist in its application.

## Category of Offences:

In Canada, criminal law is enacted by Parliament in Ottawa. The criminal law defines offences, including traditional categories such as assault, murder, robbery, to newer offences involving computers, organized crime, and terrorism.

Many crimes are defined in the *Criminal Code*, while others are defined in other pieces of federal legislation, such as the *Income Tax Act*, and *Controlled Drugs and Substances Act*.

There are also other regulatory offences, which are enacted by provincial and municipal governments.

## Levels of Court:

The vast majority of criminal cases are dealt with in the various Provincial Courts across the province. Provincial court judges are appointed by the provinces and sit without a jury.

In Canada, if the crime charged is quite serious (called an "Indictable Offence" in Canada and akin to the U.S. "Felony"), the Accused will often has a right to have a trial before a Judge alone (often called a "bench trial"), or to have it heard before a "Judge and Jury." In a "Judge and Jury" trial, the judge acts as the judge of the law, and the jury acts as the judge or trier of the facts. Only federally appointed superior court judges can sit with a jury. In British Columbia, this level of court is known as the BC Supreme Court.

However, the bulk of offences are charged as a "Summary Offence" (akin to U.S. "misdemeanours") and typically contain maximum punishments of six months imprisonment and \$2,000 in fines.

Both the accused and Crown may be able to appeal verdicts or judgments. These appeals can be heard, depending on the circumstances, by the BC Supreme Court, and the BC Court of Appeal. Further appeals can be made in rare circumstances to the Supreme Court of Canada, which sits in Ottawa.

### Jury System:

The origins of the Jury system are up for debate; however it may be said to be founded in the Frankish inquest, and transplanted into England by the Norman Kings. It was meant to replace rather dubious and barbaric methods of trial, such as Trial by Ordeal, or Trial by Combat. Today, the jury does not know beforehand the facts of the case or the parties. This is in contrast to the way it was in the 12<sup>th</sup> century. Initially the Shire Reeve (Sheriff) would swear 4 knights, who would in turn selected 12 good knights who knew the litigant and the issues, and swore upon Oath to determine the issues.

In the US, this jury system was also created to prevent abuses from Royal interference and to ensure that it was in fact, the people, and not the government, that decided the fates of their fellow citizens. The US also has different types of juries, including, petit and grand jury.

In a typical criminal case, potential jurors are summoned by the Sheriff's Office and instructed to appear before the judge and lawyers on a certain day. These jurors will be seated behind the bar in the observers' seats. It is here that the lawyers begin the process of selecting the jury.

In the US, this examination and selection process includes a dialogue between the potential jurors and lawyers, in what is called a *voir dire* (French for "to speak the truth"). In comparison to the US process, the Canadian *voir dire* is curtailed significantly, with little dialogue between the lawyers and jury pool. The *voir dire* is a truth-seeking process where the lawyers try to cleanse the jury pool from any unfair prejudice or bias that may jeopardize the fairness of the proceedings.

This process of removal is called "challenging" the juror. There are two types of challenges: 1) challenges for cause; and 2) peremptory challenges. The first type of challenge is where it is believed that the juror cannot sit as an impartial decision maker. The second category - principled on the requirements of a fair trial - is reserved for the lawyers to strike a potential juror for almost whatever reason. However, this is not an absolute and unfettered power. For example, in the US, a Defendant may raise what is called a *Batson* claim (named after the case in which the principal was enunciated) where there is an allegation that the prosecutor has stricken all the jurors of the same race as the defendant on the basis of race alone.

Jurors may also be excused by the judge for other reasons, such as undue burdens that the trial will cause on the juror, or other human frailties. It is important to know that if one is dismissed from jury duty, it is not necessarily a reflection on one's character, or

disposition. It simply means that that person was not suitable, for whatever reason, on that day, for that specific trial.

Once a juror is selected, he or she is sworn in, and asked to take a seat in the Jury Box. Juries can range in size, but generally contain 12 people; sometimes there are as little as 6 (ex. for misdemeanour trials), and sometimes there are alternate jurors, which sit as jurors, but are only called upon in the event one of the original jurors cannot complete his or her sworn duty.

Jurors are sworn by their Oath, to presume the defendant innocent throughout the trial. In a criminal case, the Defendant generally need not prove anything; it is in fact the prosecutor that has the entire Burden of Proof. That level of proof must not be slight; it cannot even be 'clear and convincing;' rather, it must be so overwhelming that it removes any and all reasonable doubt from the minds of the jurors.

Jurors are often given "jury instructions" on what the law is, and it is for the jurors to apply the law to the facts they have heard. In the US, judges are not allowed to comment or summarize the facts. In Canada, judges may still provide summations of the facts. Unanimous verdicts are generally required for "guilty" or "not guilty" verdicts to be determined. In some cases, a mistrial is declared by the judge, when the jury cannot agree on a unanimous verdict. This is also known as a "hung jury."

Jury Duty is an integral part of the criminal justice system, and a high service not only to the community in which one lives, but for the rule of law, and democracy.

I would highly recommend a movie called "Twelve Angry Men," available at your local video store, which tells an interesting tale of jury deliberations in a homicide case. It is available in the 1997 MGM remake of the 1957 black and white classic.

\*Mr. Gosal is a Barrister and U.S. Attorney at Law, practising criminal defence, ICBC personal injury law, and appeals. His office is located at the York Business Park in Surrey. He can be reached at 604.598.1118 or GosalLaw.com