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### CRIMINAL JURY TRIALS: PATTERN INSTRUCTIONS AND RULES OF PROCEDURE

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*In this article the author contends that insufficient attention has been given in Canada to the instruction of juries in criminal trials. The results are often that instructions are probably misunderstood by jurors, and that on appeal orders for new trials are made because of errors in instruction, thus adding to the congestion of the courts. The author argues that Canada should, with appropriate modifications, adopt both the technique of pattern jury instructions and some aspects of the criminal procedure which are in place in the United States. These changes could best be effected by removing from the Criminal Code rules of criminal procedure, and by the enactment, as delegated legislation, of a new set of rules of procedure governing pattern jury instructions.*

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It may be useful to provide some of the background to this article. During the preparation of the book, Canadian Criminal Jury Instructions, Professor Gerry Ferguson and I took advantage of the considerable amount of American text and periodical literature on the United States practice of instructing juries. American courts pursue a quite different method of instructing juries on the law than is the case in Canada. From my earlier studies on United States jury practice, I wrote a paper on the subject, Pattern Jury Instructions, a paper delivered to the Superior Court Judge's Seminar, Calgary, Alta., August, 1989, and published (1990), 48 The Advocate 209. Publication of the paper engendered a fair amount of judicial enthusiasm for the idea.

In October 1989, I approached the Canadian Department of Justice suggesting an inquiry be conducted in the United States to discover whether it was practical and legally possible to bring into Canada the American Pattern Jury Instruction methods. The Department graciously approved the idea in late June 1990.

*Dans cet article l'auteur soutient qu'on ne fait pas assez attention au Canada aux directives données au jury dans les procès criminels. Il en résulte souvent que les jurés comprennent mal les directives et que, en appel, on décide d'ordonner un nouveau procès à cause d'erreurs commises dans les directives, ajoutant par là à la congestion des tribunaux. L'auteur suggère que le Canada devrait adopter, avec les modifications nécessaires, ce qui se fait aux États-Unis, à savoir la technique d'un modèle de directives au jury et certains aspects de la procédure criminelle. Le mieux, pour ce faire, serait de supprimer du Code criminel les règles de procédure criminelle et de promulguer, au moyen d'une législation déléguée, un nouvel ensemble de règles de procédure qui établirait un modèle de directives à donner au jury.*

### *Introduction*

Little attention has been paid by Canadian criminal law commentators to the problems of instructing juries. The Criminal Code<sup>1</sup> is silent on the subject. Courts of Appeal are often called upon to consider instructions given at trial, but, since they must do it on a case by case basis, of necessity no organized comprehensive scheme emerges from the judgments. The problem is compounded by various aspects of trial procedure which are not conducive to the formulation of jury instructions or to their being understood by a jury. It is the thesis of this article that many of these defects could be eliminated if, with appropriate modifications, Canadian courts adopted the American system of jury instruction with its associated rules of procedure. In order to develop that thesis five topics are considered:

- I. Canadian Practice
- II. Criticism of the Canadian Practice
- III. American Practice
- IV. The Advantages of the American Practice
- V. Reform in Canada

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I then visited several United States courts where I observed first hand the American jury instruction process and discussed its inner workings with American judges and lawyers. I visited the following courts: (a) King County Superior Court, Seattle, Washington, 17 to 20 September 1990; (b) United States Federal Court, 9th Circuit, Northern California Division, San Francisco, California, 11 to 15 March 1991; (c) Federal Judicial Centre, U.S. Federal Court, and Washington D.C. Superior Court, Washington, D.C., 10 June 1991; (d) United States Federal Court, 5th Circuit, Illinois Cook County Superior Court, Chicago, Ill., 11 June 1991 to 123 June 1991.

I then published a booklet, *Criminal Law Reform—Helping the Jury Understand the Law. Pattern Instructions in Criminal Jury Trials* (1991). This article is based on the booklet.

<sup>1</sup> R.S.C. 1985, c. C-46.

## I. Canadian Practice

### A. Trial Procedure

#### 1. Pre-Hearing Conference

In accordance with the provisions of section 625.1 of the Criminal Code<sup>2</sup> a pre-trial conference must be held. The precise nature of the hearing and what is expected of counsel may vary from province to province since the Criminal Code gives each provincial superior court the power to make rules relating to the pre-trial conference.<sup>3</sup>

In British Columbia, for example, the process is governed by a Practice Direction.<sup>4</sup> The conference is often a superficial exercise. It can occur a few weeks, a few days, a few hours or indeed a few minutes before the trial actually begins. The judge (who may not be the judge at trial) and counsel meet, sometimes in open court, sometimes in the private chambers of the judge and sometimes in the presence of the accused. After making inquiries of counsel, the judge fills out a one page form highlighting such matters as whether there will be any motions under the Canadian Charter of Rights and Freedoms, any complex evidentiary issues, such as the admission of a statement by the accused, what is the expected length of the trial and matters of a similar nature. Counsel are not required to file any form of brief setting out the facts, the issues and the law, and seldom are counsel prepared to discuss what should be in the judge's charge.

Since the Criminal Code omits any reference to a penalty for not having a conference, the matter is often looked upon as just another meaningless procedure that produces little if any useful information. In particular it rarely, if ever, serves to assist in the preparation of a charge to the jury.

#### 2. Pre-Charge Hearing

After all of the evidence is presented to the jury, most trial judges hold a pre-charge hearing in the absence of the jury but in the presence of the accused. There are several reasons to conduct such a hearing. One is for the judge to get the assistance of counsel as to what they think should be the charge. The other is for the judge to inform counsel what the charge will probably contain so that counsel may frame their arguments accordingly.

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<sup>2</sup> *Ibid.*, s. 625.1:

(2) In any case to be tried with a jury, a judge of the court before which the accused is to be tried shall, prior to the trial, order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by a judge of that court, be held in accordance with the rules of court made under section 482 to consider such matters as will promote a fair and expeditious trial.

<sup>3</sup> Criminal Code, *ibid.*, s. 482(3)(c).

<sup>4</sup> See J.C. Bouck, G. Turiff and J. Dillon, *British Columbia Annual Practice*, 1991, pp. 454-455.

The pre-charge hearing does not often assist the judge in preparing the charge. Usually, counsel will just offer general comments concerning the charge, for example: "Your Lordship should charge on self-defence, provocation, *etc.*" On very rare occasions, counsel may advance a detailed suggestion in writing as to how the charge should actually read.

### 3. *Addresses by Counsel to the Jury*

Only after counsel finish addressing the jury is the judge in a position to formulate a charge which takes fully into account the position of prosecution and defence. In their addresses counsel may raise issues that until then had either not been referred to, or had been referred to only in passing during the course of the trial.

### 4. *Judges' Instruction to the Jury*

#### (1) *Time*

There is considerable pressure on a trial judge to begin instructing the jury as soon as possible after the submissions of counsel. Jurors want to finish the trial and get back to leading their normal life. Moreover, the longer the judge takes to prepare the charge the greater the chance the jury will have forgotten the evidence and the addresses of counsel. Where time is short the chance of error increases.

#### (2) *Method of Instruction*

A Canadian judge instructs the jury orally. Depending on the nature of the indictment and the length of the trial a charge can last from about thirty minutes to several days. Jurors may take notes of the charge but the words usually pass too quickly for anyone other than a shorthand reporter to record accurately.

Some commentators write about the necessity of the judge speaking to the jury in a colloquial way and maintaining eye contact. Although that practice is highly desirable, it is an almost impossible goal to achieve. Many parts of the law are far too complex for the trial judge to reduce into simple English. Because of this, a judge is often forced to read carefully the exact words used by Parliament and the higher courts. Lifting one's eyes from the prepared text may cause a slight error in the reading, and that could easily result in a new trial because of misdirection.

#### (3) *Content of the Charge*

Not only must the Canadian judge tell the jury the applicable law, he or she must also review the evidence with the jury. Although some authorities suggest this can be done by simply going through the evidence witness after witness, others say the judge should "relate" the evidence to

the issues.<sup>5</sup> Counsel sometimes elect to omit any reference to the evidence when addressing the jury. Instead, they will often say to the jury, "I am not going to review the evidence with you because the judge will be doing so".

Two difficulties arise from this practice. First, the judge is almost always reviewing the evidence from his or her longhand notes taken during the course of the trial. These can be inaccurate since the judge is not a trained court reporter. The notes may also be incomplete because, for example, the attention of the judge was distracted during the trial when a particularly important piece of evidence was given. Second, relating the evidence to the issues is often a time consuming and complicated task. For example, if there are twenty witnesses at a trial, witness #1 may testify about an issue as well as witnesses #13, #17 and #19. The same witnesses may also give evidence about a number of other matters. Extracting the relevant evidence on any one issue from these four witnesses and inserting it in the appropriate part of the charge requires time for study, organization and thought. Due to the nature of the process that kind of deliberative exercise is often impossible to perform.

The trial judge must relate the theory of the prosecution and defence to the jury.<sup>6</sup> Frequently, counsel do not articulate a particular theory. In those instances, all a judge can do is repeat to the jury, in summary form, the earlier submissions made by counsel. That practice seems unnecessarily repetitive and not particularly helpful to the jury.

Finally, if counsel fail to suggest a charge on an included or lesser offence, it is the duty of the judge to instruct the jury on that offence.<sup>7</sup> Similarly, the jury must be instructed on all available defences, even if they were not raised by either counsel.<sup>8</sup> Thus the room for error is arguably increased since the trial judge has not had the benefit of submission by counsel on issues on which the jury, as a matter of law, must be charged.

### 5. Post-Charge Submissions of Counsel

As a matter of practice, at the end of the instructions, it is usual for the trial judge to ask counsel if they have any comments with respect to

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<sup>5</sup> There are inconsistent messages sent by the higher courts to trial judges with respect to the necessity of reviewing the evidence with the jury: G.A. Ferguson and J.C. Bouck, *Canadian Criminal Jury Instructions* (1987, updated annually), Notes to Instruction No. 4.77.

<sup>6</sup> Ferguson and Bouck, *ibid.*, Notes to Instruction 9; *Colpitts v. The Queen*, [1965] S.C.R. 739, at p. 752: "It is trite law that it is the duty of the trial judge to outline to the jury the theory of the defence...."

<sup>7</sup> *R. v. Longson* (1976), 31 C.C.C. (2d) 421, at p. 425 (B.C.C.A.).

<sup>8</sup> *Squire v. The Queen*, [1977] 2 S.C.R. 13, at p. 19:

It is ... the duty of the trial judge to submit to the jury ... any defence available to the accused which had been revealed by the evidence whether or not counsel for the accused chose to advance that defence in his address to the jury....

the charge. Occasionally, either Crown counsel or defence counsel will suggest, in oral form, an alteration to the charge or ask that additional instructions be given. If the judge agrees, there is a short adjournment while the judge drafts the new remarks for delivery to the jury. Then, the jury is recalled and the judge reads the new material to the jury.

More often, after making their submission to the jury, counsel are exhausted. They are in no mood to pay particular attention to the instructions, nor can they be expected to write down everything a judge says to the jury in a two to three hour charge. Even if they could, there is insufficient time for them to go to the library and determine whether the charge as given by the judge was sound in law.

All that counsel can do at this stage of the trial is try to get the general drift of the comments made by the judge. Since they are free to argue any lack of detail in the charge if the case goes to appeal, there is no incentive to assist the trial judge for the purpose of ensuring the instructions are legally correct. Moreover, there is not a great incentive for counsel to follow closely the charge so that they can immediately raise objections to it. They may consider objections at their leisure in preparing an appeal. Failure to object to a charge at trial is no obstacle to objecting at the appellate level.<sup>9</sup>

## B. *Appeal*

### 1. *Right of Appeal*

A person convicted by a trial court in proceedings by indictment may appeal to a provincial court of appeal.<sup>10</sup> The Attorney General or counsel instructed by him for the purpose may appeal to the Court of Appeal against a judgment or verdict of acquittal of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone.<sup>11</sup>

### 2. *Submissions by Counsel*

Complaints about the contents of the charge may be argued on appeal, even though they were never advanced to the trial judge.<sup>12</sup> Often the accused will appoint new counsel to present the appeal. That tends to deflect any criticism coming from the Court of Appeal concerning the failure of trial counsel to mention any complaints about the charge at the time it was

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<sup>9</sup> *Cullen v. The King*, [1949] S.C.R. 658, at p. 664:

There is no rule of law nor, in my opinion, of practice that failure of counsel, either for an accused or for the Crown or in civil matters for a litigant, to object to a charge to the jury on the ground of misdirection, is of necessity a bar to the right of appeal.

<sup>10</sup> Criminal Code, *supra*, footnote 1, s. 675.

<sup>11</sup> *Ibid.*, s. 676.

<sup>12</sup> *Supra*, footnote 9.

given. Appeal counsel can answer such criticism by laying the blame on the trial lawyer.

### 3. *Disposition of the Appeal*

#### (1) *Jurisdiction*

The Court of Appeal may allow an appeal and order a new trial, or may dismiss the appeal.<sup>13</sup> An appeal may be dismissed even if there was an error in the charge to the jury, but the Court of Appeal decides that there was no miscarriage of justice. The clear tendency of the courts, however, is to order a new trial wherever there has been an error, rather than uphold the charge. This is evidenced both by the law as stated by the courts, and the actual results on the cases. Moreover it would seem the main reason for ordering a new trial is jury misdirection.

Section 686(1)(b)(iii) of the Criminal Code allows a court to dismiss an appeal if "it is of the opinion that no substantial wrong or miscarriage of justice has occurred". Appeal courts will find a miscarriage of justice occurred where there is alleged misdirection, "if it is impossible to say that the verdict would have necessarily been the same" had the proper instruction been given.<sup>14</sup> The rationale for this approach is said to be:<sup>15</sup>

The failure to correct such an impression by direction from the trial judge rendered the right to silence a snare of silence for the appellant. Without any direction to ignore these questions and answers, it is impossible to say that the verdict would necessarily have been the same.

Putting the test in positive rather than negative language, a new trial will be ordered on an allegation of misdirection if it is possible the verdict would have been different had the proper direction been given.

Where the grounds of the miscarriage are based upon the admission of inadmissible evidence the test is even more stringent: a new trial will be ordered if there is any possibility at all that a jury properly instructed and acting judicially, on admissible evidence, might conclude that the accused had not been proven guilty beyond a reasonable doubt.<sup>16</sup> Lambert J.A., who dissented in the British Columbia Court of Appeal, but whose judgment was approved in the Supreme Court of Canada, put the test in these words:<sup>17</sup>

So in deciding whether to apply s. 613(1)(b)(iii), the question is not whether we consider that the explanation offered by the defence is incredible, but whether there is any possibility at all that a jury, properly instructed and acting judicially,

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<sup>13</sup> Criminal Code, *supra*, footnote 1, s. 686.

<sup>14</sup> *R. v. Chambers*, [1990] 2 S.C.R. 1293, at p. 1319, (1990), 59 C.C.C. (3d) 321, at p. 343.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *R. v. Chambers* (1989), 47 C.C.C. (3d) 503, at p. 541 (B.C.C.A.).

on admissible evidence, might conclude that the accused had not been proven to have been guilty beyond a reasonable doubt.

Almost anything is possible. More things become so if "there is any possibility *at all*". Therefore, the test for ordering a new trial because the trial judge admitted inadmissible evidence is highly subjective and so lacks a solid foundation in legal principle. Any appeal court judge can conscientiously find that a jury might have found the accused not guilty had the jury only heard the admissible evidence.

The rigorous standard suggested by the language of the judgments is borne out by the actual results in the cases. Ferguson and Bouck<sup>18</sup> provide a statistical analysis of how the Ontario Court of Appeal and the Supreme Court of Canada dealt with appeals relating to the inadequacies of jury charges. For the period from 1981 to 1989, the Ontario Court of Appeal upheld twenty-four charges that were in error, since there was no substantial wrong or miscarriage of justice, and returned forty-nine cases for a new trial because of errors in the charge. In other words, twice as many appeals were allowed and new trials ordered because of faulty instructions, as compared to dismissals of appeals on findings of error in the charge since the error did not result in a substantial miscarriage of justice. A more recent sampling of courts of appeal decisions suggests that about 70% of new trial orders arise from jury misdirection, 13% from evidentiary problems, such as admitting inadmissible evidence, and 17% from procedural errors and the like.<sup>19</sup>

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<sup>18</sup> *Op. cit.*, footnote 5, Statistical Surveys, in Introductions to 2nd ed. and 1989, 1990 and 1991 Supplements. Their findings may be summarized as follows:

1. 1981 to 1989-Ontario Court of Appeal

Total number of cases	98
Charges upheld as satisfactory	21
Charges requiring a new trial	49
Charges-no substantial wrong	24

**Reversal rate requiring a new trial 50%**

2. 1974 to 1984-Supreme Court of Canada

Total Number of cases	53
Charges upheld as satisfactory	27%
Charges requiring a new trial	18%
Charges-no substantial wrong	8%

**Reversal rate requiring a new trial 34%**

It is admitted that this analysis only represents reported cases. Many appeal decisions upholding a judge's instructions or ordering a new trial because of imperfect instructions remain unreported. Sometimes appeals from faulty instructions are not taken for a variety of reasons. The accused may not have any money for an appeal, the sentence given by the trial judge was on the low side and a new trial resulting in a new conviction might result in a higher sentence, *etc.* It is impossible to say what percentage of the jury charges are correct and what ones are in error. Statistics are not available. The above figures are simply an indication.

<sup>19</sup> Ferguson and Bouck, *op. cit.*, footnote 5.



The Canadian test as to whether to order a new trial because of jury misdirection imposes a counsel of perfection on the trial judge. One of the effects of this approach by the courts is to underscore even more strongly the importance of the charge. If the system of charging is flawed the standard of perfection required by appellate courts simply serves to compound the problem.

## (2) *Format of Judgments*

Appeal courts do not usually see their role as providing any sort of precise guidance to the trial judges on the delivery of jury instructions. Nor do they believe it is necessarily their responsibility to express the law in language that an average juror might understand. Rather, they mostly act as academic commentators on the efforts of the trial judge. With some notable exceptions, appeal court judgments simply criticize the trial judge for his or her inadequacies in the presentation of the jury instructions and then order a new trial.<sup>20</sup> Seldom do Canadian appellate courts articulate, in explicit language that a jury might understand, what the judge should have said.<sup>21</sup>

<sup>20</sup> Examples of the many instances where the higher courts criticize trial judges for failing to instruct properly the jury while at the same time offering no express guidance as to how this should be done, can be found in the following cases:

1. *R. v. Dick* (1947), 87 C.C.C. 101, at p. 115 (Ont. C.A.):

In view of the evidence in this case, it was most important . . . to clearly define to the jury what "abetting" and "counselling" and "procuring" mean, as these terms are used in s. 69 [now s. 21] and to instruct the jury how s. 69 might be applied in this case.

2. *R. v. Mohamed*, [1989] B.C.D. Crim. Conv. 5535-01 (B.C.C.A.):

. . . Because the self-defence sections are complex, the jury requires more assistance in relating pieces of evidence to the legal ingredients of self-defence than would be needed in most other circumstances.

. . . it was essential that the law on the subject and the evidence relating to that law were clearly explained to the jury.

3. *Azoulay v. The Queen*, [1952] 2 S.C.R. 495, at p. 499:

It was, I think, the duty of the trial judge, in summing up this highly technical and conflicting evidence, to strip it of the non-essentials, and . . . to present to the jury the evidence in its proper relation to the matters requiring factual decision, and direct it also to the case put forward by the prosecution and the answer of the defence. . . .

An example of academic comment on the way a trial judge should direct a jury, without articulating how this should be done by the use of exact words, can be found in V.G. Rose, *Parties to an Offence* (1982), p. 45, where the author says a trial judge is supposed to:

. . . clearly define the terms used in that section [s. 21], and explain [to the jury] both how the provisions might bear on the facts in front of them and what findings they must make before they may apply those provisions. This explanation may, however, be in "simple language", if it accurately conveys to the jury the elements of liability under s. 21.

<sup>21</sup> Many of the judgments of Arthur Martin J.A., of the Ontario Court of Appeal, now retired, are a notable exception to this comment. When interpreting the law for the benefit of the litigants and other trial judges, his writing was always a model of analysis of the law. On any particular issue, sentences and phrases could often be taken from his decisions and read word for word to the jury.

As for any speech, there are two aspects to a jury instruction. One part is the organization of the material so that the various segments of a jury charge flow naturally and logically from one subject to the next. The other is the composition of the words in each segment or division. There is little mention of the organization of a jury charge in any Canadian appellate decision.<sup>22</sup> As to the second matter, courts of appeal rarely descend into the necessary detail of the words that a judge should use. They leave that up to the trial judges to try and articulate in future cases.

Where appellate courts approve of a jury direction, the actual words used by the trial judge are seldom mentioned. Thus, it becomes difficult, if not impossible, for another judge in a future trial dealing with the same issues to unearth the "approved" instruction. Succeeding trial judges must "reinvent the wheel".

### (3) *Assumptions Underlying Appellate Judgments*

When examining a jury instruction, Canadian courts of appeal rely on the two unproven assumptions previously mentioned: first, that the jury remembered everything the judge said in the oral charge and, second, having remembered it all, they understood every word that was spoken. Neither of those assumptions are proven. Moreover it is impossible to provide proof, one way or the other, for section 649 of the Criminal Code in effect prevents all communication with jurors once a trial is over.

## II. *Criticisms of the Present Practice*

The present Canadian practice is not conducive to the formulation of a charge that a jury can understand, remember and apply to the case at bar. That is so for a number of reasons.

First, the trial process does not require counsel to participate in any significant way in the preparation of the charge. The pre-hearing conference and the pre-charge hearing do not contribute to the process. Counsel are not required to object after a charge to alleged defects in it; they can hold their fire for an appeal. Effective submissions of counsel in their addresses to the jury are of course of assistance to the trial judge,

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<sup>22</sup> Organization of a jury charge is an important factor when it comes to jury comprehension: W.W. Steele and E.G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate* (1988-89), 67 North Carol. L. Rev. 77, at p. 85:

Strawn and Buchanan's second experiment compared pattern instructions that were organized to tell the jury what to do one step at a time. The rewritten instructions used a combination of sequential special-issue-like instructions and instructions about the process of deliberation. When the instructions were tested using a videotape of a real trial, the jury using the pattern instructions was unable to reach a verdict but the jury using the rewritten instructions reached a verdict in ninety-five minutes. This test, then, showed that not only the language but also the organization of jury instructions affects the quality of jury deliberations.

but there is often little time for a judge to assess them before the jury must be charged.

Second, appellate courts put a tremendous weight on the charge and yet give little guidance in preparing it. Appellate judgments focus on specific defects, but often do not provide much assistance in stating what the charge should be like and integrating those suggestions into the charge as a whole. It is left to trial judges to carry out the infinitely more difficult task of converting appellate court judgments into language a jury might understand.<sup>23</sup>

Third, one can question the ability of a jury to understand and apply a charge, particularly a long charge. The law is increasingly complicated, and the evidence may be complex. An oral charge would often not be absorbed at a single setting even by a panel of experts. In earlier times, a jury charge seldom lasted much longer than ten or thirty minutes. Now it may often take hours or, in some cases, even days. Empirical evidence from American studies indicates that even when an oral charge lasts just twenty minutes, experienced jurors who are tested on comprehension of the charge achieve a 46% understanding of a civil charge and a 53% understanding of a criminal charge.<sup>24</sup>

Fourth, given the lack of guidance by counsel or the appellate courts trial, judges must do the best they can. It is true that a relatively small number of Canadian trial judges experience little difficulty in charging a criminal jury. But they are usually individuals who devoted all, or almost

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<sup>23</sup> Ferguson and Bouck, *op. cit.*, footnote 5, was written in an effort to change this unsatisfactory practice. It contains suggested forms of charges on all the major offences in the Criminal Code, the statutory and common law defences, procedural and evidentiary instructions. It is brought up to date on an annual basis in accordance with relevant case law.

There were three main purposes in writing the book. The first was to give some help to trial judges in their preparation of jury instructions. The second was to reveal to the practising bar what a jury instruction is likely to contain so that counsel would be better able to suggest appropriate amendments to the instructions. The third was to give courts of appeal an opportunity to see suggested forms of charges with authoritative notes so that they could either approve of the forms in a general way or suggest improvements to them by way of specific wording. In that way jury instruction law would likely develop along more rational lines.

Although we attempted to use layperson's language, as a matter of policy, we decided we should not stray too far from the words of the higher courts, even if they were difficult to comprehend.

The first two objectives succeeded in varying degrees. Unfortunately, courts of appeal mostly ignore the publication. They seldom take advantage of the opening given to them by either agreeing with the suggested form on a specific topic or suggesting how the form should be modified to meet the relevant law. They tend to continue the old practice of criticizing the efforts of the trial judge without making specific suggestions as to what ought to be the precise form of the instruction.

<sup>24</sup> W.W. Schwarzer, *Communicating with Juries: Problems and Remedies* (1981), 69 Cal. L. Rev. 731, at p. 741.

all, of their entire legal practice to criminal law. Consequently they often have an encyclopaedic knowledge of the criminal law. Most judges, with the help of their colleagues, work to provide charges that juries can follow and that appellate courts will not upset. It is however a difficult task.

Fifth, as was noted earlier, the defects of the practice lead too often to orders for a new trial. This contributes to the clogging of the courts and is the cause of too long delays in final verdicts being reached.

A feature worth noting is the effect of the crush of litigation on orders for new trials. Decades ago, it was possible to commence a new trial after one appeal within about two years of the commission of the original crime. Now, the time span is much longer. In British Columbia the usual course of events runs something as follows. Other provinces may complete the proceedings more quickly and some may take longer.

Assuming an accused is arrested at the time of the offence, the time to a preliminary hearing on any case of consequence is about six months. Then, it is at least another six months before the actual trial is held before a jury. If there is an appeal, the case may take from one to three years before the appeal courts hands down its ruling. Should the litigation stop at that point, a new trial will usually commence about another six months after the appeal court's decision.

In other words, there can be a period of between two and a half to four and a half years from the time of the original offence until a second trial is conducted. Even then, the second trial can go through the same process and a third new trial can be ordered some additional one and a half to three and a half years after the second trial. Altogether there can be a time lapse of approximately two and a half to four and a half years for the first new trial and five to eight years for the second new trial after the occurrence of the alleged offence.

If the case proceeds to the Supreme Court of Canada, one can add on another two to three years. Thus, a serious crime committed on 1 January 1991 will come on for a jury trial in British Columbia around 1 January 1992. If a new trial is ordered later by the Court of Appeal it will be heard sometime between 20 June 1993 and 30 June 1995. If a new trial is ordered by the Supreme Court of Canada, on average, the second trial will probably occur sometimes between 30 June 1995 and 30 June 1998. Altogether a time lapse of some four and a half to seven and a half years for the first new trial to occur after the occurrence of the alleged offence.

### III. *American Practice*

For the purposes of this article, the significant aspect of the American practice is, of course, the widespread use of standard jury instructions. In order however to understand fully the value of standard instructions they must

also be considered in the context of American trial practice. Thus, standard instructions and trial practice both require consideration.

### A. *Standard Instructions*

#### 1. *History*

There are fifty different states, each with its own criminal law and procedure, including the method of instructing juries. In addition, there are thirteen United States Federal Court Circuits, each with its own methods of instructing juries. While it would be imprecise to say "this is the way they do it in the United States", there is a common theme running through their respective statutes and rules.

The modern history of the development of standard instructions can be taken to have started in California in 1938.<sup>25</sup> Judge William Palmer of the Los Angeles Superior Court published a book on uniform civil jury instructions—*Book of Approved Jury Instructions (BAJI)*. A second book on criminal jury instructions—*California Jury Instructions -Criminal (CAL-JIC)* was published in 1946.

In the beginning, many members of the California Bench and Bar treated the idea of pattern jury instructions with scepticism. A good number of California lawyers and judges thought the program impractical. They considered standardization of jury instructions impossible. But BAJI received immediate and enthusiastic approval within a year of its publication. In 1940, Judge Palmer reported that it was so firmly established in the practice of the court and in the eyes of both judges and lawyers that no one would induce the court to abandon it.<sup>26</sup>

Illinois was the next major state to adopt the technique. The Illinois Judicial Conference prepared a survey of Jury Instructions as a ground for reversal on appeal in Illinois. It showed that 38% of the reversals from 1930 to 1955 were caused in whole or in part by erroneous instructions.<sup>27</sup>

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<sup>25</sup> For some discussion and criticism of the earlier practice, see: R.J. Farley, *Instructions to Juries—Their Role in the Judicial Process* (1932-33), 42 Yale L.J. 194; M.A. Soper, *The Charge to the Jury* (1941), 1 F.R.D. 540.

<sup>26</sup> R.G. Neiland, *Pattern Jury Instructions—A Critical Look at a Modern Movement to Improve the Jury System*, A Research Project of the American Judicature Society, Chicago (1979), p. 7.

<sup>27</sup> Don Musser, *Instructing the Jury—Pattern Instructions* (1967), 6 Am. Jur. Trials 923, at pp. 929-930:

With increasing demands made upon their time, trial lawyers have become keenly aware of the duplication of labor and the waste of time in the traditional preparation of jury instructions. Faced with the problem of preparing instructions, counsel invariably found a chaotic mass of material, often fraught with repetition, argument, and incomplete statements of the law. The average lawyer had to start virtually from scratch. Two sets of instructions then confronted the trial judge; many of them overlapped. Jurors were often kept waiting in idleness for many hours while the court and counsel labored over instructions. The need for an accepted system of standardized jury instructions, that will eliminate much of the duplicated effort, is clear.

This is in contrast to a 7.1% reversal in the California appeal courts following the adoption of BAJI.<sup>28</sup> Like California, lawyers and judges in Illinois praised the adoption of pattern jury instructions.<sup>29</sup>

By 31 December, 1978, pattern jury instructions for civil cases were in use in thirty-eight United States jurisdictions. Drafting projects were underway or planned in four others. Criminal jury instructions were also available in thirty-eight jurisdictions with projects planned in seven others. By 1980 at least one set of instructions was supposed to be available in forty-three states, the District of Columbia and the Federal courts.<sup>30</sup> They are the product of local court and bar committees and tend to contain the minimum amount of information a judge may use when instructing a jury.<sup>31</sup>

In 1957 a book on United States Federal Court Jury Instructions appeared. By 1977 its co-authors were Hon. Edward J. Devitt, Chief Judge,

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A perusal of appellate court opinions in most states will reveal another need for improvement in the way juries are instructed; there are too many reversals on the grounds of erroneous jury instructions. The Illinois Judicial Conference prepared a survey of jury instructions as a ground for reversal on appeal in Illinois. This survey showed that 38 percent of the reversals from 1930 to 1955 were caused in whole or in part by erroneous instructions. It has been estimated that the reversals caused by erroneous instructions cost the taxpayers of Illinois from five to ten million dollars a year. The expense items included judges' pay, jurors' pay, use of courtroom facilities, lawyers' time, litigants' time, and other related expenses.

<sup>28</sup> P.H. Corboy, *Illinois System of Instructing Jurors in Civil Cases (1958-59)*, 8 De Paul L.R. 141, at p. 148.

<sup>29</sup> Musser, *loc. cit.*, footnote 27, at pp. 931-932:

Comments of the Illinois trial judges are testimonials to the effectiveness of pattern instructions in actual trial practice. After experience in the use of IPI, the trial judges were asked for their comments. Over fifty replies were received. Without exception, they praised the new method of instructing juries. Typical comments pointed out that lawyers no longer complained about instructions favoring one side or the other. Fewer objections were being made, and the number of requested instructions had been greatly reduced. Many hours had been saved by court and counsel in preparing instructions, and the instruction conference during trial had been reduced from hours to minutes. . . .

Pattern instructions have found solid support in courts of review. Appellate court justices have noted that pattern instruction publications minimize the instruction research required of the reviewing courts and narrow the possibility of reversible error.

<sup>30</sup> Neiland, *op. cit.*, footnote 26, p. 11.

<sup>31</sup> California Jury Instructions Civil (BAJI) (6th ed., 1977). Judge John A. Loomis, Chairman of the BAJI Committee, states in the preface to this edition:

The basic philosophy of pattern jury instructions is that the judge should limit his responsibility to communicating the applicable law and leave advocacy to counsel who alone may argue the application of the law to the facts in evidence.

United States District Court for the District of Minnesota, and Charles B. Blackmar, Professor of Law, St. Louis University.<sup>32</sup> The authors set out the need for better quality jury instructions because of the complaints of jurors that they did not understand the judge's instructions.

The authors suggest that counsel prepare and submit written requests for instructions in every case.<sup>33</sup> They should be "clear, concise, definite, direct and accurate. . . . Negatively, good instructions should not be verbose, ambiguous, vague, contradictory, abstract nor repetitious. They should never be didactic, oratorical nor argumentative; but on the other hand, they should be direct, expository and fair and neutral as between the parties".<sup>34</sup>

Pattern forms of charges reduce, condense and simplify the relevant law. Thus, American instructions to the jury are more succinct, less lengthy and far less academic than those in Canada. That tends to keep their delivery time within the attention span of the average juror.<sup>35</sup>

## 2. Illustrations

The nature of United States standard instructions may best be illustrated by looking at two examples, one an instruction on self defence, the other on that most difficult of topics, voluntary intoxication and specific intent.

The following instruction on self defence is taken from forms designed for the United States Federal Court, 9th Circuit:<sup>36</sup>

<sup>32</sup> E.J. Devitt and C.B. Blackmar, *Federal Jury Practice and Instructions* (3d ed., 1977).

<sup>33</sup> *Ibid.*, vol. 1, p. 242.

<sup>34</sup> *Ibid.*, p. 245, citing S. Thomas, *Improvement in Charges to Juries* (1941), 1 F.R.D. 141, at pp. 141-142.

<sup>35</sup> Neiland, *op. cit.*, footnote 26, p. 53:

The indisputable fact, however, is that the vast majority of the states have already made a commitment to the preparation and widespread use of pattern instructions. Such a commitment is not unwise. Pattern jury instructions can be an effective tool in jury trials. When drafted and used properly, they may help jurors to a fair and just verdict. They tend to promote impartiality, accuracy, and uniformity in instruction practices. At the trial level, they may be able to save time for court and counsel in the preparation of instructions. Preliminary evidence however, indicates they do not affect the workload of appellate court judges to any great extent.

<sup>36</sup> *Manual of Model Criminal Jury Instructions for the Ninth Circuit* (1989). This form book runs to 293 pages. Other jurisdictions refer to similar books as "Pattern Jury Instructions". For example, see the *United States Fifth Circuit Pattern Jury Instructions, Criminal Cases* (1990) (207 pages).

Discussions with United States federal judges indicate that model charges are designed more for use as a beginning step in the preparation of a charge. Pattern Instructions are apparently meant to be more definitive of the law and so more "appeal proof" than Model Instructions. An examination of the Model Charge forms as compared to the Pattern Charge forms fails to reveal any obvious difference between the two.

### 6.05 SELF-DEFENSE

The defendant has offered evidence of having acted in self-defense. Use of force is justified when a person reasonably believes that it is necessary for the defense of oneself or another against the immediate use of unlawful force. However, a person must use no more force than appears reasonably necessary in the circumstances.

Force likely to cause death or great bodily harm is justified in self-defense only if a person reasonably believes that such force is necessary to prevent death or great bodily harm.

The instructions in Ferguson and Bouck<sup>37</sup> on self defence, following Canadian law, occupy about forty-one pages of suggested directions. They are intended to be an exhaustive reproduction of Canadian case law on the subject, reduced into a form that can be understood by a jury. Except for unique situations, the United States Ninth Circuit Pattern Form 6.05 covers the essential principles of self defence, but does so in less than one half a page.

In California the issue of drunkenness and specific intent is set out in Pattern Form #4.21:<sup>38</sup>

#### **VOLUNTARY INTOXICATION—WHEN RELEVANT TO SPECIFIC INTENT**

(1989 Revision)

In the crime of \_\_\_\_\_ of which the defendant is accused [in count[s] \_\_\_\_\_ of the information], a necessary element is the existence in the mind of the necessary [specific intent to \_\_\_\_\_] [mental state[s] of \_\_\_\_\_].

If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in determining whether defendant had such [specific intent] [mental state].

If from all the evidence you have a reasonable doubt whether the defendant formed such [specific intent] [mental state[s]], you must find that [he] [she] did not have such [specific intent] [mental state[s]].

The Instruction in Ferguson and Bouck<sup>39</sup> on drunkenness or intoxication occupies about ten and a half pages of suggested instructions.

Each of the above American pattern forms on self defence and drunkenness recites the basic criminal law principles applicable to that area of the law. Canadian law adds layers of academic complexity on top of these common law rules. It exemplifies the technicality of Canadian criminal law and how difficult it must be for the average juror to understand.

The primary idea behind the pattern jury instruction system is that where, for instance, there is an issue of self defence, it is sufficient if the

<sup>37</sup> *Op. cit.*, footnote 5, instructions #8.56, 8.60 and 8.64.

<sup>38</sup> California Jury Instructions Criminal (5th ed., 1988), Vol. 1, p. 159.

<sup>39</sup> *Op. cit.*, footnote 5, instruction #8.36.



judge gives the jury the contents of the pattern form charge. Should either counsel contend the pattern form is inadequate because of the nature of the evidence, then it is up to objecting counsel to draft an amended instruction in written form and present it to the trial judge. If counsel fails to do so, there can be no later complaint on appeal about the adequacy of the pattern form instruction.

On the other hand, if the trial judge rejects any suggested changes to the pattern form, and a court of appeal later finds the trial judge erred in this respect, the appeal will succeed and a new trial will be ordered.

Inherent in the process of many states and the Federal court system, is the right of the trial judge to ignore the pattern form charges or the charges submitted by counsel and deliver to the jury what the judge believes is the appropriate instruction on the law in the circumstances of the case. However, since pattern forms have the implicit stamp of approval from court appointed committees, it is usually easier and safer to rely on them rather than on a "home made" instruction.

## B. Practice

The use of pattern jury instructions needs to be understood in the context of the trial process. The following description of some of the relevant practice is derived primarily from the federal court system.

### 1. Pre-Trial Conference

American pre-trial conferences are usually governed by Rules of Procedure made pursuant to a statute like the Canadian Criminal Code. In that sense, the rules are delegated legislation. In most states and the federal system, the rules allow individual state county superior courts, and individual federal circuit trial courts, to enact Local Rules that are not inconsistent with the governing rules for the state or federal courts, as the case may be.<sup>40</sup>

Under the federal system, the Federal Rules of Criminal Procedure provide for the holding of pre-trial conferences. On the motion of the court or on the motion of any party, a pre-trial conference may be convened at any time after the filing of the indictment or information.<sup>41</sup> Local Rules of the various circuits detail the nature of the hearing and what is expected of counsel for both parties. One of these agenda items is the requirement that both the prosecution and the defence produce a set of proposed jury

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<sup>40</sup> Two examples of the authority given to a majority of the judges of a state county superior court and a federal circuit court to enact local rules are as follows: Washington State: Washington Court Rules, 1991 (1990), Rule 83; U.S. Federal District Trial Courts: Federal Rules of Criminal Procedure, December 1, 1990; Rule 57.

<sup>41</sup> Federal Rules of Criminal Procedure, *ibid.*, Rule 17.1.

instructions.<sup>42</sup> One or more pre-trial conferences may occur during the period before the trial. They are not usually restricted to the eve of the trial.

## 2. *Counsel's Address to the Jury*

As in Canada, United States statutes or rules govern the order in which counsel may address the jury.<sup>43</sup> In some states and in some Federal courts, the judge delivers the charge first and counsel then place their submissions before the jury.

## 3. *Pre-Charge Hearing*

Before the trial begins, American trial counsel may be required to deposit with the trial judge the form of the charge they say the judge should deliver. Once the evidence is completed, it is then just a matter of determining what original forms are appropriate, what additional forms are necessary and what forms need amendment because of the evidence heard by the jury since the commencement of the trial.<sup>44</sup>

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<sup>42</sup> For example, The Local Rules of the United States District Court for the Northern District of California, effective 1 August 1977, revised 1 May 1983, 1 November 1988, provide for pre-trial conferences in Rule 325. In summary form they read:

- (a) Production of Grand Jury testimony of witnesses to be called at the trial.
- (b) Production of exculpatory evidence or other evidence favourable to the accused.
- (c) Agreement as to facts that need not be proved at the trial.
- (d) Severance of the trial or any accused.
- (e) Issues arising with respect to informers and identification evidence.
- (f) Pretrial exchange of list of witnesses expected to be called.
- (g) Pretrial exchange of exhibits, documents, *etc.*
- (h) Preparation of trial briefs on issues of law likely to arise at trial.
- (i) Scheduling of trial and of witnesses.
- (j) Settlement of jury instructions, *voir dire* questions, and challenges to the jury.

<sup>43</sup> Federal Rules of Criminal Procedure, *supra*, footnote 41, Rule 29.1:

29.1 After the closing of the evidence the prosecution shall open the argument. The defense shall be permitted to reply. The prosecution shall then be permitted to reply in rebuttal.

<sup>44</sup> By way of example, here are the relevant words of Rule 30, Federal Rules of Criminal Procedure, *ibid.*:

30. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed actions upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request any party, out of the presence of the jury.

At this stage a pre-charge hearing takes place. It is usually held in the judge's private chambers. After considering the submissions, the judge then decides how the charge should read. Appropriate amendments are made by the judge with the aid of word processing and photocopy machines. A copy of the finished charge is then given to counsel before they begin their submissions to the jury.

If counsel object to the form of the charge they must make a proper request for a correction to be made. The request should set forth the exact language of the proposed instruction. Although trial judges sometimes grant an oral request for instructions, the rules generally call for the request to be in writing.<sup>45</sup> The request must be made before any argument is made to the jury or it will not be considered. An oral or written request made

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To a similar effect, following is an excerpt from Washington State, Superior Court Rules, Washington State Court Rules, 1991, including Amendments Received through September 1, 1990 (1990), Rule 6.15, p. 596:

**Rule 6.15 Instructions and Argument**

(a) **Proposed Instructions.** Proposed jury instructions shall be served and filed when a case is called for trial by serving one copy upon counsel for each party, by filing one copy with the clerk, and by delivering the original and one additional copy for each party to the trial judge. Additional instructions, which could not be reasonably anticipated, shall be served and filed at any time before the court has instructed the jury.

Not less than 10 days before the date of trial, the court may order counsel to serve and file proposed instructions not less than 3 days before the trial date.

Each proposed instruction shall be on a separate sheet of paper. The original shall not be numbered nor include citations of authority.

Any superior court may adopt special rules permitting certain instructions to be requested by number from any published book of instructions.

(b) [Reserved]

(c) **Objections to Instructions.** Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and refusal to give a requested instruction or submission of a verdict or special finding form. The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused. The court shall provide counsel for each party with a copy of the instructions in their final form.

(d) **Instructing the Jury and Argument of Counsel.** The court shall read the instructions to the jury. The prosecution may then address the jury after which defense may address the jury followed by the prosecution's rebuttal.

(e) **Deliberation.** After argument, the jury shall retire to consider the verdict. The jury shall take with it the instructions given, all exhibits received in evidence and a verdict form or forms.

<sup>45</sup> L.B. Orfield's *Criminal Procedure From Arrest to Appeal* (2nd ed., 1985), Vol. 5, p. 46.

after the conclusion of the charge is too late.<sup>46</sup> Where the trial judge denies a request for instructions, he or she need not state a reason.<sup>47</sup>

Many American jurisdictions allow or require the defendant to object to the form of the charge after it is delivered to the jury. But the objection must be based on the failure of the judge to give a written instruction as requested by counsel. General complaints, such as are sometimes made by Canadian counsel, are insufficient to preserve the error for appeal purposes. The objection must be specific.<sup>48</sup>

Failure of counsel to object to the charge in Federal court precludes review in a Federal Court of Appeal.<sup>49</sup> The same rule exists in the state court systems.<sup>50</sup>

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<sup>46</sup> *Ibid.*, pp. 47-49.

<sup>47</sup> *Ibid.*, p. 56.

<sup>48</sup> Some idea of what is required from defence counsel can be found in the article by J.J. Murphy, Jr., *Errors in the Charge, Litigation* (1987-88), 14:3 *Litigation* 39:

So, how do you do it? You must write down everything the judge says, putting a check mark alongside those portions you consider objectionable. You must take crisp, legible notes on the entire charge while simultaneously composing the well reasoned speech you will give pointing out the errors to the trial judge and also making a solid record for the court of appeal.

While the article is written for civil jury trials, much of the same kind of work is expected of defence counsel in a criminal trial.

<sup>49</sup> *Farrar v. Cain*, 756 F. 2d 1148 (5th Circ., 1985), as stated by Murphy, *ibid.* The author goes on to comment that even a misleading instruction is not grounds for reversal if counsel do not object. Also, an objection that is too general or fails to state the grounds on which it is made will not protect the party's rights. The reason for this is Federal Rule of Evidence #61 which provides in part (Murphy, *ibid.*, at p. 41):

The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

In other words, "harmless error" will be overlooked by a Court of Appeal. Because of this, most Federal Appeal Courts leave the decision at trial undisturbed. The error stands, "unless it is apparent on the face of the record that a miscarriage of justice may occur"; *Herndon v. Seven Bar Flying Services, Inc.*, 716 F. 2d 1322, at p. 1330 (10th Cir., 1983), cited by Murphy, *ibid.*, at p. 41.

At p. 42, Murphy points out that counsel will fail on appeal if they state their objections to the charge partially, generally, or imprecisely.

<sup>50</sup> See C.E. Torcia, *Wharton's Criminal Procedure* (12th ed., 1976), Vol. 4, para. 539:

An error by the trial judge in giving or refusing an instruction may be urged on appeal only if an appropriate objection was made in the trial court; the main purpose of the requirement being to accord the trial judge a fair opportunity to correct an error in his proposed charge. . . . On the other hand, if the error was "plain", the court may take cognizance of it even though no objection had been interposed.

A California civil decision put the rationale behind the rule in these words: *Sommer v. Martin* 204 P. 33, at p. 36 (Cal. Dist. C.A., 1921), citing *Hayne*, *New Trial and Appeal*, vol. 1, 103:

#### 4. Judges' Instructions to the Jury

##### (1) Method of Instruction

Once the form of the charge is settled by the judge after the pre-charge hearing, the instructions are reduced into typewritten or printed form. A copy of that instruction is then given to both counsel.

Depending upon the court, and the practice of the particular judge, the charge may be read to the jury before counsel make their submissions or after; or, most of it may be read to the jury before the addresses of counsel and part of it after.<sup>51</sup>

Again, depending upon the jurisdiction and the practice of the judge, each juror may be given a copy of the charge as it is read by the judge or, get one copy of the charge after the jury retires to deliberate or, get no copy at all.<sup>52</sup>

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Besides, it is due to the judge, in furtherance of justice, that his attention should be called to the legal principle which is claimed to be violated by the admission or rejection of the evidence. In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.

<sup>51</sup> W.H. Schwarzer, *Reforming Jury Trials* (1991), 132 F.R.D. 573, at p. 585:

Although traditionally judges have given instructions after the closing arguments, many have now concluded that it makes more sense to give most of them at the close of the evidence before the arguments. Lawyers commonly give jurors a preview of the instructions on their closing arguments; this will be unnecessary if the instructions are given first. Moreover, the closing arguments will be more meaningful to jurors if they have first been given the law which they may apply to the facts. The Federal Rules have been amended to permit this practice. The judge would be well-advised, however, briefly to instruct the jury after the lawyers' closing arguments on the rules governing their deliberations and their duty to follow the law as stated in the instructions.

In the initial instance, the charge is always given orally, even though jurors also may receive a copy. When read, it is not necessarily recorded by the court reporter because the written form of the charge is the form that is examined for purposes of appeal: see Orfield, *op. cit.*, footnote 45, p. 29.

<sup>52</sup> Steele and Thornburg, *loc. cit.*, footnote 22, at p. 101. The authors append this footnote on the issue of the desirability of giving written instructions to jurors in state courts:

131. Other practices unrelated to the way in which instructions are written can affect the jury's ability to understand its job and follow instructions. For example, studies have demonstrated that jurors who receive written copies of their instructions pay more attention to the instructions and reach more accurate results, yet only 16 jurisdictions currently allow the jury to take copies of the instructions to the jury room. [R.F.] Forston, ... [Sense and Non-Sense: Jury Trial Communication, [1975] Brigham Young L. Rev. 601, at p. 619].

Since the judge is not required to review the evidence with the jury, the charge can usually be given from pattern form instructions in about twenty to thirty minutes. Very rarely will it take more than an hour.

## (2) *Content of the Charge*

There are certain types of instructions a judge must give even though they are not requested by counsel. These include the general principles of law and the essential questions of law involved in the case. The list is not clearly articulated but seems to include such things as: presumption of innocence, reasonable doubt, right to acquittal or conviction in each count.<sup>53</sup> State court instructions of the same nature seem to be more extensive.<sup>54</sup>

As in Canada, many United States jurisdictions also require the trial judge to charge a jury on included offences, even though they are not mentioned by counsel to the trial judge or in their addresses to the jury. One difference seems to be that American law allows the judge to examine the evidence in order to see if it supports a conviction for an included offence.<sup>55</sup> Canadian law tends to restrict the search for an included offence to the legislation defining the crime and the form of the indictment.<sup>56</sup>

There is no requirement in American law that the judge instruct the jury on the theory of the prosecution or the defence. Nor must the judge instruct the jury on any defence not advanced by counsel for the defence. Failure of counsel to provide the judge with a typewritten copy of an instruction precludes any later complaint on appeal that the instruction ought to have been left with the jury.

State court judges do not review the evidence or comment upon it. Although federal law permits a federal trial judge to comment on the evidence, discussions with federal trial judges indicate this rarely happens in the Federal Court system.

## C. *Appeal*

### 1. *Right of Appeal*

As in England, only the defendant has a right of appeal to a court of appeal in the United States. There is no right of appeal by the prosecution in the event of an acquittal.

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<sup>53</sup> Orfield, *op. cit.*, footnote 45, pp. 18-22.

<sup>54</sup> See CALJIC, Appendix A (1979 Revision), pp. 301-321, for a discussion of instructions a California trial judge must give even though not requested by counsel. Certain matters must be told the jury by the judge as laid down by statute, laws of criminal procedure and case law.

<sup>55</sup> CALJIC (5th ed., 1988), Appendix C, Vol. 2, p. 515:

The instructing of the jury on lesser included and lesser related offenses had become a major concern for the trial judge because of the requirements of *sua sponte* instructions developed by the case law.

<sup>56</sup> *R. v. Manuel* (1960), 128 C.C.C. 383, at p. 385 (B.C.C.A.).

## 2. Disposition of the Appeal

Failure to object properly to an instruction constitutes a waiver of any complaint and so cannot be raised as an alleged error in the Court of Appeal.<sup>57</sup> The goal of the rule requiring timely and proper objection is to allow the court to correct any errors in the instructions before they are given.<sup>58</sup> On appeal, even though no objection to the instructions is made at the trial, if the alleged error is basic and highly prejudicial, the appeal court may give effect to the plain error rule and review the error on its own motion.<sup>59</sup> Whether or not plain error exists depends upon the facts and circumstances of each case.<sup>60</sup>

Generally speaking, courts of appeal seldom exercise their inherent power to review fundamental errors that are not preserved by timely and adequate objections.<sup>61</sup> Where there is no request from the defendant for a particular instruction, there is no ground for reversal for failure to give such an instruction.<sup>62</sup>

## IV. Advantages of the American Practice

In this part of the article, I will attempt to articulate the advantages of the American systems of instructing juries over that which presently exists in Canada.

### A. Pattern Instructions

First and foremost there is the advantage of the use of pattern jury instructions. These provide a clear and simple base for instructing the jury, whether they are capable of being applied without modification to the case at bar, or whether they need some modifications to suit its particular circumstances.<sup>63</sup>

The impression should not be left that the system is not without its difficulties. Some of these however have little to do with the merits of pattern instructions.<sup>64</sup> Some in the United States' legal community are not aware enough of the problems created by poor jury instructions; and so do not see the need for reform. There is the traditional resistance to change. Writing, and rewriting, pattern instructions is difficult, and some, for a number of

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<sup>57</sup> *Supra*, the text at footnotes 49 and 50.

<sup>58</sup> Orfield, *op. cit.*, footnote 44, p. 65.

<sup>59</sup> *Ibid.*, p. 74.

<sup>60</sup> *Ibid.*, p. 79.

<sup>61</sup> R. Martin, *Settling the Jury Charge: Comments on Rule 51 and the Dunn Case* (1968), 44 F.R.D. 293, at p. 296.

<sup>62</sup> Orfield, *op. cit.*, footnote 45, p. 15.

<sup>63</sup> *Supra*, p. 19 *et seq.*

<sup>64</sup> For the following text, see Steele and Thornburg, *loc. cit.*, footnote 22, at pp. 78-79.

reasons, are not prepared to undertake that task. The nature of the adversary system can also be an inhibiting factor; lawyers tend to be more concerned with the interests of their clients than with the overall clarity of jury instructions. Finally the attitude of the higher courts can also be discouraging. As in Canada, they tend to scrutinize instructions for points of legal accuracy while ignoring overall comprehensibility.<sup>65</sup>

There are more substantive concerns about pattern jury instructions. Neiland<sup>66</sup> discusses and responds to some of these criticisms. His remarks may be summarized as follows:

(1) They are too abstract: because a standard instruction is drafted from a specific set of facts, but is designed for use in all cases involving the particular point of law covered, the standard instruction is little more than a definition. In reply, Neiland says the problem is not so much with the abstractness of pattern instructions themselves, but with the failure or inability to use them properly.

(2) They discourage flexibility: because they are regarded as error proof, particularly when prepared by a committee of the state Supreme Court, trial judges are rarely willing to allow even minor modifications. In reply, Neiland says the tendency to freeze language is only partially a failure of drafting committees to use creative means of achieving the dual goals of accuracy and understandability. This results from the cautiousness of most trial judges and the general resistance to changes in "approved" language found in most appellate courts.

(3) They are argumentative: in the civil law complaints are made that pattern jury instructions are slanted towards the other side. Neiland discounts this objection since it seems to come from the laudable policy of drafting committees to eliminate instructions telling juries what not to do instead of telling them what to do.

(4) They should not be mandatory: there is no particular consensus in the United States on the subject. States vary from mandatory to recommended to voluntary. Some states backed away from mandatory use in order to evaluate the idea over a period of time. Mandatory use tends to lead to the avoidance of the responsibility of both counsel and the court

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<sup>65</sup> Steele and Thornburg, *ibid.*, at p. 79, note 9, cite on this point J. Frank, *Law and the Modern Mind* (1930), p. 181:

What a crop of subsidiary semi-myths and mythical practices the jury system yields! Time and money and lives are consumed in debating the precise words which the judge may address the jury, although everyone who stops to see and think knows that those words might as well be spoken in a foreign language—that, indeed, for all the jury's understanding of them, they are spoken in a foreign language. Yet, every day, cases which have taken weeks to try are reversed by upper courts because a phrase or sentence, meaningless to the jury, has been included in, or omitted from the judge's charge.

<sup>66</sup> *Op. cit.*, footnote 26, pp. 39 *et seq.*



to be alert to the possible need to modify and supplement the pattern instruction. Neiland suggests that pattern instructions should be used when applicable. This promotes their widespread use in an effort to achieve uniformity, accuracy and impartiality.

There is however one valid criticism of the current form of some pattern jury instructions. Steele and Thornburg<sup>67</sup> found that even when juries conscientiously tried to follow their instructions most of these instructions could not be understood by most jurors. Apparently, the draft in prepared form met the test of legal analysis but remained incomprehensible to the average juror. However, given appropriate time and thought, existing pattern forms can be amended to meet both the test of legal correctness and the test of jury comprehension.

Nonetheless, whatever the room for improvement, the benefit derived from patent jury instructions is clear. In a foreword to the third edition of *California Jury Instructions-Criminal*<sup>68</sup> Chief Justice Traynor commented:

California Jury Instructions-Criminal ... for many years have filled a vital need in criminal jury trials. Moreover, their use has reduced the causes for appeal and thus lessened the load of the Supreme Court and Courts of Appeal. Most importantly, they have decreased the number of new trials necessitated by reversals due to erroneous jury instructions.

In innumerable appellate decisions CALJIC instructions have been reviewed and judicially approved.

## B. *The Trial Process*

The American conduct of a trial has also a number of features which make it more attractive than its Canadian counterpart.

### 1. *The Pre-Trial Conference*

The main advantage of the American pre-trial conference procedure is that counsel know well before the trial begins they will be called upon to prepare a set of instructions for the trial judge. As a result, they are immediately involved in the charging process and thus have a vital stake in the contents of the jury instructions. If they fail to present a particular instruction, the omission of that instruction by the judge is not a ground they can rely upon if the case goes to appeal.

Second, the prosecution and the defence get a pre-trial picture of the position being taken by the other side. This helps the judge to anticipate the nature of the issues and avoids trial by ambush. Every one involved has the opportunity of understanding the major issues before the trial and prepare accordingly. On the other hand, Canadian counsel are frequently

<sup>67</sup> *Loc. cit.*, footnote 22, at p. 77.

<sup>68</sup> See Caljic (5th ed., 1988), Preface, p. viii.

ignorant of the precise issues that the other side might raise. Nor does the judge get any advance notice. Issues can arise without warning during the course of the trial. That makes it more likely that errors will occur in Canadian practice since the time for judicial research and preparation is limited once the trial begins.

Third, under the United States system, counsel become better educated in the criminal law. Today, most Canadian counsel only possess a vague understanding of what should be in the charge to the jury. It is only after the verdict of the jury that counsel pay much attention to the details of the instructions. Then, they examine the charge for any inadequacy as a basis for appeal. Requiring counsel to concentrate on the particulars of the instructions before they are given to the jury, ought to produce a better quality of instruction and more knowledgeable counsel. All of that is to the benefit of the jury and the criminal justice system.

## *2. The Pre-Charge Hearing*

American counsel draw the charge in the first instance. Hence, they are aware of the precise words that should go into the final instruction. The charge is then refined at the pre-charge hearing, taking into account any evidence heard by the jury that might require amending the original drafts.

All of that process appears more organized and efficient than what is common practice now in Canada. Following the American precedent, it is more likely a Canadian jury will be given a correct charge on the law on the first trial.

## *3. The Addresses of Counsel to the Jury*

If no Pre-Charge Hearing is held in a Canadian trial—and no law requires it to take place—counsel are often left in a state of uncertainty as to what they should tell the jury about the law that will be given to them by the judge. But, if the judge instructs the jury before counsel make their submissions, as is the practice in many parts of the United States, then counsel know exactly what law applies in that particular case. As earlier mentioned, the judge, the jury and counsel all have a written copy of the instructions on the law before them. Hence, counsel can say, for example, “The judge told you the ingredients the prosecution must prove to gain a conviction are the following, here is the evidence that proves those ingredients beyond a reasonable doubt.”

In my view the American practice has much to commend it. Counsel are better informed on the law contained in the judge’s instructions and thus are more likely to mould their submissions to fit those instructions. All of this should make the process more rational and hence more understandable to the average juror.

#### 4. Judge's Instructions to the Jury

Because it is recommended the charge be reduced to written form and handed to the jury, the jury will not have to rely on their memory as to what the judge told them orally. There is the added benefit of the jury reading the charge along with the judge since two senses of the human body are at work absorbing the instructions, and not just one; that is the eyes and the ears as compared to the ears alone. Empirical research confirms what is already known. Individuals who receive information in writing are far more likely to apply the information correctly than if they hear the information orally.<sup>69</sup>

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<sup>69</sup> A. Elwork, B. Sales and J. Alfini, *Making Jury Instructions Understandable* (1982), pp. 19-20:

When people are given written texts they in fact are given a chance to go over material several times; it is this factor which explains the superiority of written material over lectures in terms of being comprehensible and memorable. The superiority of written presentation over vocal presentation does not suggest that it is not necessary to present materials vocally when they are presented in written form. Several experimenters have shown that vocalization of written material facilitates memory. Thus, the ideal is to present materials in both modes at the same time.

... Giving the jurors a chance to read the written copy several times in the deliberation room increases the probability that they will comprehend and remember the instructions and allows easy access to them anytime clarification is needed.

To a similar effect, see K. Berg and A. Gilman, *Get to the Point* (1989), pp. 6, 33, where the authors comment on the work of Hermann Ebbinghaus, a pioneer researcher on the psychology of human memory around the turn of the century:

Thirty minutes after an oral speech, the average listener has forgotten 40% of what was said. By the end of the day, 60%. By the end of a week, 90%.

Tests conducted on control group of juries confirm these findings. For complex instructions it is impossible for a jury to remember them after listening to them just once: Elwork, Sales and Alfini, [*op. cit.*, *supra*], p. 19.

The same point was made by [R.F.] Forston, [Sense and Non-Sense: Jury Trial Communication, [1975] Brigham Young L. Rev. 601], at pp. 610-611 ...

In some U.S. jurisdictions, the trial judge may give the jury a tape recording of the charge: Schwarzer, *loc. cit.*, footnote 51, at pp. 584-585:

Many judges are giving jurors one or more copies of the charge or a tape recording of it. Appellate courts have approved this practice so long as jurors are instructed that they must consider the charge in its entirety. A survey of lawyers indicates that they overwhelmingly favour allowing the jury to see the charge. Similarly, a survey of jurors showed that over three quarters wanted access to the written instructions during deliberations; some jurors asked to have individual copies for ready reference.

For a commentary on the practice of leaving a tape recording of the charge with the jury, see, C.M. Hansel, *Criminal Procedure—Should the Jury Have Tape Recorded Instructions?—United States v. Watson*, 669 F. 2d 1374 (11th Cir., 1982), [1983] *Ariz. St. L.J.* 599.

Whatever may be the practice in the United States Federal Courts, it appears that only sixteen U.S. jurisdictions allow the jury to receive a written copy of the instructions: see Steele and Thornburg, *loc. cit.*, footnote 22, at p. 101, footnote 131.

As the American judge does not have to charge on the evidence, the burden of reminding the jury about the evidence is shifted to counsel. Two advantages arise as a result. First, the judge is relieved of the tedious and wearying task of taking extensive long hand notes of the evidence. Second, it is counsel who know about the evidence long before the trial begins. Counsel acquire a detailed familiarity with the evidence before the trial through the discovery process and the Preliminary Hearing. On the other hand, the evidence is only revealed to the judge for the first time, as it is presented in the court room. Therefore, it seems reasonable to let counsel deal with the evidence and not the trial judge.

Even though the logic seems persuasive, it is probably too great a jump in our system to deny a Canadian trial judge the right to comment upon the evidence. Hence, Canadian law should give a trial judge the option of commenting on the evidence if the judge considers it necessary. Any failure to do so should not be a ground of appeal.

### *5. Objections to the Charge*

Canadian experience of successful appeals based upon an error in the judge's charge is sufficient proof that neither counsel will always pick up the errors after the charge is read to the jury by the trial judge. The process tends to make it physically impossible for counsel to absorb and analyze the instructions as they are read to the jury. Nor is there any incentive to object at the time. Either side is still entitled to complain about the charge in the court of appeal, despite the fact they remained silent when asked by the judge to comment at the close of the instructions.

To preserve any suggested instructional error on appeal, the American lawyer must be specific and must put the objection in writing for the benefit of the trial judge. This is not as difficult as it may seem since both counsel are involved in the instructional process before the trial commences and again at the pre-charge hearing.

By adopting the American method, Canadian lawyers will become more knowledgeable on what should be in the judge's instructions and hence more helpful to the trial judge. Thus, jury instructions are more liable to be right the first time. That means there is less likelihood of error and so fewer chances a court of appeal will order a costly new trial because of an error in the charge.

### *6. Disposition by the Court of Appeal*

In the United States, there appears to be a heavier onus placed upon an appellant to prove a charging error affected the verdict of the jury than is the case in Canada. In most instances, the appellant must show he or she objected at the time the alleged error occurred. Although failure to object is not fatal in some situations, an appellate court where there has

been an objection will not order a new trial unless the error was basic and highly prejudicial.

The English Court of Appeal will not set aside a conviction unless it is shown a miscarriage of justice occurred. In reaching this decision it does not speculate on what the jury might have done had the instruction been correct. This is thought to be unrealistic. But, in Canada, on a finding of instructional error by a court of appeal, if it is possible the verdict would have been different had the proper direction been given to the jury, then there will be an order for a new trial.

The Canadian test comes very close to establishing a standard of perfection for the jury instruction process. Such a standard is rarely achievable and is therefore unreasonable. It is also based on guess work because the appeal court is required to speculate on the possibility of a properly instructed jury finding the defendant not guilty, an event that is impossible to prove one way or the other. It should be abandoned in favour of a more sensible theory.

In this regard, the English standard seems to be the more rational. Following English precedent, a Canadian court of Appeal should only order a new trial if it is shown on an examination of all the evidence and the instructions that there was a miscarriage of justice.

### V. Reform

In order to introduce a set of pattern jury instructions it would be desirable first to change the general process by which rules of criminal procedure are established. This would increase the chance of changes being made in jury instructions, and indeed of other changes being implemented. I propose therefore to make some suggestions for changing the way in which rules of criminal procedure are established, and summarize the changes that should be made with respect to jury instructions.

#### A. The Process of Reform

##### 1. General Reform

For unknown reasons, Canada does not have a separate set of procedural rules governing practice and procedure in the criminal law. Almost all of the criminal rules of procedure are part of the substantive law as contained in the Criminal Code.<sup>70</sup> On the civil side of the law, the

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<sup>70</sup> Section 482 of the Criminal Code, *supra*, footnote 1, gives authority to superior courts of criminal jurisdiction to make rules of court not inconsistent with the act. Acting under this authority, Criminal Rules of Procedure have been enacted by the majority of the judges in the Supreme Court of British Columbia on such matters as: (a) Summary Conviction Appeals; see B.C. Annual Practice, 1991, p. 512; (b) The Practice in Relationship to Prerogative Writs; see B.C. Annual Practice, 1991, p. 452.

In addition, the Governor in Council may enact rules of court in criminal matters. All rules so made prevail and have the effect as if enacted by the Criminal Code: s. 482(5). Evidently, the Governor in Council has never promulgated any rules relying on this section.

provincial Lieutenant Governors in Council pass rules of civil procedure as delegated legislation. Matters of substantive law are either found in the common law or in the statutes of the various provinces. American criminal law follows the same practice as is done in the Canadian provinces with respect to civil law. In other words, the substantive criminal law is contained in the statute law. Rules of criminal procedure are enacted separately as delegated legislation.<sup>71</sup> Hence, procedural reforms can be put into effect more easily since changes do not require the approval of the federal or state legislatures.

It is submitted that the criminal law of Canada will likely develop in a more orderly and coherent way if all the rules relating to criminal procedure are taken out of the Criminal Code and passed as delegated legislation.

Necessary amendments to criminal procedure could be made as the circumstances demanded. It would not be essential to wait for scarce parliamentary time in order to obtain the required amendments. The Criminal Rules would contain all matters dealing with procedure from the laying of an information to the warrant delivering the defendant to prison. Archaic phrases and practices could be updated with a minimum of fuss.

At the present time there appears to be authority for the Governor in Council to enact rules for jury procedure. Section 482(5) of the Criminal Code provides:

(5) Notwithstanding anything in this section, the Governor in Council may make such provision as he considers proper to secure uniformity in the rules of court in criminal matters, and all uniform rules made under the authority of this subsection prevail and have effect as if enacted by this Act.

To accommodate the Canadian pattern form process, it is recommended that the Governor in Council enact Rules of Jury Procedure pursuant to section 482(5). Coincidentally with the coming into force of these criminal jury procedural rules, the relevant sections of the Criminal Code dealing with jury procedure can be repealed.<sup>72</sup>

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<sup>71</sup> For example, see Federal Rules of Criminal Procedure, December 1, 1990, p. (v), reciting Title 28, United States Code, Authority for Promulgation of Rules:

Para 2072. **Rules of procedure and evidence; power to prescribe**

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

<sup>72</sup> This initiative may be the stepping stone for the removal of all procedural matters from the Criminal Code and subsequent enactment as Rules of Criminal Procedure. Parliament could then confine itself to passing laws on substantive criminal matters, such as defining crimes, defences and length of sentences.

The preparation of the rules could follow the pattern in the provinces with respect to civil rules of procedure. The Governor in Council should have an advisory Committee composed of say three judges, three lawyers and two academics. It would recommend to the Governor in Council suggested amendments to the Rules of Jury Procedure. Its members would serve a non-renewable term of say three years. In that way lawyers, judges and academics across Canada would be able to participate in the process. Except for reasonable expenses, there would be no remuneration for their services. The honour of participating would be enough.

Provincial courts, provincial superior and appellate courts, by a vote of the majority of their judges, would have the right to enact Local Rules relating to jury procedure providing they were consistent with the general rules as passed by the Governor in Council.<sup>73</sup>

## 2. *Preparing Pattern Jury Instruction and Rules*

Before the pattern jury process can be put into place, a set of Pattern Jury Charges must be drafted and published. They should cover all the major crimes described in the Criminal Code, all defences and the necessary evidentiary and procedural instructions.

The Committee which prepares the general rules of jury procedure should also be responsible for drafting the Pattern Jury Instruction forms. In the beginning, it may need a paid staff of one or two academics including an English language expert on plain English. Financing the continuous activities of the Pattern Jury part of the Committee is often accomplished in the United States through payment of royalties from commercial publishers, arising out of the sale of books on Pattern Jury Forms. The same could happen in Canada.

Pattern Jury Rules Committees in the United States are sponsored by various interests, some by the highest appeal court of the state, some by local Bar Associations, some by Judicial Councils or Judges' Associations, some by state administrative offices.<sup>74</sup> English Specimen Directions for the Crown Court are approved by high ranking members of the judiciary.<sup>75</sup>

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<sup>73</sup> At the present time, various sections of the Criminal Code allow provincial superior courts to enact rules. For comparative purposes, United States Federal District Courts are given the authority to enact Local Rules under Rule 57, Federal Rules of Criminal Procedure, December 1, 1990, Rule 57.

Similar authority is given to enact Local Rules in State Superior Courts. For example, see Washington State Court Rules, 1991, Local Criminal Rules, Superior Court, King County, p. 969.

<sup>74</sup> See Neiland, *op. cit.*, footnote 26, p. 11.

<sup>75</sup> The Introduction to the book on Specimen Instructions for the Crown Court, dated April 1991, reads in part:

These Revised Directions have been prepared at the request of the Judicial Studies Board and approved by the Lord Chief Justice and Lord Justice Watkins.

Assuming the drafting task will be done under federal auspices, responsibility for the work of the Committee could be assigned to the Supreme Court of Canada. That would give the instructions preliminary acceptance but the Court could always reserve the right to disagree with an instruction if it comes before it in an actual case.

### 3. *Procedural Reforms*

The principal task of the Committee proposed above would be of course to draft criminal rules of procedure and to draft a set of pattern jury instructions, and in carrying out that task it would find much assistance in what has been done in the United States. It will however be clear from what has been said earlier that not only is there a need for a set of pattern instructions, but that there is also a need for changes in the way a jury criminal trial is conducted. The following are some suggestions for changes in that respect which a Committee could consider:

- (1) Counsel for the prosecution and the defence should each deliver to one another, and to a judge at a pre-trial conference, a proposed set of jury instructions.
- (2) Before the judge delivers the charge to the jury, there should be a pre-charge hearing to determine the exact form the instructions should take.
- (3) Counsel should put their forms of instructions in writing. Otherwise, they will be deemed to have waived any complaint about the charge on appeal.
- (4) Defence counsel should have the option of making an opening statement to the jury either after the opening statement of the prosecution, or at the opening of the defence.
- (5) Counsel should have the primary responsibility of reviewing the evidence before the jury. The trial judge should also have the option of reviewing the evidence with the jury but should not be obliged by law to do so.
- (6) The judge should have the option of giving the instructions to the jury in whole or in part, either before or after the addresses of counsel.
- (7) The order of addressing the jury should be for the prosecution always to go first, followed by the defence argument, with a right of reply by the prosecutor.
- (8) The charge to the jury on the law should be in writing. It should be read to the jury by the judge. Each juror should be given a copy of the charge to take to the jury room.
- (9) The trial judge should not have to explain to the jury the theory of the defence and the prosecution. That is the responsibility of counsel.
- (10) A new trial should only be ordered by a Canadian court of appeal where it is shown, on an examination of all the evidence and the instructions, that there was a miscarriage of justice. What a jury might



have done had it been properly instructed should not be part of the test since that consideration is too speculative.

#### *4. An Ancillary Reform—Repeal of Section 649 of the Criminal Code*

This section effectively prevents all communications with jurors after the trial is over. Because of this, researchers, lawyers and others are unable to determine whether a jury really understands present day jury instructions. Judges do not know what they must do to improve their methods of communicating with the jury. Since the point of jury instructions is to inform the jury on the law, the continued existence of the section prevents us from discovering whether the jury understands the law. Besides that, section 649 of the Code may offend the provisions of section 2(b) of the Canadian Charter of Rights and Freedoms as interfering with freedom of expression.

American lawyers and others are able to talk to jurors once the trial is over. In this way, American lawyers get to learn their trade, and researchers are able to tell judges what is wrong and what is right about jury instructions. Many American judges simply tell jurors on their discharge that they do not have to talk to anyone about the trial, but that they are free to do so if they wish.

If the pattern jury instruction process is to succeed, it is essential that section 649 be repealed so that Canadian judges, lawyers and researchers can understand better how the system actually works in practice and what improvements should be made.

#### *Conclusion*

Trial by jury is a right given to anyone charged with an offence in Canada where the maximum penalty that can be imposed is one of imprisonment for five or more years. Judges often tell jurors that it is one of the oldest and most important of our legal traditions and has made us the envy of many other people in other parts of the world. Because of its significance in our democracy, we ought to ensure that it is as up to date and as easy to administer as is humanly possible.

Present day Canadian rules of jury procedures and the method of instructing juries are badly in need of reform. There are better, more efficient and less costly ways of performing these tasks. We have the opportunity to modernize them by developing pattern jury instructions and jury procedures suited to Canadian law and Canadian society. Using plain English techniques, we can improve upon the United States example and jump ahead of them by a generation.

We should begin the process immediately. As each day goes by we perpetuate a system that long ago outlived its usefulness. A modern democratic country such as Canada deserves a criminal justice system that is in keeping with the times.