Lawyers judge the jury

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Un relevé d'opinion sur le jury dans les affaires pénales a été envoyé aux avocats de la Colombie-Britannique, du Manitoba, du Nouveau-Brunswick, et de la Nouvelle-Écosse au printemps 1988, et les résultats de cet exercice ont été rapportés.

An opinion survey on the jury in criminal cases was sent to lawyers in British Columbia, Manitoba, New Brunswick, and Nova Scotia during the spring of 1988, the results of which are reported.

DEBATE ON THE JURY SYSTEM CONTINUES. Detractors depict the jury as injecting into our justice system uncertain and irrational prejudice and ignorance.[1] On the other hand, adherents applaud the jury for its collective good sense and its existence as a bulwark against tyranny.[2] The Law Reform Commission of Canada in its Report on the jury listed five positive functions served by the jury:[3] an excellent fact-finder; a cross-section of the community and is able to act as the conscience of the community; the ultimate protection against oppressive laws; public involvement in the criminal justice system; and, increases the public's trust in the system. The Law Reform Commission found "almost unanimous support for the jury system in criminal cases" among the

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1 For a summary of the debate over the jury see: H. Kalven & H. Zeisel, *The American Jury* (Boston: Little, Brown, 1966) at 3-11 and R. Simon, *The Jury: Its Role in American Society* (Lexington, Mass.: D.C. Heath, 1980) at 11-26.

2 The classic statement on the role of the jury in preserving our democratic traditions was made by Lord Devlin:

> Each jury is a little parliament. The jury sense is the parliamentary sense. I cannot see the one dying and the other surviving. The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives (*Trial By Jury*, 3d ed. (London: Stevens, 1966) at 164).

3 *The Jury* (Study Paper, no. 16) (Ottawa: The Commission, 1982) at 5.

people consulted.[4] Support was also found for the jury in three surveys conducted by the commission involving the general public, jurors, and trial judges.[5] One group not canvassed was lawyers.

In fact, no study has asked lawyers about their opinion of the jury, and yet lawyers are intimately involved, if not instrumental, in the final decision to go to trial before a jury.[6] Their perspective is also unique in that they are the trained professionals who must work with the lay jury over the course of a trial.

This article outlines the results of a survey on the jury in criminal cases sent out to lawyers in British Columbia, Manitoba, New Brunswick, and Nova Scotia during the spring of 1988. The survey was seeking information on the jury in three areas: the lawyers' opinion of the jury; the use of juries in the criminal justice system; and, factors that influence the decision to elect trial by jury.

I. Survey Methodology

A. The Sample

The target population for the survey was private practitioners, who would be most likely involved with clients in the decision to elect trial by jury in a criminal case. Accordingly, we were interested in the defence counsel perspective, so lawyers working for the Crown were excluded. We also wanted the opinion of practitioners only, and non-practitioners were excluded.

The first concern in any survey is the obtaining of a representative sample. Ideally, every private practitioner from across Canada should have been canvassed. Such was not possible. Nor were we able to use a random selection method to obtain a sample of opinion from each province in Canada. We relied upon the mailing list from the Canadian Bar Association of members who indicated an interest in criminal law. The list excluded student members of the association. Cost dictated that the sample be limited to 1,000 mailings and we chose to cover four provinces; namely, British Columbia, Manitoba, New Brunswick, and Nova Scotia. British Columbia was selected, because that province, like Ontario, retains frequent use of the jury in civil cases, and we were interested in testing whether greater familiarity with the jury impacted on lawyer opinion. In contrast, Manitoba was chosen, because in that

4 *Ibid.*

5 Law Reform Commission of Canada, *Studies On The Jury* (Ottawa: The Commission, 1979).

6 For a general overview of studies on the jury, see V. Hans & N. Vidmar, *Judging the Jury* (New York: Plenum, 1986).

province the civil jury is virtually extinct.[7] New Brunswick and Nova Scotia represent similar population sizes from neighbouring provinces within the same geographic region of Canada, and we were interested in assessing whether any provincial differences resulted.

B. Mail Survey

The primary advantage of a mail survey is that it can provide information from a wide geographic area at minimal expense. There are, however, recognized weaknesses in using a mail questionnaire. First, the response rate is low. To encourage response, we included a short covering letter that asked for the lawyer's assistance, a self-addressed stamped envelope, and the survey was kept short.[8] A reminder letter with a copy of the survey was sent out to non-respondents two weeks after the initial mailing. Secondly, the sample is self-selective. We do not know the motives of those who chose not to reply, and our sample of respondents may be different from the non-respondents. Thirdly, questions could be misinterpreted. To avoid this problem, we engaged in a test survey with colleagues at the University of Ottawa. Fourthly, the survey must be short. In our case, the survey consisted of only thirteen questions, which are reproduced at Appendix A. With such a survey, it is not possible to gather as detailed information as can be done through personal interviews, for example.

C. Sampling Result

The list obtained from the Canadian Bar Association contained 980 members who were drawn from the four provinces and who had indicated an interest in criminal law. From this list, we deleted those whose address indicated employment with the respective departments of the Attorney General or federal Justice Department. In the end, 916 surveys were mailed in March 1988, and 435 replies were received by 7 June 1988. Table 1 provides a summary of the responses between the four provinces.

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7 Manitoba Law Reform Commission, *The Administration of Justice in Manitoba, Part II* (Report, no. 19) (Winnipeg: Queen's Printer, 1975) at 37 and 47.

8 Two excellent sources on the preparation of a survey are D. Orlich, *Designing Sensible Surveys* (Pleasantville, N.Y.: Redgrave, 1978), and D. Miller, *Handbook of Research Design and Social Measurement*, 4th ed. (New York: Longman, 1983).

TABLE 1:
The Sample and Survey Response

Province	Surveys Sent Out	Replies Received	Per Cent of Responses	Private Practitioners
B.C.	570	246	43.2	207
Man.	155	81	52.2	67
N.B.	97	54	55.7	44
N.S.	94	54	57.4	40
TOTAL	916	435	47.5	358

Of the 435 surveys returned, a number were not completed in their entirety. Also, the first question in the survey asked "Do you presently carry on the private practice of law?" If the response was "no" to this question, the respondent was asked to clarify their involvement in the law, and this allowed us to determine whether or not to include the person in our sample of private practitioners. 55 non-practitioners were identified in this way. In the end, our sample included 358 lawyers presently in private practice.

In addition to the regional distribution, we also asked for information on years of practice;[9] percentage of practice in criminal law;[10] rural-urban location of their practice.[11]

TABLE 2:
Years of Practice Since Receiving Call to the Bar

Years of Practice	Responses	Per Cent
0 – 3	44	12.3
4 – 10	150	41.9
11+	164	45.8

9 Table 2.
10 Table 3.
11 Table 4.

TABLE 3:
Extent of an Exclusive Criminal Law Practice

Proportion of Total Practice that Derives from Criminal Cases	Responses	Per Cent
More than Half	49	13.7
Exactly Half	40	11.2
Less than Half	268	75.1

TABLE 4:
Location of Law Office

Population of Locality in which Law Office Is Situated	Responses	Per Cent
100,000 – 500,000	194	54.3
10,000 – 100,000	112	31.4
Less than 10,000	51	14.3

II. LAWYER OPINION OF THE JURY

A. Fair and Just Verdicts

The primary goal of any system of law is to see that justice is done. A common characterization of the jury is that it is "incompetent and ill-motivated" guided by "ignorance" and "personal prejudice," and to be preferred is the cool dispassion of the professional judge.[12]

This jury characterization is not supported by the 1977 surveys conducted by the Law Reform Commission of Canada.[13] In those surveys, the public, jurors, and judges were asked which was more likely to arrive at a just and fair verdict, a judge or a jury. The public opinion poll result showed that approximately 50% of the Canadian public felt both were equally fair and just; however, of those indicating a preference, 36.7% chose the jury verdict, and only 9.2% preferred the verdict of a judge.[14] The question asked in our survey of lawyers was the same as that asked in 1977 of jurors and judges and is represented in Table 5. The results show that lawyers, like jurors and judges, view favourably the work of juries. The total lawyer percentage, however, is deceptive and is skewed because of the favourable opinion of juries held by British Columbia practitioners, who provided 58% of our responses. A

12 Simon, *supra*, note 1 at 11.
13 *Supra*, note 5.
14 *Supra*, note 5 at 10-11.

regional breakdown of the results shows a marked variation between provinces. Table 6 shows that practitioners in British Columbia and in Nova Scotia are more favourably disposed towards the jury, but, that in Manitoba and New Brunswick, the responses indicate more faith in the verdict of judges.

TABLE 5:
"In a Criminal Trial, Do You Think It Is More Likely that a Judge or a Jury Will Arrive at a Just and Fair Verdict?"

	1977 Survey of Jurors		1988 Survey of Judges & Lawyers	
	Before Service	After Service	Judges	Lawyers
Judge Much More Likely	15.6	10.9	10.4	7.7
Judge Somewhat More Likely	13.8	13.2	23.7	19.2
Equally Likely	27.8	26.9	45.6	41.5
Jury Somewhat More Likely	28.3	25.6	16.8	24.1
Jury Much More Likely	14.6	23.3	3.5	7.4

TABLE 6:
In a Criminal Trial, Do You Think It Is More Likely That a Judge or a Jury Will Arrive at a Just and Fair Verdict?

	B.C.	Man.	N.B.	N.S.
Judge Much More Likely	10 (5.0%)	8 (12.3%)	9 (20.5%)	0
Judge Somewhat More Likely	32 (16.0%)	14 (21.5%)	12 (27.3%)	9 (22.5%)
Equally Likely	87 (43.5%)	30 (46.2%)	13 (29.5%)	15 (37.5%)
Jury Somewhat More Likely	57 (28.5%)	9 (13.8%)	5 (11.4%)	13 (32.5%)
Jury Much More Likely	14 (7.0%)	4 (6.2%)	5 (11.4%)	3 (7.5%)
Total	200	65	44	40

B. Confidence in a Jury Verdict

A second variable in the perception of juries is confidence in the correctness of a rendered verdict. Our questionnaire asked lawyers how likely it was for a jury wrongly to convict an accused. This same question had been asked in the 1977 survey of jurors and judges. The results as shown in Table 7 reveal that, although all groups surveyed were

fairly satisfied with the verdicts of juries, judges and lawyers were even more confident in the abilities of the jury than were jurors themselves.

TABLE 7:
How Likely Do You Think It Is that a Person Could Be Wrongfully Convicted by a Jury?

	1977 Survey of Jurors		1988 Survey of Judges & Lawyers	
	Before Service	After Service	Judges	Lawyers
Very Likely	5.9%	3.2%	2.3%	1.7%
Fairly Likely	8.6%	13.4%	4.5%	6.8%
Somewhat Likely	21.5%	20.4%	6.8%	20.5%
Fairly Unlikely	31.2%	22.1%	29.0%	36.8%
Very Unlikely	26.1%	30.6%	35.8%	25.6%
Extremely Unlikely	6.8%	10.2%	21.6%	8.5%

Once again, the provincial breakdown of the lawyer responses shows disagreement. Confidence in jury verdicts is highest in British Columbia and in New Brunswick, and it is the lowest in Manitoba. The divergence of opinion is extreme in that only 13.6% of the Manitoba respondents felt that the likelihood of a wrongful conviction from a jury was "very" or "extremely" unlikely, whereas Table 8 reports that, in British Columbia and New Brunswick, over 40% had a high degree of confidence in jury verdicts.

TABLE 8:
How Likely Do You Think It Is That A Person Could Be Wrongfully Convicted by a Jury?

	B.C.	Man.	N.B.	N.S.
Very Likely	3 (1.5%)	2 (3.0%)	0	1 (2.6%)
Fairly Likely	12 (5.9%)	5 (7.6%)	2 (4.7%)	5 (13.2%)
Somewhat Likely	33 (16.2%)	23 (34.8%)	9 (20.9%)	7 (18.4%)
Fairly Unlikely	74 (36.3%)	27 (40.9%)	14 (32.6%)	14 (36.8%)
Very Unlikely	60 (29.4%)	6 (9.1%)	14 (32.6%)	10 (26.3%)
Extremely Unlikely	22 (10.8%)	3 (4.5%)	4 (9.3%)	1 (2.6%)
Total	204	66	43	38

One can only speculate as to the reasons for the differences of opinion on the jury between practitioners in British Columbia and in

Manitoba. A possibility is regional custom.[15] Practitioners in British Columbia use juries more in civil and criminal cases, and familiarity breeds practice, which in turn breeds acceptance. In Manitoba there is no civil jury tradition, and the "custom" in criminal cases is for trial before judge alone. Unfamiliarity, therefore, may account for the Manitoba lawyers' suspicion of the jury. Our survey of lawyers did find that the more experienced lawyers, who presumably would have more exposure to juries than less experienced lawyers, were more favourably inclined towards the jury, as Tables 9 and 10 demonstrate.

TABLE 9:
In a Criminal Trial, Do You Think It Is More Likely That a Judge or a Jury Will Arrive at a Just and Fair Verdict?

	Years In Practice		
	0 – 3	4 – 10	11+
Judge Much More Likely	3 (6.7%)	11 (7.8%)	13 (8.0%)
Judge Somewhat More Likely	13 (28.9%)	25 (17.7%)	29 (17.8%)
Equally Likely	17 (37.8%)	62 (44.0%)	66 (40.5%)
Jury Somewhat More Likely	8 (17.8%)	31 (22.0%)	45 (27.6%)
Jury Much More Likely	4 (8.9%)	12 (8.5%)	10 (6.1%)
Total	45	141	163

TABLE 10:
How Likely Do You Think It Is That A Person Could Be Wrongfully Convicted by a Jury?

	Years In Practice		
	0 – 3	4 – 10	11+
Very Likely	1 (2.4%)	3 (2.1%)	2 (1.2%)
Fairly Likely	3 (7.1%)	12 (8.4%)	9 (5.4%)
Somewhat Likely	11 (26.2%)	36 (25.2%)	25 (15.1%)
Fairly Unlikely	19 (45.2%)	50 (35.0%)	50 (36.1%)
Very Unlikely	8 (19.0%)	32 (22.4%)	50 (30.1%)
Extremely Unlikely	0	10 (7.0%)	20 (12.0%)
Total	42	143	166

15 Kalven and Zeisel in their study on the jury in the United States (*supra*, note 1 at 24-25) raised the issue of state custom and showed that the decision to go to a jury varied enormously between states.

The survey did not find any significant differences in opinion based on the urban or rural location of the law office or based on the size of the law firm in which the lawyer practised.

C. Use of the Jury

One observer in his attack on the jury stated, "almost its only consoling feature is the thoroughness of its decline."[16] Most commentary confirms that both the civil and criminal jury are in decline in Canada, Australia, Great Britain, and the United States.[17] Yet talk of the demise of the jury was raised fifty years ago, and the jury has still survived.[18]

Two factors go to determine the use of juries. First, as a matter of law, is the jury available? Secondly, as a matter of choice, does the party want a trial by jury?[19] The decline of juries in civil cases in Canada is directly related to both of these variables. The right to a civil jury trial has been restricted in all the provinces. In Quebec, civil jury trials were abolished in 1976.[20] Ontario, in contrast, provides the general rule that most civil actions in the supreme and district courts may be tried before a judge and jury.[21] It should be noted that the Law Reform Commission of Ontario recommended the abolition of this broad right to jury trials.[22] However, the recommendation was not accepted. In Manitoba civil jury trials as of right are available only for actions for defamation, malicious arrest, malicious prosecution, and false imprisonment.[23] Other civil matters are to be tried before a judge without a jury, unless otherwise ordered.[24] History shows that counsel in Manitoba are loath to petition for a jury. Between 1944 and 1975 only four civil actions were tried before a jury in Manitoba.[25] Accordingly, the Manitoba Law Reform Commission concluded that the "civil jury is all but a dead letter in Manitoba."[26] But that need not be the case. The legislation in

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16 H. Mannheim, cited in Law Reform Commission of Canada, *The Jury In Criminal Trials* (Working Paper, no. 27) (Ottawa: The Commission, 1980) at 1.

17 Willard Estey, "The Jury System and Its Place in the Judicial Process: A Role for the Jury in the 1980's," in *The Second Annual Advocacy Symposium*, (Ottawa: Canadian Bar Association, 1983) at 4; Allan McEachern, "The Jury Process As Seen From A Judicial Perspective," in *The Second Annual Advocacy Symposium, Ibid.*, at 1; J. Driscoll, "The Decline of the English Jury" (1979) 17 Am.Bus.L.J. 99-112.

18 S. Harris, "Is The Jury Vanishing?" (1930) 7 N.Y.Univ.L.Q. Rev. 657.

19 Kalven & Zeisel, *supra*, note 1 at 14.

20 *Jurors Act*, S.Q. 1976, c. 9, s. 56.

21 *Courts of Justice Act*, S.O. 1984, c. 11, s. 121.

22 Ontario Law Reform Commission, *The Administration of Ontario Courts, Part I* (Toronto: Queen's Printer, 1973).

23 *Court of Queen's Bench Act*, S.M. 1988-89, c. 4, s. 64(1).

24 *Ibid.*, s. 64(2).

25 *Supra*, note 7 at 37.

26 *Supra*, note 7 at 47.

British Columbia has the same presumption in favour of trial by judge alone and a revival in the use of civil juries for personal injury actions began in the 1950's when counsel simply started to petition for such jury trials.[27] Nothing is stopping Manitoba lawyers from doing the same. In *Desiatnyk* v. *Brown*, Molloy Co.Ct J. reviewed the Manitoba case law on civil juries and granted the plaintiff's motion for a jury trial in an action that involved a personal injury claim.[28] The point to be made is that the lack of civil jury trials in Manitoba is not because the law prohibits them; it is because practitioners in Manitoba, preferring the example of their English counterparts, do not want civil jury trials.

In criminal cases, there is uniformity across Canada for use of juries. For most indictable offences the accused has the right to elect trial by judge and jury.[29] The Law Reform Commission of Canada proposes a streamlining, in that trial by jury be made available for all indictable offences that have a maximum punishment of over two years imprisonment, which closely parallels the existing practice.[30] Right to a jury is enshrined in the s. 11(f) of the *Canadian Charter of Rights and Freedoms*, where "the maximum punishment for the offence is imprisonment for five years or more severe punishment".[31] In the past, there have been proposals presented to limit further the right of jury trials in criminal cases, and one can foresee attempts to bring the *Criminal Code* into accord with the five year guarantee under the *Charter*.[32] It may well be true that few "minor" criminal charges proceed before a jury. Estey J.'s response is:[33]

> When all is said and done, however, I am convinced that the jury trial, being the combination of a trained judge with a panel of community members, represents the best tribunal available for resolving the issues raised in many cases, and that it should be preserved and its use promoted. The vast majority of criminal cases in

27 *Rules of Court*, B.C. Reg. 310/76 (as amended), Rule 39(17). For a history of the civil jury in British Columbia, see K. Smith, "History and Use of Civil Juries'" in *Jury Trials* (Victoria: The Continuing Legal Education Society of British Columbia, 1981) at 10.

28 [1962] 40 W.W.R. 65 (Man. Co. Ct.).

29 *Criminal Code*, R.S.C. 1985, c. C-46, s. 536(2) [hereinafter referred to as *Criminal Code*].

30 Law Reform Commission of Canada, *Classification of Offences* (Working Paper, no. 54) (Ottawa: The Commission, 1986) at 48.

31 Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*, (U.K.), 1982, c. 11 [hereinafter referred to as *Charter of Rights*].

32 In 1976, the federal government circulated a draft proposal to limit the use of juries, but, in the face of massive opposition, the proposals were withdrawn (A. Maloney, "The Role of the Lawyer in Society," (1979) 9 Man. L. J. 351 at 361.)

33 Estey, *supra*, note 17 at 6 [emphasis added].

Canada are, of course, tried without a jury. *It is the right to demand a jury if desired that is important, however, and not the frequency with which that right is exercised.*

Information on the use of the jury in criminal cases is sparse. Table 11 shows some limited information obtained from the departments of the Attorney General in Manitoba, Nova Scotia, Ontario, and the Yukon.[34] Table 11 provides data on criminal code "charges"; the numbers do not represent individual accused persons. For example, if one person had been charged with five offences, Table 11 would reflect all five charges. The statistics do confirm that the bulk of criminal matters are dealt with in the Provincial Courts and that relatively few matters proceed to trial before a judge and jury. In particular, the lack of jury use is again highlighted in the province of Manitoba in contrast to Ontario and Nova Scotia.

TABLE 11:
Criminal Code Offences

A. Manitoba Year	Provincial Court	Before Judge Alone	Before Judge and Jury
1982	26,469	286	37
1983	28,804	335	36
1984	27,381	569	46
1985	29,503	465	60
1986	30,144	475	54
B. Nova Scotia **Year**	**Provincial Court**	**Before Judge Alone**	**Before Judge and Jury**
1984	26,885	1,808	454
1985	27,095	1,172	209
1986	25,216	1,077	338

34 The author contacted the various provincial and territorial government departments responsible for the administration of justice in their respective jurisdictions, and only the governments listed in Table 11 kept statistics that assisted this study.

C. Yukon

Year	Provincial Court[35]	Before Judge Alone	Before Judge and Jury
1983	2,729	6	2
1984	2,605	4	2
1985	2,166	3	2
1986	2,465	5	2

D. Ontario[36]

Year	Provincial Court	Before Judge Alone	Before Judge and Jury
1984/85	33,493	4,791	1,516
1985/86	30,835	4,578	1,574

Our survey data confirms that few matters do proceed to trial before a jury. Of the respondents who indicated that more than half of their practice was devoted to criminal law, 18.4% indicated that, over the past twelve months, they had not participated in a criminal jury trial, and a total of 63.3% had been involved in three or less jury trials during the past year.

The irony is that the lawyers in our survey agreed that a judge alone was more likely to convict than a jury, as Table 12 reflects. Of note is that not one lawyer indicated that a judge is much less likely to convict than is a jury. This is consistent with other studies on the jury. Kalven and Zeisel in *The American Jury* found agreement between judge and jury in four out of five cases, and where there was disagreement "the jury was less lenient than the judge in 3 per cent of the cases and more lenient than the judge in 19 per cent of the cases."[37] Nor should it necessarily be thought that, in the one out of five cases where there is disagreement, the jury erred. The reasons for the disagreement are not entirely clear, but one researcher ascribed the different verdicts "not to a failure to understand the evidence but rather to a different sense of justice."[38]

35 Represents totals for the fiscal year between 1 April 1987 and 31 March 1988.

36 Statistics include only those counts that went, or are going, to trial.

37 Kalven, *supra*, note 1 at 59.

38 Hans, *supra*, note 6 at 245. An opposing view is presented in J. Baldwin & M. McConville, *Jury Trials* (Oxford: Clarendon Press, 1979).

TABLE 12:
Generally Speaking, Do You Think a Judge Is More or Less Likely To Convict than Is a Jury?

	B.C.	Man.	N.B.	N.S.
Judge Much More Likely?	29 (14.4%)	8 (12.3%)	8 (18.2%)	4 (9.8%)
Judge Somewhat More Likely?	92 (45.8%)	25 (38.5%)	24 (54.5%)	18 (43.9%)
Equally Likely	62 (30.8%)	22 (33.8%)	9 (20.5%)	15 (36.6%)
Judge Somewhat Less Likely?	18 (9.0%)	10 (15.4%)	3 (6.8%)	4 (9.8%)
Judge Much Less Likely?	0	0	0	0

Cries for reform of the jury are often raised precisely because of the higher acquittal rates by juries. There is a perception that too many guilty defendants are being wrongly acquitted. In response to the police complaint concerning the 50% acquittal rate before juries, the Victoria Law Reform Commission observed that 125 years ago in Victoria the acquittal rate also was about a one-half. Of the limited statistics that we do have from Ontario, the acquittal rate for juries does not appear to be out of line in comparison to trials before judge alone:

TABLE 13:
Criminal Code Counts in Ontario

A. Provincial Court	Charges		Guilty Pleas
Years	Trial Charges	Charges Dismissed/Acquitted	
1984-85	33,493	16,276 (48.6%)	149,329
1985-86	30,835	15,635 (50.7%)	126,110
1986/87	30,227	15,766 (52.2%)	122,913
B. District Court Jury	**Charges**		**Guilty Pleas**
Years	Trial Charges	Charges Dismissed/Acquitted	
1984-85	1,516	697 (46.0%)	1,416
1985-86	1,574	700 (44.5%)	1,208
1986-87[39]	1,261	602 (47.7%)	706

39 1 April to 31 December 1986.

Dismissal of charges may distort the results, but they do indicate that, as soon as a matter is contested in the criminal courts. the likelihood of an acquittal is approximately fifty per cent, regardless of method of trial. Of course, the data also confirms that most matters do not go to trial and are dealt with by way of a guilty plea.

D. The Decision To Go To Trial Before A Jury

1. Who Makes the Decision

As has been seen, the *Criminal Code* gives to an accused person a broad right to trial by jury. Is the decision that of the accused or of the accused's counsel? The conduct of a trial obviously is within the control of the lawyer, but leading lawyers indicate that the decision to go to trial before a jury is the client's decision.[40] The lawyer provides advice, recommends, even attempts to persuade, but the final decision rests with the client. Our survey results do not accept this view. A majority of the respondents stated that the decision was for the lawyer to make and not the client:

TABLE 14:
The Lawyer, and Not the Client, Decides Whether To Have a Jury Trial

	B.C.	Man.	N.B.	N.S.
Strongly Agree	64 (30.9%)	18 (26.9%)	20 (46.5%)	8 (20.0%)
Agree	86 (41.5%)	27 (40.3%)	16 (37.2%)	21 (52.5%)
Undecided	13 (6.3%)	6 (9.0%)	2 (4.7%)	4 (10.0%)
Disagree	39 (18.8%)	14 (20.9%)	5 (11.6%)	4 (10.0%)
Strongly Disagree	5 (2.4%)	2 (3.0%)	0	3 (7.5%)

This result makes a decision-maker out of the lawyer, and what is underscored is how important lawyer attitudes and opinions of the jury are.

2. The Sentence that Follows Conviction By A Jury

An accused person may pay the price for the decision to have a trial by jury. Hans Zeisel, a co-author of the leading study *The American Jury*, noted:[41]

40 F.L. Bailey and H. Rothblatt, *Successful Trial Techniques For Criminal Trials* (Minneapolis: Lawyers Cooperative, 1971) at 76.

41 *Supra*, note 1 at 6.

The criminal jury is being diminished by a different threat. Unknown to the general public, some jurisdictions have reduced jury trials to the danger point. In one of our major cities, the share of jury trials of all dispositions after felony arrest has sunk to 2 percent. This is the result of a sentencing policy that discourages jury trial by giving defendants after conviction by a jury on the average more than twice the sentence they had been offered (and refused) for a guilty plea.

This same tendency has been observed in Canada.[42] Any disparity in sentencing between an accused who pleads guilty and an accused who is sentenced following a finding of guilt by a jury can be rationalized in that the guilty plea is a factor in mitigation; the accused person is willingly accepting responsibility for his actions and is not putting the state to the expense, nor a victim through the trauma, of a trial. Going to trial before a jury denies the accused this mitigation. Yet, this "denial of mitigation" is tantamount to punishment for exercising a right to trial by one's peers.

Our survey was concerned with any disparity in sentencing following trial by judge and jury and trial by judge alone. The results do not support the contention that a person found guilty by a jury receives a higher sentence than if found guilty by a judge.[43] More respondents disagreed with the above contention than agreed with it in British Columbia, New Brunswick, and Nova Scotia; Manitoba was the exception. The Manitoban result is consistent with the lack of criminal jury trials in that province. A Nova Scotian lawyer alluded to a local practice in his province: "Last jury trials were about 5 years ago on s. 4(2) N.C.Act [that is, trafficking under the *Narcotic Control Act*]. Both were guilty and sentences were heavy. Since then local counsel have avoided jury trials." If accused persons are being "penalized" for exercising their right to a jury trial, and this survey merely raises the question and does not confirm that fact, then this is a serious *de facto* threat to the use of juries.

42 S. Verdun-Jones and A. Hatch, *Plea Bargaining And Sentencing Guidelines* (Ottawa: Canadian Sentencing Commission, 1988) at 35.
43 Table 15.

TABLE 15:
A Person Found Guilty by a Jury Receives a Higher Sentence than if Found Guilty by a Judge

	B.C.	Man.	N.B.	N.S.
Strongly Agree	8 (3.9%)	6 (9.0%)	5 (11.4%)	2 (5.1%)
Agree	25 (12.1%)	18 (26.9%)	8 (18.2%)	11 (28.2%)
Undecided	72 (35.0%)	26 (38.8%)	11 (25.0%)	8 (20.5%)
Disagree	87 (42.2%)	13 (19.4%)	16 (36.4%)	16 (41.0%)
Strongly Disagree	14 (6.8%)	4 (6.0%)	4 (9.1%)	2 (5.1%)

The "sentencing risk" that may attach to a jury trial impacts upon the first question with which we dealt in this part, who decides the mode of trial. If sentence is higher following a finding of guilt by a jury in comparison to a judge sitting alone, which at least Manitoban lawyers say occurs, the accused ought to be informed of this potential. Further, should not the decision to opt for a jury trial then be made by the "risk-taker," the accused, and not by his lawyer?

3. Trial by Jury for Serious Offences Only

Although the *Criminal Code* makes trial by jury available for a wide range of offences, we asked the lawyers whether jury trials ought to be used only for the most serious crimes.

TABLE 16
Jury Trials Are Only To Be Used for the Most Serious Offences

	B.C.	Man.	N.B.	N.S.
Strongly Agree	12 (5.8%)	4 (6.0%)	7 (15.9%)	3 (7.5%)
Agree	39 (18.8%)	20 (29.9%)	14 (31.8%)	13 (32.5%)
Undecided	19 (9.2%)	10 (14.9%)	3 (6.8%)	3 (7.5%)
Disagree	96 (46.4%)	28 (41.8%)	14 (31.8%)	16 (40.0%)
Strongly Disagree	41 (19.8%)	5 (7.5%)	6 (13.6%)	5 (12.5%)

The result is consistent with other findings in our survey in that lawyers in British Columbia most favour a broad use of juries. The other provinces indicate divided opinion over this question. Of interest is that a number of lawyers commented that the practice of their locality dictated that juries only be used for the most serious of offences. One Manitoba practitioner observed that "judges are reluctant to have jury trials on the assize which are clogged or reserved for murder, manslaughter, rape and cause death by criminal negligence." A second

Manitoba lawyer was more pointed: "... the judges here have a stated policy that, if we elect jury on a minor offence, they will hammer the accused if he is convicted." These comments once again raise allegations of systemic restraint on jury use.

4. Juries and Complex Cases

It is a common criticism of the jury that they do not understand the case before them. How can uninitiated jurors be expected to understand and apply the law when the professional judges and lawyers find the law difficult? Research refutes this concern. Kalven and Zeisel in their major study of juries in the United States concluded "that for the law's practical purposes the jury does understand the case."[44] Over ninety per cent of the judges surveyed in the 1977 the Law Reform Commission of Canada agreed that juries generally were able to understand and evaluate the evidence.[45] The lawyers in our survey show less confidence in the abilities of juries to apply the law in complex cases.[46] Once again, most confidence in jury "intelligence" is bestowed by British Columbia practitioners.

TABLE 17:
Jurors Do Not Understand Complex Cases

	B.C.	Man.	N.B.	N.S.
Strongly Agree	14 (6.8%)	5 (7.5%)	9 (20.5%)	3 (7.5%)
Agree	50 (24.2%)	29 (43.3%)	17 (38.6%)	12 (30.0%)
Undecided	26 (12.6%)	15 (22.4%)	6 (13.4%)	9 (22.5%)
Disagree	91 (44.0%)	15 (22.4%)	11 (25.0%)	14 (35.0%)
Strongly Disagree	26 (12.6%)	3 (4.5%)	1 (2.3%)	2 (5.0%)

5. Delay in Jury Trials

"It is a sad reality that the hallowed institution of the jury sometimes becomes a mere device for delay," said McEachern J.A.[47] Delay is inherent in our criminal justice system, and delay may deter an accused person from electing trial by judge and jury if the time for such a trial is delayed. This is particularly a consideration if an accused is in custody awaiting trial. Our survey found that most lawyers found a delay factor associated with jury trials. In Nova Scotia, over seventy per cent of the lawyers agreed that it took much longer to get to trial before a jury than

44 Kalven, *supra*, note 1 at 158.
45 *Supra*, note 5 at 137.
46 Table 17.
47 *Supra*, note 17 at 2.

before a judge alone.[48] Delay, then, may be another systemic deterrence to the use of jury trials.

TABLE 18:
It Takes Much Longer To Get To Trial before A Jury than before A Judge Alone

	B.C.	Man.	N.B.	N.S.
Strongly Agree	36 (17.5%)	6 (9.0%)	11 (25.0%)	12 (29.3%)
Agree	66 (32.0%)	25 (37.3%)	17 (38.6%)	18 (43.9%)
Undecided	33 (16.0%)	13 (19.4%)	7 (15.9%)	2 (4.9%)
Disagree	64 (31.1%)	22 (32.8%)	9 (20.5%)	7 (17.1%)
Strongly Disagree	7 (3.4%)	1 (1.5%)	0	2 (4.9%)

6. Other Factors

Besides the above specified questions on the decision to go to a jury, the survey asked, "What factors influence your decision whether or not to proceed to trial before a jury in a criminal case?" The lawyers were then provided with space to provide an "open-ended" response. One of the problems with an "open-ended" answer is that they are difficult to categorize and misunderstandings arise as to exactly what the respondent meant in their short, written response. The primary advantage is that the respondents are given free reign to raise concerns, and, in this way, new relevant factors can be uncovered. Table 19 summarizes factors raised by our sample lawyers.

TABLE 19:
What Factors Influence Your Decision Whether or Not To Proceed to Trial before A Jury in a Criminal Case?

Factors	Responses
Repugnant Nature of Crime	84
Character of the Accused	63
Cost	50
Facts of the Case	49
Complexity of Case	46
Sympathy Factor	45
Issue of Law	31
Type of Defence ("Technical")	31
Characteristics of the Lower Court Judges	30
Delay (Client in Custody)	29
Can the Accused Testify?	27
Credibility	26
Record of the Accused	24

48 Table 18.

Factors	Responses
Sentencing Risk	21
Seriousness of Offence	20
Character of the Victim	11
Sexual Offence	10
Strength of the Crown's Case	9
Publicity	8
Wishes of the Client	6

For discussion purposes, these factors have been grouped into the following general categories: the facts of the case, factors pertaining to the accused, points of law, sentencing factors, and external factors.

a. The Facts of the Case

The leading factor cited by the lawyers was the "repugnant nature of the crime." This underscores the emotional impact that a crime may have on the jurors. Is this the type of crime that your fellow citizens would understand or by which they would be repulsed? A British Columbia lawyer put it this way: "Ability of the jury to put themselves in the place of the accused and say – there but for the grace of God go I." "Sympathy", both for and against your client, must be weighed along with sympathy both for and against the victim. Another British Columbia practitioner wrote, "Jury trial elections should be allowed for any case where the complainant is the government, such as offences under the *Income Tax Act, Anti-Combines Act,* etc." The "government" obviously is not a sympathetic victim.

Emphasis on the "facts of the case" reinforces the perception that a jury is seen as primarily a fact-finding body and may be better suited for that role than a judge sitting alone. A number of commentators have referred to the "jaundiced view of defendants" held by judges, who are tired by the endless treadmill of criminal cases.[49] Seymour Wishman in his book *Anatomy of a Jury,* wrote:[50]

> The big secret not told to the jurors but known by judges, lawyers, and just about anyone connected with law enforcement is that most people who are indicted *are,* in fact,

49 Fortas J. cited in Law Reform Commission of Canada, *supra,* note 17 at 16. Estey J. also observed:

> The presence of these amateur participants in the judicial process insures that the parties involved are the true focus of the proceedings. It is not just another trial to them as it may be to a judge who has experienced the same process so often (*supra,* note 17 at 5).

50 (New York: Time Books, 1987) at 130.

guilty. Of the several hundred clients Bernstein had represented, virtually all of them had been guilty of something, though not necessarily of the crime they were charged with in the indictment. But to Bernstein, the innocence of the jury was its single greatest virtue. Jurors would actually presume that a defendant was innocent in ways that judges, those brutalized souls who deal with the administration of justice on a daily basis, were no longer capable of believing.

Simply put, the judicially inexperienced jury, naive in the ways of our criminal justice system, has a better understanding of the presumption of innocence and the meaning of reasonable doubt. Kalven and Zeisel in their study of the American jury support this proposition:[51]

It is well to remember a major point about the legal requirement that for conviction there be proof beyond a reasonable doubt: it is the normative or value judgment expressed in this requirement. It is a way of saying that we live in a society that prefers to let ten guilty men go free rather than risk convicting one innocent man. This is, to be sure, an almost heroic commitment to decency. In the end the point is that the jury, as an expression of the community's conscience, interprets this norm more generously and more intensely than does the judge.

The "generosity" of the jury, however, ought not to be abused. A common piece of advice is that, "for hopeless cases the jury is the court of last resort." The fact-finding ability of the jury should not be minimized. Irving Younger in his classic lecture, "The Art of Cross-Examination", admonished his listeners as follows:[52]

I have reached this stage of life as an almost total cynic. I believe in virtually nothing, but there is one thing that I believe in: juries. They are extraordinary. As Gilbert K. Chesterton said, "You take twelve people, lock them in a room, and the Holy Ghost descends." They become something special.... They are smarter than we are. They remember everything. They understand everything. They never make a mistake. They always come up with the right answer.

b. Factors Pertaining to the Accused

In trials concerning questions of fact, a critical factor will be the impression on the jury left by the accused. Common sense dictates that a favourable, or at least a neutral, impression is better than a negative one. The "character of the accused" was listed second by our sample of lawyers. The lawyers also noted the "credibility" of an accused, which is paramount in trials resting on disputed facts.

Related to credibility is the preliminary question, can the accused testify? One respondent categorically asserted, "If I take a jury, my client

51 Kalven, *supra*, note 1 at 189.

52 I. Younger, *The Art of Cross-Examination* (Washington: Litigation Section, American Bar Association, 1976) at 20.

must be able to testify." An important consideration in the decision to put an accused on the stand is whether or not the accused has a prior criminal record. The Crown has the authority under section 12 of the *Evidence Act* to introduce prior convictions.[53]

c. Points of Law

The respondents confirmed the view that questions of fact are better suited for juries and that questions of law should go to judges. A number of the lawyers cited the technical nature of the evidence or the type of defence raised. Presumably a "technical" or a procedural defence ought to go to a judge. After all, judges are there to see that the law is applied; juries, on the other hand, are more interested in seeing that "justice" is done in a particular case. Lawyers appear to accept the adage, "Bad law, good facts, go to a jury." Conversely, cases of "good law, bad facts" go to a judge.

d. Sentencing Factors

The problem of delay, especially as it pertains to an accused person in custody, was again raised, as well as the potential risk of a higher sentence. A related factor is confidence in judges sitting alone. Enthusiasm for the jury wanes as confidence in a well-trained judiciary grows, and no doubt the decline in the use of juries in Canada is attributable to the faith the public and lawyers have in our judges.[54] Nevertheless, it remains important for a lawyer to know the judges:

> The next guideline, for me, is this – Will the judge acquit. Any lawyer worth a brief will know with a strong degree of probability exactly what a given judge will do in certain circumstances.... If you do not have a "book" on your judge, consult a more experienced lawyer and if in the facts of your case the judge can be predicted to acquit – he's your man.

e. External Factors

Publicity was a factor raised by a small number of the lawyers. As we have seen, a jury trial may be a rarity in certain localities, and its "uniqueness" alone may attract public attention. A more significant concern raised by many of the lawyers was cost. One of the lawyers wrote:

> The one factor which you haven't surveyed – which I think is really important is the problem of cost. A jury trial is much more expensive – whether or not there is a

53 *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 12. The Supreme Court of Canada in *Corbett* v. *R.* (1988), 64 C.R. (3d) 1 ruled that a trial judge has a discretion to exclude evidence of prior convictions if a mechanical application of s. 12 would undermine the right of a fair trial.

54 *Supra*, note 5 at 38.

preliminary because such trials involve a lot of extra time. The formalities attached to a jury trial – from elaborate addresses to the jury – instructions to juries, adjournments, voir dires etc. take a lot of time. My experience is that clients *do not pay* for the time and I've only collected my fees on a few of the trials I have done. I suspect its mostly legal aid clients who have jury trials these days.

This raises a serious question as to the access to jury justice by middle-class clients. A New Brunswick lawyer also observed that, in his province, access to jury trials by legal aid clients was limited to "very serious" offences. This issue was pursued with the respective legal aid bodies across Canada, and we found that, in most of the provinces, the decision on a jury trial was a matter to be financed as of right and was left purely up to the client and his lawyer.[55] In New Brunswick, the decision on a jury trial is subject to the rule that, apart from charges of murder and manslaughter where jury trials are automatic, counsel for the accused must submit a written opinion to the Area Director setting out how and why justice will best be served by a trial by jury.
This policy may indeed support the above lawyer's contention that, in New Brunswick, funding for jury trials is only available for "very serious" offences. A British Columbian practitioner noted that, even if jury trials are funded by legal aid, they are not cost-efficient for the lawyer who must devote "all" of his time to the trial when in progress and at the lower legal aid tariff.

6. Types of Crimes that Go to a Jury
Statistics are not available as to the type of offences that are tried before a jury. To provide some information on this statistically void area, our survey asked the lawyers to indicate in what type of offences they were involved over the past year that were tried before a jury. The results of the ten most cited offences are found on Table 20.

55 Letters were sent to all of the legal aid administering agencies. We received replies from all jurisdictions except Nova Scotia, Prince Edward Island, and the North West Territories. Seven of the jurisdictions indicated an unqualified right to jury trials.

TABLE 20:

Factors	Responses
Sexual Assault	80
Murder[56]	75
Trafficking	31
Fraud	23
Robbery	22
Assault Cause Bodily Harm	21
Break and Enter	21
Theft Over	14
Assault	9
Criminal Negligence	8

The offences listed in Table 20 confirm that a jury is resorted to generally for only serious crimes. The large number of sexual assault cases also is consistent with other studies and with our earlier findings on the reasons given by lawyers for electing trial before a jury. Sexual assault cases are generally "fact" cases dealing with the issues of identification or consent. In consent cases, credibility is critical. The victim is also put on trial.[57] Kalven and Zeisel found almost total disagreement with the judge's ruling on the major charge in "simple rape" cases where there were no aggravating factors, such as evidence of extrinsic violence, multiple assailants, or the parties were complete strangers.[58] Kalven and Zeisel referred to an "assumption of risk" factor:[59]

> Where it perceives an assumption of risk the jury, if given the option of finding the defendant guilty of a lesser crime, will frequently do so. It is thus saying not that the defendant has done nothing, but rather that what he has done does not deserve the distinctive opprobrium of rape.

This study represented mid-1950's attitudes. However, more recent studies still show that juries are more reluctant to convict defendants of rape than other serious crimes and that they remain strongly influenced by the victim's behaviour.[60]

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56 The offence of murder is to be tried before judge and jury unless the accused and the Crown agree to waive the jury trial (*Criminal Code*, s. 473).

57 Hans, *supra*, note 6 at 199-217.
58 Kalven, *supra*, note 1 at 253.
59 *Ibid.* at 254.
60 Hans, *supra*, note 6 at 210-7.

III. CONCLUSION

ESTEY J. IN CLOSING A SPEECH devoted to the jury stated:[61]

> Overriding all other considerations in my mind is the rising conscious or subconscious realization in the community that the jury stands as the last bastion of freedom in a highly organized, albeit democratic, community. This bulwark, as it has for centuries past, protects the individual and his freedom against incursion by the state, paternalistic or otherwise, and this paramount characteristic of the concept of trial by one's peers is the insurance policy of survival of this historic institution in our midst through the 1980's and far beyond.

The primary purpose of our study was to assess the "consciousness" of lawyers towards juries in criminal cases. Up until now, we have had to rely upon anecdotal references to juries contained in writings by lawyers or about lawyers. The survey provides some limited statistical information from which to access alleged lawyer perceptions of the jury.

Perhaps the most significant finding from the survey is how important lawyer opinion is. The vast majority of lawyers canvassed said that the decision to elect trial by judge and jury was theirs to make and not their clients. Further, we found that where lawyer opinion of the jury was most favourable (in British Columbia), the jury appears to be used more and, conversely, where lawyer opinion of the jury was least favourable (in Manitoba), the jury appears to be used less. Therefore, contrary to what Estey J. says, lawyers and not the community at large, play the pivotal role in deciding the fate of the jury in our criminal justice system.

To assist lawyers in making an "informed" decision about juries, here is a summary of the survey findings:

1. Generally lawyers view the jury with favour and have confidence in jury verdicts.

2. Lawyers agree that a judge is more likely to convict than a jury.

3. The lawyer, and not the client, decides whether to have a jury trial.

4. Lawyers have divided opinion concerning the ability of juries to understand complex cases.

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61 Estey, *supra*, note 17 at 11.

5. Lawyers generally agree that it takes longer to get to trial before a jury than before a judge alone.

6. A primary consideration in electing trial by judge and jury is how the facts of the case will influence the jury.

7. Cost is a major consideration in deciding trial by jury.

8. Only serious offences generally go to trial before a jury, and lawyers are divided as to whether jury trials should only be used for the most serious of offences.

9. Election of trial by judge and jury is used most often for sexual assault cases.

The survey also raises a serious question about whether the legal "right" to trial by jury actually is thwarted in practice. A number of possible systemic deterrents to the use of a jury were identified: delay in going to trial before a jury; allegations of higher sentences being imposed on those found guilty by a jury; localized "custom" limiting the use of juries; and, the cost of going to trial before a jury. These issues need further consideration, study and, if necessary, rectification in order to ensure that the right to trial by jury in a criminal case truly is available to all accused.