

Trial by Jury and the Toronto 18

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ABSTRACT

This chapter examines the trial of Fahim Ahmad, Steven Chand, and Asad Ansari, which was the only jury trial in the Toronto 18 prosecutions and the first held under post 9/11 terrorism offences. Part II examines the role of juries in past national security trials. These include those that occurred after the 1837 rebellions; after the assassination of D'Arcy McGhee; after the 1885 Métis resistance; after the Winnipeg General Strike; and after the October Crisis of 1970. The third part examines the public record of the Toronto 18 jury trial, including decisions about what questions could and could not be asked by the accused about potential jurors and the decision to require the three accused to stand in the prisoner's dock. Part IV examines the future of jury trials in terrorism cases in light of the exploration of this topic by the Air India commission and 2019 reforms to jury selection. Although the jury is often conceived as a shield for the individual from the state, it can also be a sword that the state can wield against unpopular accused. Sometimes unpopular accused may be better off selecting, if they can, trial by judge alone.

Keywords: Jury; Challenge for Cause; Prejudice; Political Violence; Terrorism Trials; Race; Religion

I. INTRODUCTION

The Toronto 18 prosecutions included the first jury trial held under Canada's new terrorism offences enacted after 9/11. Fahim Ahmad, Steven Chand, and Asad Ansari chose trial by jury. Ahmad pled guilty in the middle of the jury trial. Chand and Ansari were subsequently found guilty by the jury.

The jury looms large in the collective mythology of Anglo-American criminal justice starting with the reference to a jury of peers in the Magna Carta of 1215. Nevertheless, the criminal jury is used much less in Canada than in the United States, England, and Australia. Moreover, there are real debates about whether the jury is a burden or a benefit for some accused.

Jury trials in Canada are only mandatory when the accused is charged with murder, treason, intimidation of Parliament, or piracy.¹ Parliament did not add the new terrorism offences it created in the aftermath of the 9/11 terrorist attacks to this short list. The accused in the two other trials in the Toronto 18 prosecution selected or “elected” trial by judge alone.

Those accused have a right under subsection 11(f) of the *Canadian Charter of Rights and Freedoms* to a jury trial because they face five years imprisonment or more. In cases of multiple accused, which is frequently the case in terrorism prosecutions, trial judges can also force trial by jury on accused if a co-accused selects trial by jury² unless severance into separate trials is ordered in the interests of justice.³ The Attorney General also can require trial by jury.⁴

A. Outline

The second part of this chapter will discuss the role that juries have played in Canadian trials involving allegations of involvement with political violence or terrorism. These include trials from the 1837 rebellions, Fenian

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¹ Criminal Code, R.S.C. 1985, c. C-46, ss. 469, 473. Even in these cases, there may be a trial by judge alone if both the accused and the prosecutor consent.

² Criminal Code, s. 567.

³ Criminal Code, ss. 473, 591(3). This power has been ordered in cases where the evidence is substantially stronger against one of the accused and where evidence against one accused would not be admissible against another. *R v. Guimond*, [1979] 1 S.C.R. 960, 94 D.L.R. (3d) 1. Canadian courts, however, tend to be reluctant to sever the trials of accused charged in a joint enterprise even when the evidence is, as in the case at hand, more prejudicial against one accused (Ahmad) than the others (Chand and Ansari). For example, in *R v. McLeod* (1983), 6 C.C.C. (3d) 29 at para 6, the Ontario Court of Appeal dismissed an American case (see *Bruton v. United States*, 391 U.S. 123 (1968)) that held separate trials were required in cases where it was unrealistic to expect the jury to separate out the evidence). The Canadian Court concluded: “whether a jury can or cannot rise above such evidence, there is no question that the law presumes they can.”

⁴ Criminal Code, s. 568. This section has been challenged by the accused but upheld under the *Charter*. See *R v. Hanneson* (1987), 31 C.C.C. (3d) 560 (Ont HCJ).

violence and the assassination of D'Arcy McGhee, trials during the Red Scare and after the Winnipeg General Strike, and trials involving the FLQ. Although the jury is conceived as a shield for the individual from the state, it can also be a sword that the state can wield against unpopular accused. Sometimes unpopular accused may be better off selecting, if they can, trial by judge-alone. Indeed, the most controversial acquittal in a Canadian terrorism case – the 2005 acquittal of two men accused of participating in the 1985 Air India bombings – came from trial by judge alone.⁵

The third part will examine what is known about the one jury trial that was held in the Toronto 18 case. Unfortunately, the public record about the jury and its selection is surprisingly scarce. I was unable to discover any press coverage or transcript of the jury selection process or even any media reports about the selection and composition of the jury. What is known, however, is that the trial judge allowed 11 questions to be asked of prospective jurors in an effort to determine whether they could be counted on to act impartially despite the massive pre-trial publicity in the case and the possibility of racial and religious prejudice against the accused who were Muslim and, in the case of Fahim Ahmad and Asad Ansari, were also Brown.⁶

Unfortunately, we do not know how prospective jurors answered these questions and which ones were excluded for not being impartial. We also do not know how or if Ahmad, Chand, and Ansari exercised the 12 peremptory challenges they each had or how the Crown exercised the 36 peremptory challenges it had that allowed it to keep prospective jurors off the jury without providing reasons.⁷ There are also no press reports about how the jury reached their verdict over five days of deliberation. Unlike in the United States, it is illegal for Canadian jurors to disclose their deliberations.⁸ Finally, juries, unlike judges, do not give reasons for their verdicts; they merely announce findings of guilty or not guilty associated with each criminal charge (or that the jury could not come to a unanimous conclusion on a charge or charges in the case of a “hung jury”). Although an appeal was taken from the jury’s conviction of Ansari, the appeal focused

⁵ R v. Malik and Bagri, 2005 BCSC 350.

⁶ R v. Ahmad et al., 2010 ONSC 256 [*Ahmad*]. Chand did not identify as a visible minority and the actual question asked was whether prejudice would result because the accused “could be considered to be members of visible minorities.”

⁷ Criminal Code, s. 634, repealed S.C. 2019, c. C-25, s. 269.

⁸ Criminal Code, s. 649.

on alleged errors of law that the trial judge made in admitting evidence and explaining the law to the jury and not on the jury's verdict itself. In short, the jury room and much of the jury selection process in this case remains opaque.

Part IV will discuss the future role of juries in Canadian terrorism prosecutions. As the Commission on the Air India bombings concluded in its 2010 report, juries are here to stay because of their constitutional entrenchment. About half of those accused of terrorism since 2001 who have gone to trial have elected trial by jury and about a half have elected trial by judge alone. Two accused of involvement in the 1985 Air India bombings that killed 331 people were acquitted in 2005 after a judge-alone trial. The Air India Commission rejected requests by the victims' families to make jury trials mandatory in terrorism trials. It also rejected proposals that terrorism trials should be heard by a panel of three judges as opposed to one trial judge.⁹ Denying the accused a jury trial is more common in Europe – including in Northern Ireland where judge-alone trials were used in terrorism trials – and in many countries on the continent which lack a right to trial by jury.

The jury selection process in Canada has changed since the 2010 Toronto 18 jury trial. Peremptory challenges have been abolished in part in response to an all-white jury's acquittal of a white farmer who killed Colten Boushie, a Cree man. This case, like the Toronto 18 jury trial, raised the sensitive issues of for whom the jury is a benefit and for whom it is a burden. This question is informed by the way that systemic discrimination against Indigenous and racialized groups, as well as against those who are not Canadian citizens, adversely affects the representativeness of Canadian juries. This raises important questions about equality that the late legal philosopher Ronald Dworkin reminded us were fundamental as we debated the shifting balance between liberty and security after the 9/11 terrorist attacks.¹⁰

⁹ Canada, *Commission of Inquiry into the Bombing of Air India Flight 182*, in *Air India Flight 182: A Canadian Tragedy*, vol. 3, Catalogue No. CP32-89/5-2010E (Ottawa: Supply and Services, 2010). I was the research director for this inquiry.

¹⁰ Ronald Dworkin, "The Threat to Patriotism," *New York Review of Books*, February 28, 2002, <https://www.nybooks.com/articles/2002/02/28/the-threat-to-patriotism/>.

II. A SHORT HISTORY OF THE CANADIAN JURY IN CASES INVOLVING POLITICAL VIOLENCE

The jury was seen as an integral part of the English colonial justice system in Canada. Although Quebec was allowed to keep its civilian private law, English criminal law was imposed in Quebec in no small part because of the guarantee of a trial by a jury of peers. The jury was seen as “the glory of the English law” and “the most transcendent privilege which any subject can enjoy.”¹¹ At the same time, allowances had to be made for the geographically large and sparsely populated country. Six-person, as opposed to 12-person juries, were used in the West. The highest court in England upheld Parliament’s jurisdiction to reduce the jury to six people in the 1885 treason trial of the Métis leader Louis Riel.¹²

A. The Riel Trial

The Riel and other trials stemming from the 1885 resistance were held before a six-person jury in Regina who were publicly identified as Protestants (Riel and many of the Métis were Catholic). Father Andre, an observer of the trials, complained that the jurors were “all Protestants, enemies of the Métis and the Indians, against whom they hold bitter prejudices. Before such a jury you cannot expect an impartial judgment.”¹³

Riel, as an American citizen, would have been entitled under the common law to a “mixed jury” of half citizens and half non-citizens had he been tried before such juries were abolished in the middle of the 19th century. If he had been tried a few years later in Manitoba or Quebec, Riel would have been entitled to a distinctly Canadian mixed jury of half Francophones and half Anglophones. These mixed juries were also subsequently abolished as more direct means to protect language rights developed. Nevertheless, mixed juries raise what is today the often-unspoken question of who sits on juries and whether the composition of the jury matters. As I have argued elsewhere, the mixed jury should not be dismissed as a medieval relic or a pernicious capitulation to identity politics. All members of the jury must agree on a verdict.¹⁴ The different perspectives

¹¹ William Blackstone, *Commentaries on the Laws of England*, vol. 3, 8th ed. (1778), 379.

¹² *R v. Riel*, (1885) 10 App Cas 675, 55 L.J.P.C. 28.

¹³ As quoted in Kent Roach, *Canadian Justice Indigenous Injustice The Gerald Stanley and Colten Boushie Case* (Montreal: McGill-Queen’s University Press, 2019), 30.

¹⁴ Roach, *The Gerald Stanley and Colten Boushie Case*, 90–124.

incorporated in a mixed jury are a starting point, not an endpoint. Indeed, in terrorism trials when there may be a lack of understanding, fear, and even hatred of “the other,” mixed juries may foster true impartiality.

B. The 1837 Rebellion Trials

Claims that juries were not impartial have been heard throughout Canadian history, though there is no way to prove or disprove such allegations of bias given the secrecy of jury deliberations. William Lyon Mackenzie condemned one jury after the 1837 rebellions as, “a mock jury selected of the basest, most dependent Tories... picked up by the sheriff at Hagerman’s order.”¹⁵ At the same time, four of the eight Toronto trials that went to trial before a jury resulted in acquittals. The accused in those cases made extensive use of peremptory challenges to eliminate those that they perceived as partisan.¹⁶ It is easy to accuse a jury of being packed of partiality, but far more difficult to establish or rebut such claims.

In response to concerns about jury packing, complex legislation was introduced in 1850 in Upper Canada designed to ensure that all those who were entitled to vote would be eligible for jury duty. The voters’ list, of course, was underinclusive. It excluded women, Indigenous peoples, and those who did not own property. Nevertheless, the 1850 reforms demonstrated some concern that juries be representative and that claims of jury packing and bias could be corrosive to public confidence in the administration of justice.

C. The Fenian Trials

Despite the 1850 reforms, there were failed attempts to challenge panels of prospective jurors in Ontario trials of alleged Fenians or Irish separatists. The Irish-Canadian press reported on, “how carefully the Irish element appears to have been eliminated from the jury panel.”¹⁷ At the same time, it appears that Catholics did serve on some of the juries in some of the Fenian cases. Moreover, some of the alleged Fenian terrorists who

¹⁵ Paul Romney and Barry Wright, “The Toronto Treason Trials March–May 1838,” in *Rebellion and Invasion in the Canadas 1837–1839*, eds. F. Murray Greenwood and Barry Wright (Toronto: University of Toronto Press, 2002), 106.

¹⁶ Romney and Wright, “The Toronto Treason Trials,” 107.

¹⁷ R. Blake Brown, “Stars and Shamrocks will be Sown’ The Fenian State Trials 1866–67,” in *Political Trials and Security Measures 1840–1914*, eds. Barry Wright and Susan Binnie (Toronto: University of Toronto Press, 2009), 53.

were American citizens exercised their common law right as non-citizens to have juries composed of half citizens and half non-citizens.¹⁸ In any event, these cases indicate that fears about religious discrimination, in this case against the Catholic Fenians and in the Riel cases against the Catholic Métis, have been a constant in Canada's history of political violence.

The most famous Fenian trial was the trial of Patrick Whelan for the 1868 assassination of D'Arcy McGee, a Cabinet Minister who opposed the Fenian cause of which Whelan was a part. Whelan was convicted by a jury that was selected after Whelan had exhausted all of the 20 peremptory challenges that were available to him because he was charged with a capital offence. The Crown used peremptory challenges to keep people with Irish names – who might be perceived as sympathetic to the Irish-nationalist Fenian movement – off the jury.¹⁹

Although there were (and still are) an unlimited number of challenges for cause, i.e., challenges on the basis that a prospective juror cannot be impartial, one of Whelan's peremptory challenges was deemed to have been used to challenge a prospective juror who apparently had said before trial: "If I was on Whelan's jury, I'd hang him."²⁰ Another juror, who had said before the trial that it "looked like [Whelan] was guilty," was allowed to serve when he told the court that he had not "made up my mind one way or another."²¹ Today, there are concerns that challenges for cause are not up to the task of ensuring impartiality in an age of 24-hours-a-day news and social media. Truth be told, such concerns have long existed.

There were other problems with Whelan's trial. Prime Minister John A. Macdonald sat on the bench with the trial judge for four days of the trial. The trial judge gave the jury a direction that was favourable to the prosecution. It focused on Whelan's political opposition to McGee²² and

¹⁸ Brown, "Fenian State Trials," 54.

¹⁹ The accused used peremptory challenges to keep people with French names off the jury perhaps because the only witness who testified that he saw Whelan shoot McGee was French-Canadian. T.P. Slattery QC, *'They Got to Find Me Guilty Yet'* (Toronto: Doubleday and Company, 1972), 58.

²⁰ Michael A. Johnston, "Whelan Still Waiting," *Criminal Law Quarterly* 66, no. 19 (2018): 21.

²¹ Johnston, "Whelan Still Waiting," 22.

²² The Crown in its closing argument told the jury "At one time the prisoner was reading a speech by D'arcy McGhee denouncing Fenianism. This excited him greatly, and he said he would 'go up and blow McGhee's bloody brains out.'" The trial judge told the jury that such "violent language could lead to the belief that he [Whelan] intended to assassinate McGhee." See Slattery, *Guilty Yet*, 257, 276.

an alleged jailhouse confession, as well as circumstantial evidence that placed Whelan near the site of the assassination with a pistol. Upon being found guilty, Whelan said that Roman Catholics such as himself “are looked at as traitors, always traitors.” He declared that he was not a Fenian and, moreover, that he was innocent of McGee’s murder.²³ After several unsuccessful appeals on the jury selection issue, with strong dissents concluding that Whelan had been deprived of a challenge of cause,²⁴ Whelan was publicly executed in Ottawa in front of a crowd of 5000 people.

D. Red Scare Trials

Terrorism-type trials involved not only politically motivated violence as in the Whelan trial but also allegations of apprehended political violence. A jury composed mainly of farmers²⁵ convicted union leader R.B. Russell, one of the leaders of the Winnipeg General Strike, of seditious conspiracy in 1919. At trial, Russell wanted to have 12, as opposed to four, peremptory challenges. He was prepared to accept the risk of increased punishment in exchange for eight more peremptory challenges. The trial judge ruled against him.²⁶ Russell argued on appeal that he should have had more than four peremptory challenges in selecting the jury and that he was prejudiced by the introduction of some of the evidence against his co-accused. The Manitoba Court of Appeal dismissed the appeal with a number of judges calling the Winnipeg General Strike “a wide-spread system of terrorism” with citizens “subjected... to terror.”²⁷

²³ Slattery, *Guilty Yet*, 280, 285–86. The trial judge when sentencing Whelan replied: “In this country Irishman are well treated. In this province your sect is equal to any other, and only across the river, you will find it actually superior....” At the time, the accused were not competent witnesses, but they were allowed to speak after the jury’s verdict.

²⁴ The trial judge in Whelan’s case sat on both levels of appeals and voted to uphold his own judgment in part on the basis that he would have denied the challenge for cause in any event. *R v. Whelan*, [1869] O.J. 64 at 275, affirmed in [1868] O.J. 1 at 78–79. Sir John A. Macdonald refused to consent to a delay in the execution that might have allowed an appeal to the Privy Council in England.

²⁵ Kenneth McNaught, “Political Trials and the Canadian Political Tradition,” in *Courts and Trials: A Multidisciplinary Approach*, ed. M.L. Friedland (Toronto: University of Toronto Press, 1975), 149–50.

²⁶ Jack Walker Q.C., “Prologue: The Great Canadian Seditious Trials (2nd Ed.)” *Manitoba Law Journal* 42, no. 5 (2019): 71

²⁷ *R v. Russell* (1920), 51 D.L.R. 1 at 11, 29, 33 C.C.C. 1 (Man CA).

In a subsequent sedition trial in 1919, seven co-accused argued that the Crown's ability to make unlimited stand asides of prospective jurors allowed it to pack the jury. The accused offered to simply take the first 12 jurors randomly selected. Both the Crown and the trial judge rejected the offer after having consulted with the Court of Appeal. A junior prosecutor in 1919 who subsequently became President of the Exchequer Court, Joseph T. Thorson, recalled that the Crown had a "dossier" prepared by the Mounted Police on all prospective jurors. He was "shocked at the fact that it... [was] possible to pack a jury, strictly in accordance with the law, in such a way that there is no possibility of an acquittal for the accused, and I believe that this was the situation in the case of the trial of the strike leaders."²⁸

Later during the Red Scare, Tim Buck and eight others were convicted of being members of an unlawful association. The jury only deliberated for two hours, and the accused were sentenced to five years imprisonment.²⁹ The judge told the jury that while section 98 of the *Criminal Code*, which prohibited groups that would bring about "governmental, industrial or economic change" by "force or violence" was criticized by the accused as a "harsh law" and "whether it is harsh or not, it is the law... it is the duty of every loyal Canadian citizen to peacefully submit to the law."³⁰ An alternative "workers jury" found Buck not guilty even though Buck and his co-accused had challenged many on his real jury and obtained a jury of "trade workers and farmers."³¹

E. FLQ Trials

Pierre Vallières was convicted by a jury of manslaughter and sentenced to life imprisonment for his alleged involvement in a 1966 FLQ bombing. Much of his trial focused on his radical writings and the prosecutor improperly warned the jury: "[g]entlemen, free the accused [Vallières] and you will know what will happen." His conviction was overturned on appeal, in part because of the prosecutor's (apparently successful) appeal to the

²⁸ Walker, "Canadian Seditious Trials," 177.

²⁹ Reg Whitaker, Gregory S. Kealey, and Andrew Parnaby, *Secret Service: Political Policing in Canada from the Fenians to Fortress America* (Toronto: University of Toronto Press, 2012), 121.

³⁰ Dennis G. Molinaro, *An Exceptional Law: Section 98 and the Emergency State, 1919–1936* (Toronto: University of Toronto Press, 2017), 116.

³¹ Molinaro, *An Exceptional Law*, 94.

jury's "passion and prejudice."³² Nevertheless, Vallières was convicted by jury on a retrial only to have that jury conviction overturned again by the Quebec Court of Appeal.³³ Some in Quebec, such as Dr. Henry Morgentaler who was acquitted multiple times by juries for violating Canada's restrictive abortion law, would have seen the jury as an important shield from the state. Vallières, the Marxist and author of *Nègres blancs d'Amérique*, would likely have seen the jury more as a sword. He certainly did better once his case was considered on appeal by independent and professional judges as opposed to lay jurors.

In his trial for the murder of Quebec Cabinet Minister Pierre Laporte during the October Crisis of 1970, Paul Rose was six times denied the right to use a peremptory challenge (ie. without giving reasons) after he unsuccessfully challenged the impartiality of prospective jurors on the basis that they were prejudiced against him by pre-trial publicity and his involvement in the FLQ. In a 3:2 decision, the Quebec Court of Appeal confirmed Rose's murder conviction even though the English common law had allowed the accused to use peremptory challenges after a failed challenge for cause that itself might prejudice a juror against the accused.³⁴

F. Is Trial by Jury a Benefit for those Accused of Terrorism?

The above historical cases raise the question of whether trial by jury is always of benefit for unpopular accused.³⁵ The Canadian *Criminal Code* was amended in 1909 to allow the Attorney General to require trial by jury even in cases where the accused elected trial by judge alone.³⁶ The amendment was explained in Parliament as responding to the possibility that an accused might want a trial by a judge alone who was "unduly friendly to the accused."³⁷ Eighty years later, the Supreme Court of Canada rejected the

³² R v. Vallieres, [1970] 4 C.C.C. 69 (QC QB).

³³ R v. Vallieres, (1973) 15 C.C.C. (2d) 241 (QCCA).

³⁴ R v. Rose (1973), 12 C.C.C. (2d) 273 (QCCA).

³⁵ For other arguments, including those based on social science evidence that jurors may not be able to follow warnings from judges or understand the complexity of expert evidence, see Benjamin L. Berger, "Peine Forte et Dure: Compelled Jury Trials and Legal Rights in Canada," *Criminal Law Quarterly* 48, no. 2 (2003): 205-48.

³⁶ An Act to amend the Criminal Code, S.C. 1909, c. 9, s. 2.

³⁷ As quoted in J.C. Martin Q.C., *Martin's Criminal Code, 1955* (Toronto: Cartwright and Co., 1955), 785.

argument made by a woman who was accused of hiring someone to kill her husband that she had a right to a judge alone.³⁸

Today, jury trials for murder and treason (but not terrorism) remain mandatory unless the Attorney General and the accused both consent to trial by judge alone. Canada's longest terrorism trial involving the 1985 Air India bombings was held before a judge sitting alone even though it involved murder counts. It resulted in the acquittal of both men charged with the murder of 331 people.³⁹ As will be seen in Part IV of this chapter, this led to opposition by some, including the families of the 331 victims of the Air India bombings, to trial by judge alone. The operative assumption here was that a jury would have been more likely to have convicted those accused of the deadliest act of terrorism in Canadian history.

The Supreme Court has affirmed the secrecy of jury deliberations⁴⁰ and held that it would not inquire when a juror complained that another juror had used racial slurs during deliberations. In contrast, the United States Supreme Court has allowed such an inquiry.⁴¹ In general, the United States is less protective of its juries than Canada. The United States allows prospective jurors to be extensively screened by the parties before they are selected. It attempts to control the discriminatory use of peremptory challenges either by prosecutors or the accused. It also allows jurors to be interviewed by the press after they have reached their verdicts. The Canadian jury, including the one used in the Toronto 18 case, remains a particularly opaque black box.

III. THE TORONTO 18 TRIALS AND TRIAL BY JURY

Two of the Toronto 18 trials were conducted before a judge alone and resulted in convictions of one adult and one youth. The third and last trial resulted in Steven Chand and Asad Ansari being convicted by a jury and Fahim Ahmad pleading guilty during the middle of the trial.

³⁸ R v. Turpin, [1989] 1 S.C.R. 1296, 48 C.C.C. (3d) 8. For a similar conclusion in the United States, see *Singer v. U.S.*, 380 U.S. 24 (1965). But for powerful arguments that the jury can be a disadvantage, see Berger, "Compelled Jury Trials."

³⁹ Canada, *Bombing of Air India Flight 182*.

⁴⁰ R v. Pan, 2001 SCC 42 at para 17, [2001] 2 S.C.R. 344.

⁴¹ Peña-Rodríguez v. Colorado, 137 S. Ct. 855 (2017).

A. Jury Selection and Questions Asked of Prospective Jurors

In late March 2010, the *Toronto Star* reported that:

[T]he court will begin the arduous task of vetting 1,168 prospective jurors. It's expected that it will take about a week and a half to sift out those who, for various reasons, cannot sit through the trial, which could last up to two months. Then lawyers will begin to whittle down the pool of prospective jurors with a list of 11 carefully crafted questions until they select 12. The selection process could last up to a month.⁴²

In fact, the process of selecting the jury took only a week.⁴³

B. Yes to Eight Questions about Pre-trial Publicity

The trial judge, Justice Fletcher Dawson, decided that 11 questions would be asked of the prospective jurors to determine if they would be impartial and decide the case only on the basis of the evidence that they heard. He allowed the following eight questions about exposure to the extensive pre-trial publicity in the case, including those surrounding the June 2006 arrests and press conference. This included reports of planned attacks and beheadings at Parliament, which were allegations that would feature in the Crown's case against Fahim Ahmad:

On June 2, 2006, the accused in this case were arrested and charged with terrorism-related offences. They are part of a case that has been referred to in the media as the "Toronto 18."

1. Have you seen, heard or read anything about this case, on the television or the radio or in the newspapers?
2. Have you seen, heard or read anything about this case on the internet?
3. Have you talked about this case with anyone?
4. Have you heard anyone talk about this case?
5. (If applicable) Would you describe your memory of what you have seen, heard or read as strong, fair or poor?
6. (If applicable) As a result of anything you have seen, heard or read, have you formed an opinion about the guilt or innocence of the accused?

⁴² Isabel Teotonio, "Last three Toronto 18 defendants head to trial: Month-long jury process will begin Monday as landmark terrorism case enters its final phase," *Toronto Star*, March 22, 2010.

⁴³ "Nearly Four Years After Toronto 18 Arrests Last Trial in Terror Case Begins," *City News*, April 11, 2010, <https://toronto.citynews.ca/2010/04/11/nearly-four-years-after-toronto-18-arrests-last-trial-in-terror-case-begins/>.

7. (If applicable) Would you describe the opinion you have formed as strong?

8. Despite any opinion that you may have formed, would you be able to set that opinion aside and decide the case based only on the evidence at trial and the instructions of the trial judge?⁴⁴

These questions sought much preliminary information about what the prospective juror had heard from conventional media and “the internet” before asking the last question about whether the juror could set aside any opinions and decide the case only on the evidence at trial. As such, the questions seemed better designed to reveal the exposure of prospective jurors to prejudicial pre-trial publicity than relying on the last question, which demanded a simple and blunt yes/no response.⁴⁵

The eight questions also provided the parties with information that they might use to bring peremptory challenges even if the two jurors appointed to judge the prospective jurors’ responses to these questions accepted a prospective juror as impartial. The trial judge allowed these eight questions despite the traditional concerns that Canadian judges have displayed about protecting the privacy of prospective jurors. Canadian courts have traditionally avoided extensive questioning because of concerns about the privacy of prospective jurors.⁴⁶ The eight questions allowed in this case responded to the reality of the extensive and prejudicial pre-trial publicity in the case.⁴⁷

⁴⁴ *Ahmad*, ONSC at para 53.

⁴⁵ The Crown proposed a single question, namely: “There has been substantial media coverage of this case. Will you be able to set aside anything you have heard or seen about this case in the media and reach a verdict based solely on the evidence you hear in this court room and the instructions you receive from Justice Dawson?” See *Ahmad*, ONSC at para 12.

⁴⁶ *R v. Hubbert* (1975), 29 C.C.C. (2d) 279 (Ont Sup Ct).

⁴⁷ On an application for a publication ban, Justice Sprout recognized: “Simply put this case must be near the top of the list in terms of cases in which massive and sustained media coverage raises a concern that fair trial rights may be compromised. The allegations could not be more sensational involving attacks on politicians and on public buildings. The allegations are also of a type likely to evoke an emotional or prejudicial response given that the terrorist threat alleged would pose a general threat to members of the public going about their ordinary lives. There would be few people in Peel Region who would not themselves, or have family or friends who, ride the Toronto subway and frequent public buildings. Prospective jurors would recognize themselves as possible targets of the conduct alleged.... For a multitude of reasons this is an emotionally charged case. It stands to reason that strong emotions may cause or contribute to, and I paraphrase Chief Justice Lamer, impressions that cannot be consciously dispelled.” See *R v. N.Y.*, 2008 CanLII 13374 at paras 37–39 (ON SC).

In contrast to the above questions on pre-trial publicity, the trial judge would only allow more simplistic “yes/no” questions about whether prospective jurors would be able to decide the case fairly given that the accused were visible minorities and Muslim.

C. No to Multiple Choice Questions About Racial Prejudice

Jamaal James (who was a co-accused who would subsequently plead guilty and was the only Black accused) was, “not content with a question calling for a yes or no answer. He submit[ted] that a multiple-choice answer would be more effective in uncovering bias and would assist the triers in deciding whether the prospective juror is impartial.” James proposed that the following be read to prospective jurors after a question about their ability to decide the case impartially and without racist bias was asked:

“Which answer most accurately reflects your answer to that question?

- (a) I would not be able to judge this case fairly.
- (b) I might be able to judge this case fairly.
- (c) I would be able to judge this case fairly.
- (d) I do not know if I would be able to judge this case fairly.”

Justice Dawson rejected this request despite James’ reliance on a decision by Justice Durno that would have allowed such a question after Justice Durno had heard expert evidence that such questions were more effective in revealing racist bias.⁴⁸ Justice Dawson was concerned about “perverse

⁴⁸ See *R v. Douse*, 2009 CanLII 34990 at para 195 (ON SC) where Justice Durno stated: “I accept there are problems with the question. First, it is a complex question with the potential juror having to ask themselves two questions. Second, the manner in which the question is often asked with the potential juror hearing the question for the first time when asked in the witness box, can lead to jurors who would be impartial being rejected because they think about their answer to a complex question. Third, the question calls for either a ‘yes’ or ‘no’ answer, with no variations available. Fourth, the challenge is determined on the basis of one word from the potential juror.” He added: “the applicant submits that multiple-choice answers provide the triers with more and better information because the issues being addressed are complex and individuals’ beliefs cannot always be defined by a ‘yes’ or ‘no’ answer. I agree. Giving the potential jurors several options for responding would allow them to more accurately provide their self-evaluation. It would give the triers a more accurate answer than the ‘yes’ or ‘no.’ While this variation would lengthen the challenge for cause procedure marginally, subject to a re-assessment after it was used in court, I do not see the increased time as a reason to maintain the one-word answers. I am also not persuaded at this time that

results.” For example, a juror who testified that they did not know whether they could judge the case fairly might still be accepted as impartial and sit on the jury. The judge also doubted that he would have authority under the *Criminal Code* to intervene in such an eventuality.⁴⁹ Finally, he also expressed concerns that the multiple-choice question would intrude on the privacy of the prospective jurors and take more time. He stressed that all of these reasons cumulatively influenced his decision not to allow the multiple-choice question.⁵⁰

D. Yes to One Question about Racial Prejudice

In the end, prospective jurors were only asked one question about racial prejudice, namely: “All of the accused could be considered members of visible minorities. Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the men charged could be considered to be members of visible minorities?”⁵¹ This question begged a simple yes or no response. It did not examine the potential interaction between the accused’s colour, their religion, the pre-trial publicity, and the nature of the charges that they faced. In fairness to the trial judge, the courts have rejected challenges on the basis of the nature of the charges in cases dealing with drugs and sexual assault.⁵² The issue here, however, is the possible interaction of racial and religious prejudice with both pre-trial publicity and the allegations of terrorism made at the trial.

The trial judge’s conclusion that the privacy of the jurors would be threatened if they were invited to provide a range of answers or that the jury selection process would be less efficient are not, in my view,

this form will lead to applications to ask further questions to qualify the answers.” See also Regina Schuller, Veronica Kazoleas, and Kerry Kawakami, “The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom,” *Law and Human Behavior* 33, no. 4 (2009): 320 which found that the one blunt question was not effective in screening for racial bias but finding more open-ended or reflective questions made people more aware about how racial bias may affect their judgment.

⁴⁹ *Ahmad*, ONSC at para 31. The decision about impartiality was, at the time, made by two triers otherwise qualified as jurors.

⁵⁰ *Ahmad*, ONSC at para 33. In a subsequent terrorism trial, questions designed to reveal whether prospective jurors were “unsure” about the ability to put aside prejudices were also disallowed. See *R v. Jaser*, 2014 ONSC 7528 at para 17.

⁵¹ *Ahmad*, ONSC at para 51.

⁵² *R v. Parks*, 1993 CanLII 3383, 65 O.A.C. 122 (ONCA); *R v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863.

convincing. The multiple questions would not have added substantially to the time spent on questioning. In addition, they would not have intruded into privacy. For example, they did not even ask why a prospective jury selected one answer compared to three alternative answers.

The strongest justification for not allowing the multiple-choice question may be the harm that might be caused should some of the jurors have admitted that they did not know whether they could judge the case fairly or that they might not be able to do so, but who nevertheless may have been accepted by the two triers as impartial and capable of sitting on the jury. The single question asked about racial prejudice would require a binary and perhaps simplistic “yes” or “no” answer.

E. No to Six Questions about Religious Prejudice

With respect to potential religious prejudice, Steven Chand proposed the following six questions to be asked of prospective jurors:

From what you may, at any time, have seen, read or heard, have you formed an opinion that a Muslim would be more prone to acts of violence than those who follow other faiths?

Would you describe this opinion as a strong one?

Despite any opinion you may have formed, would you be able to set that opinion aside and decide the case only on the evidence at trial and according to the instructions of the trial judge?

From what you may, at any time, have seen, read or heard, have you formed an opinion that a Muslim would be more prone to acts of terrorism than those who follow other faiths?

Would you describe this opinion as a strong one?

Despite any opinion you may have formed, would you be able to set that opinion aside and decide the case only on the evidence at trial and according to the instructions of the trial judge?

Like the multiple-choice questions on pre-trial publicity, these questions had an ability to enter into a conversation with prospective jurors that might reveal any bias they might have associating Muslims with violence and explore the strength of that bias. The questions also would have placed the parties in a more informed position to exercise preemptory challenges.

Chand’s six proposed questions seem closely patterned on the questions that the trial judge allowed concerning pre-trial publicity. Nevertheless, Justice Dawson emphatically rejected them as “intrusive

inquiries into the opinions and beliefs of prospective jurors that appear to be directed at finding out what kind of person they are for the purpose of deciding whether to exercise a peremptory.”⁵³ The trial judge’s objections may have been well-founded about another proposed question he rejected that would have asked prospective jurors whether they had attended a 9/11 memorial service.⁵⁴ But the judge’s rejection of Chand’s proposed questions discounted the reality of stereotypes associating Muslims with terrorism. In my view, there was a realistic possibility in Toronto in 2010 that at least some jurors might be more willing to conclude that a young Brown Muslim man had a terrorist intent as opposed to a young white man with no religious convictions.

Even accepting an assumption “that many Canadians believe that Islam is more violent than other religions”, Justice Dawson concluded:

[T]his does not establish a bias supporting a conclusion that some members of the jury panel may not be able to act impartially. As the Crown submits, and I agree, there is a difference between believing that terrorist offences are disproportionately committed by Muslims, and believing that all Muslims are prone to commit terrorist offences. While an informed prospective juror might reasonably believe that terrorism offences are disproportionately committed by a small subset of Muslims, that does not mean that they believe that the average Muslim is prone to commit a terrorist offence. An analogy might be drawn to asking jurors whether they believe that men are more likely to commit sexual assault than women. Most jurors would probably say yes. However, that does not mean that there is a reasonable prospect that they would exhibit partiality against all men charged with sexual assault.⁵⁵

The trial judge’s analogy to men accused of sexual assault failed to capture the cumulative effects of pre-trial publicity and the intersection of racial and religious bias that produced stereotypes associating Brown, Muslim men with terrorism. It also avoided the issue that many jurors who would resist reasoning that men, because they are men, are likely to commit sexual assault would either be men themselves or have close family and

⁵³ *Ahmad*, ONSC at para 39.

⁵⁴ As the trial judge concluded: “The fact that a prospective juror felt sympathy for the victims of those tragic events does not readily translate into a realistic prospect that they may not be impartial in judging the innocence or guilt of the accused in this unrelated case.” *Ibid* at para 19. In another terrorism trial, a judge rejected a question to prospective jurors about his support of security certificate detainees on the basis that it did not relate to a realistic possibility of bias. See *R v. Hersi*, 2014 ONSC 1303 at para 28.

⁵⁵ *Ahmad*, ONSC at para 41.

friends who were men. It was less likely that jury members themselves would be Muslim or have close family or friends who were Muslim.

The trial judge also disputed the relevance of a 2005 opinion poll limited to 100 people in part because Brampton, where the trial was held, “is very multicultural”⁵⁶ with half of its residents being born outside of Canada. Brampton is indeed diverse, but some visible minorities would be ineligible for jury duty if they were not Canadian citizens. In 2016, a study suggested that only 7% of jurors in trials in Brampton were Black and 7% were Brown, even though visible minorities constituted 73% of Brampton’s population.⁵⁷ The courts have been defensive when it comes to challenges to the representativeness of Ontario juries. They have rejected *Charter* challenges to the exclusion of permanent residents from juries⁵⁸ and the under-representation of visible minorities on suburban Toronto juries.⁵⁹

F. Yes to Two Questions about Religious Prejudice

The one concession that the trial judge did make was to follow Ansari’s counsel’s request for a question that asked whether prospective jurors would be “affected by the fact that the men charged are Muslims who are alleged to have planned to target non-Muslim Canadians?” This question came closer to naming the type of bias that could have promoted an “us versus them” attitude among the jurors, though it stopped short of naming the bias as one associating Muslims with violence and terrorism. This question was appropriate, but it is not clear why it invaded the privacy of prospective jurors less than Chand’s proposed questions. Given the extensive publicity surrounding the case, its racially and religiously charged atmosphere, and the fact that over 1,000 prospective jurors would be

⁵⁶ *Ahmad*, ONSC at para 40.

⁵⁷ Ebyan Abdigir et al., “How a broken jury list makes Ontario justice whiter, richer and less like your community,” *Toronto Star*, February 16, 2018, <https://www.thestar.com/news/investigations/2018/02/16/how-a-broken-jury-list-makes-ontario-justice-whiter-richer-and-less-like-your-community.html>. Since that time, Ontario has changed to a more inclusive source list for jurors based on health cards. See Robert Cribb and Jim Rankin, “Ontario to expand pool for jury selection: Move to OHIP database from property ownership follows Star/Ryerson investigation,” *Toronto Star*, April 19, 2019.

⁵⁸ *R v. Church of Scientology of Toronto* (1997), 99 O.A.C. 321, 1997 CanLII 16226 (ONCA); *R v. Laws* (1998), 165 D.L.R. (4th) 301, 1998 CanLII 7157 (ONCA).

⁵⁹ *R v. Hoffman*, 2019 ONSC 2462. For my additional arguments about the defensiveness of the judiciary with regards to jury representativeness, see Kent Roach, *Canadian Justice Indigenous Injustice: The Gerald Stanley and Colten Boushie Case* (Montreal: McGill Queens Press, 2019), 90–125.

summoned to the Brampton Courthouse, it seems that public confidence could have been broadened had Chand's six proposed questions been asked even if more prospective jurors would have been rejected as a result.

The two questions asked of prospective jurors about possible religious prejudice and the last of the total 11 questions asked were:

10. Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the men charged are Muslim?

11. Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the men charged are Muslims who are alleged to have planned to target non-Muslim Canadians?⁶⁰

These questions asked for simple "yes" or "no" responses from prospective jurors, though the last question had the potential for them to reflect whether they would have been unable to judge the evidence impartially if the victims of planned violence were "non-Muslim Canadians." The focus on non-Muslim potential victims begged the question that some of the potential victims may have been Muslim and suggested that prejudice was a matter of animosity between religions as opposed to stereotypes associating terrorism with Islam.

Unfortunately, there was no press reporting of how jury selection was done and no available transcript. I could also not find any press reports about the gender, racial, or presumed religious composition of the jury.⁶¹ In a subsequent ruling holding that Asad Ansari had placed his character in issue and that religious and ideological evidence that Justice Dawson had originally ruled inadmissible could now be used by the Crown, the trial judge described the jury as "relatively youthful and very multicultural."⁶²

The lack of media reporting on jury selection is troubling. It suggests complacency about the danger of racial and religious prejudice and prejudice in this emotive and highly publicized case. It is not possible to make any judgments about how the jury selection unfolded. For example,

⁶⁰ *Ahmad*, ONSC at para 51.

⁶¹ In Canadian law, a juror is a juror so long as they are Canadian citizens and otherwise qualified under s. 638 of the *Criminal Code*, including being competent in the language of the trial. The media, however, is not limited to the legal meaning. It could have, as it occurred in the subsequent Stanley/Boushie case, defined the jury on the basis of its perceived racial composition. On the differences between legal and media discourses, see Richard Nobles and David Schiff, *Understanding Miscarriages of Justice* (Oxford: Oxford University Press, 2000).

⁶² *Ahmad*, ONSC at para 10. For further discussion, see Emon and Mahmood in this volume.

we do not know whether prospective jurors' answers to the above questions revealed widespread bias or pre-judgment of the case. We do not know how the prosecution used the 36 peremptory challenges available to it or how Ahmad, Chand, and Ansari exercised the 12 peremptory challenges that they each had and the degree to which this may have responded to the answers given by prospective jurors on the challenge for cause or attempts to make the jury representative. In the end, the process of jury selection remains as opaque as the jury's five days of deliberations even though the former was done in open court. This is consistent with an attitude that maximizes the privacy of jurors and complacency about the composition or preliminary views expressed by jurors. It seems to assume the less we know about our juries, the better.

G. The Accused in the Dock

The three accused lost a preliminary motion to be able to sit with their lawyers at the counsel table. The trial judge, Justice Dawson, indicated that: "While I am generally inclined to permit accused persons to sit outside the dock whenever possible, I am not convinced that prejudice accrues from being seated in the dock."⁶³ He stressed that this was a high-profile case, the accused were charged with terrorism, that two of them, Ahmad and Chand, had been convicted of institutional violations while detained for close to four years in pre-trial custody. In order to treat all the accused the same, all three, including Ansari who had been granted bail, would sit together in the prisoner's dock. The effect that this may have had on the jury is not known. There is, however, some social science evidence suggesting that juries are more likely to find accused who sit in the dock guilty.⁶⁴

The trial took nine weeks. Press reports of the Crown prosecutor's opening submissions focused on Ahmad with the prosecutor telling the jury: "Fahim Ahmad began to talk about his plans to strike specific Canadian targets: Parliament, electrical grids, nuclear stations.... His plan was to cripple Canadian infrastructure."⁶⁵ Ahmad seemed to be the focus of the trial, though he would later plead guilty, and the jury would never get to deliver a verdict about him.

⁶³ R v. Ahmad et al., 2010 ONSC 1777 at para 20.

⁶⁴ Meredith Rossner et al., "The Dock on Trial: Courtroom Design and the Presumption of Innocence," *Journal of Law and Society* 44, no. 3 (2017): 317-44. I thank Michael Johnston for bringing this study to my attention.

⁶⁵ Allison Jones, "Criminal Toronto 18 trial opens," *The Guelph Mercury*, April 13, 2010.

Steven Chand's lawyer, Michael Moon, argued that his client "was no more than a potential recruit" who saw the Washago camp as focused on "winter survival tactics." He brought out that Chand would frequently leave the camp to smoke marijuana. He argued that Ahmad was "critical and mocking of Steven [Chand] for his peaceable and non-jihadi ways."⁶⁶ It was also reported that Chand would sometimes fall asleep at trial before the jury and that he "petulantly" replied "do I have to" after his lawyer told him to stay awake.⁶⁷

Asad Ansari's lawyer, John Norris, argued that his client "was nothing but an extra in the video to fill out the numbers, to make the events look more impressive" and that he did not know the true purpose of the terrorist camp. He left before Ahmad's "Fall of Rome" speech calling for the destruction of Western society. At the same time, the jury "viewed video of the Washago camp, in which participants clad in camouflage clothing shot guns and hoisted a black flag of the style closely associated with international terrorist groups. The jury has heard weeks of evidence about how camp participants practiced military-style drills, from marches to obstacle courses, and listened to a send-off speech from ringleader Fahim Ahmad calling for the destruction of [W]estern society."⁶⁸

The Crown also introduced evidence from a CD found in Ansari's bedroom that included photos of Osama bin Laden and masked militants holding automatic weapons and argued that this material was suggestive of Ansari's intentions.⁶⁹ In turn, Norris argued that his client was "an intelligent, curious young man who was interested in many things" and that "possessing such items is simply part of being a well-informed member of society."⁷⁰ Ansari also testified that 9/11 was a "watershed moment...after that where did I belong?" and that he "was adrift. I was lost. I had no

⁶⁶ Megan O'Toole, "Chand opposed extremism, lawyer says: 'Toronto 18' Case: Argues client was not part of 'inner circle,'" *National Post*, June 9, 2010.

⁶⁷ Allison Jones, "Last of so-called Toronto 18 terror cases in the hands of the jury," *Canadian Press*, June 18, 2010.

⁶⁸ Megan O'Toole, "Accused was 'nothing but an extra' in terror video: lawyer: Toronto 18 Case," *National Post*, June 8, 2010.

⁶⁹ Megan O'Toole, "Toronto 18 accused 'scared of weapons,'" *National Post*, May 26, 2010, A6.

⁷⁰ Allison Jones, "Accused Toronto 18 member didn't know of plot, did nothing criminal, lawyer says," *Canadian Press*, June 7, 2010.

direction in life.” He testified that he considered both suicide and fighting for the insurgency in Iraq, but “quickly abandoned that idea.”⁷¹

H. Ahmad’s Guilty Plea

In May 2010, mid-way through the nine-week trial, Fahim Ahmad pled guilty to all charges. This was front-page news. It was also news to the jury who was told by the trial judge: “Mr Ahmad is no longer with us. Mr Ahmad last week decided to change his plea to guilty.” The trial judge then explained that the guilty plea had “no impact on the guilt or innocence of the two men who remain on trial.”⁷² This may have been too much to expect from the jury. Ansari’s lawyer, John Norris, unsuccessfully made this argument in an unsuccessful attempt to obtain a mistrial. The trial judge concluded that instructions to the jury not to use evidence against Ahmad against Ansari would be sufficient even though the evidence included 48 intercepts and Ansari was only a party in three of them.⁷³ This meant that the jury had the difficult job of separating the evidence against Ahmad, apparently including intercepts where he said they should go to Parliament to “cut off some heads” and “kill everybody,”⁷⁴ from the evidence against the remaining two accused.

I. Verdict

After five full 12-hour days of deliberations, the jury found Chand and Ansari guilty of participating in a terrorist group and also found Chand guilty of a fraud charge. The defence lawyers of both men expressed disappointment with the verdict. Chand’s lawyer, Michael Moon, told the press: “Given the broad expanse of the law, anything could be caught up by it. You don’t have to have done much to be caught for terrorism.” Lead prosecutor Croft Michaelson said: “It was the result that we had always hoped for and expected.” Mubin Shaikh, the informant who infiltrated the terror cell, said he “completely disagreed” with the jury’s finding in respect

⁷¹ Megan O’Toole, “‘I was adrift, lost’: Toronto 18 suspect,” *National Post*, May, 2019.

⁷² Allison Jones, “Guilty plea in mid-trial from ringleader of so-called Toronto 18 terror group,” *Canadian Press*, May 10, 2010.

⁷³ *R v. Ansari*, 2010 CarswellOnt 11152 at para 2.

⁷⁴ Jones, “Guilty plea.”

to Chand, whom he believed was innocent. “The jury did what they were called to do... I may disagree with the decision, but I accept the decision.”⁷⁵

J. The Different Culpability of the Three Accused

Several other chapters in this book examine the sentencing and parole of the Toronto 18.⁷⁶ The sentences received by the three men are relevant here because they demonstrate how the jury heard evidence about three accused with very different levels of involvement.

Fahim Ahmad was the leader and the most culpable. He pled guilty not only to participating in a terrorist group but also to importing firearms and instructing people to carry out activities for the purpose of a terrorist group. In sentencing him to 16 years imprisonment, the trial judge explained:

Mr. Ahmad must bear considerable responsibility for embroiling other young men in his hateful pursuits. The wiretaps and other intercepts are replete with Mr. Ahmad fostering his views, instilling hatred and justifying terrorist acts in Canada on religious grounds. Mr. Ahmad is substantially responsible for virtually ruining the lives of a number of other young men who became involved in terrorist activities and now stand convicted of terrorism offences as a result of Mr. Ahmad's proselytizing.⁷⁷

It is not known the extent to which the strong evidence against Ahmad – including his statements about storming Parliament – may have influenced the jury even after Ahmad had pled guilty during the trial.

Steven Chand attended the Washago training camp for its full 13-days duration. Chand also took a subsequent trip with the ringleaders to scout a location to hide in the far north of Ontario.⁷⁸ The trial judge sentenced Chand to nine years two months.⁷⁹

The least culpable of the three accused was Asad Ansari, the only accused who was already on bail at the time of the trial. Ansari attended the camp from December 24 to December 29, 2005.⁸⁰ He was sentenced to six years and five months, which amounted to time served. It was one of

⁷⁵ Megan O'Toole, “Final two ‘Toronto 18’ accused found guilty,” *National Post*, June 23, 2010.

⁷⁶ See Michael Nesbitt and Reem Zaia in this volume.

⁷⁷ *R v. Ahmad*, 2010 ONSC 5874 at para 56.

⁷⁸ *R v. Chand*, 2010 ONSC 6538 at para 36.

⁷⁹ *Chand*, ONSC at para 95.

⁸⁰ *R v. Ansari*, 2015 ONCA 575 at paras 20, 25–27.

the lowest sentences received in a terrorism case not involving a youth.⁸¹ The unanswered question was whether the jury struggled or was successful in separating the different evidence that they heard against the three accused.

K. Ansari's Appeal

Only Ansari appealed his conviction or finding of guilt. He argued that the trial judge had erred when he told the jury:

If you were satisfied that while at the winter camp he offered his computer skills for the benefit of, at the direction of or in association with the terrorist group that would constitute participation in or contribution to the activities of the terrorist group under the first part of this question.⁸²

The Ontario Court of Appeal held that the trial judge did not err because he could not have been expected, in the 2010 trial, to tell the jury about requirements that the Supreme Court would introduce in 2012 when upholding the broadly worded offence from a *Charter* challenge on the basis of overbreadth. Specifically, the jury in Ansari's trial was not told that participation should not include:

Innocent or socially useful conduct that is undertaken absent any intent to enhance the abilities of a terrorist group to facilitate or carry out a terrorist activity", and "conduct that a reasonable person would not view as capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity.

These were activities that the Supreme Court of Canada effectively readout of the participation offence before it held in 2012 that it was not constitutionally overbroad.⁸³ One can only speculate whether the jury would have viewed Ansari's actions in a more benign light if they had been given such an instruction.

A critical issue at trial was whether the Crown had proven, beyond a reasonable doubt, the key subjective fault requirements that Ansari

⁸¹ R v. Ansari, [2010] O.J. No. 6371. See generally Michael Nesbitt, Robert Oxoby, and Megan Potier, "Terrorism Sentencing Decisions in Canada Since 2001: Shifting Away from the Fundamental Principle and Towards Cognitive Biases," *UBC Law Review* 52, no. 2 (2019): 561-64.

⁸² *Ansari*, ONCA at para 168, leave to appeal denied 2016 CanLII 18915 (SCC).

⁸³ R v. *Khawaja*, 2012 SCC 69 at para 53 as quoted in R v. Ansari, 2015 ONCA 575 at para 179, leave to appeal denied (SCC). Note that I represented the British Columbia Civil Liberties Association in *Khawaja*, and it argued (unsuccessfully) that the participation offence violated the *Charter*.

knowingly participated in a terrorist group and did so for the purpose of facilitating its ability to commit a terrorist act. It is likely that the jury disbelieved Ansari's testimony that he had no such knowledge about the group and intent to facilitate its ability to commit a terrorist act.⁸⁴ A jury's determinations of credibility are difficult to appeal in part because the jury does not give reasons for deciding why it believed or did not believe a witness, including the accused. If the case had been heard by judge alone, it is possible that the judge's reasons may have revealed appealable flaws, such as misapprehension of evidence,⁸⁵ or logical flaws in the reasoning process.⁸⁶ For example, a trial judge who said that he or she had relied upon some of the evidence relating to Ahmad's actions and words to convict Ansari might well result in an appeal court holding the verdict to be unreasonable. The same might occur if a trial judge had fixated on some of the prejudicial political and religious evidence that was entered against Ansari. It is much more difficult to hold that a jury's simply "guilty" verdict is deficient or unreasonable.

Writing for the Court of Appeal, Justice Watt stressed that the trial judge's decision to admit Ansari's undated departure letters to his family suggesting that might leave to fight for Allah was entitled to "substantial deference".⁸⁷ He concluded that the letters were relevant to Ansari's "state of mind (the intention to fight for Allah) which, in turn, tends to establish his motive for joining and his knowledge of the nature of the organization and the activities in which he participated and to which he contributed."⁸⁸ He added that the "departure letters engendered no palpable moral or reasoning prejudice. The letters revealed no extrinsic misconduct, only an intention to fight for Allah at some undefined location."⁸⁹ The Court of Appeal also held that the trial judge did not err in allowing the accused to be cross-examined on various political and religious materials that he possessed. By claiming that he was not a terrorist, Ansari had put his

⁸⁴ The Court of Appeal commented that the "the defence advanced at trial focussed principally on the fault element of the offence charged, in particular the elements of knowledge of the character of the group and the purpose underlying the appellant's camp attendance and computer assistance." See *Ansari*, ONCA at para 188.

⁸⁵ *R v. Lohrer*, 2004 SCC 80.

⁸⁶ *R v. Beaudry*, 2007 SCC 5; *R v. Sinclair*, 2011 SCC 40.

⁸⁷ *Ansari*, ONCA at para 120.

⁸⁸ *Ansari*, ONCA at para 116.

⁸⁹ *Ansari*, ONCA at para 122.

character in issue and the trial judge had limited the amount of material introduced into trial.⁹⁰

It is questionable whether the Court of Appeal's ruling fully accounted for the context of the Toronto 18 case and the post 9/11 attitudes towards Muslims and terrorism. The Court of Appeal's decision that the departure letters revealing that Ansari was willing "to die for Allah"⁹¹ could be admitted raised concerns about whether the jury was sufficiently protected from giving undue weight to such evidence. The evidential value of the letters was limited. They were likely written a year before Ansari attended the Washago camp. Their prejudicial effect on the jury might have been great because it invoked stereotypes of Muslims willing to die for their religion and sometimes to kill innocent people while doing so. Despite this, the Court of Appeal confidently concluded that the acceptance of the letters as evidence would cause Ansari no "palpable moral or reasoning prejudice."⁹²

Given the jury's lack of reasons and the secrecy of their deliberations, we do not know and probably will never know what, if any, weight the jury placed on the political and religious evidence or indeed why it concluded that the Crown had proven Ansari's guilt beyond a reasonable doubt. We only know that the jury deliberated for five long 12-hour days before reaching its unanimous verdict that both Ansari and Chand were guilty.

IV. THE FUTURE OF THE JURY IN CANADIAN TERRORISM PROSECUTIONS

A. The Difficult Choice of Trial by Jury or by Judge-Alone

Did Chand and Ansari make a mistake in electing trial by jury as opposed to trial by judge alone? A judge in a judge-alone trial would have been exposed to more potentially prejudicial evidence than the jury even if they had ruled the evidence inadmissible. At the same time, it is likely that a judge would have been less influenced by Ahmad's unexpected decision

⁹⁰ *Ansari*, ONCA at paras 156, 160.

⁹¹ *Ansari*, ONCA at para 110.

⁹² *Ansari*, ONCA at para 122.

to plead guilty in the middle of the trial. Unlike jurors, judges know the many incentives that may lead a person to plead guilty.⁹³

A judge trying the case alone might also have been less influenced by the religious and ideological evidence than a jury⁹⁴ and might have more easily divorced the evidence against Ahmad from the quite different evidence against Chand and especially Ansari. At the same time, Justice Dawson volunteered at sentencing that he shared what he assumed was the jury's view that Ansari's innocent explanations for his attendance at Washago were not credible. Given this statement it was possible that the trial judge would have convicted Ansari in a judge-alone trial.⁹⁵

In any event, accused in terrorist prosecutions seem split about the comparative advantages of trial by jury or trial by judge alone. Michael Nesbitt's research has revealed that, as of early 2019, of the 19 individuals who have gone to trial to fight terrorism charges in Canada, nine were tried by judge alone and ten by a jury. Of these 19 individuals, five were acquitted. Three of these 19 accused have been acquitted by judge-alone trial and two, teenagers El Mahdi Jamali and Sabrine Djermane, were acquitted by a Montreal jury.⁹⁶

It may be that some juries may recoil from branding people as terrorists even in the face of broadly defined offences such as participating in a terrorist group. One of the lawyers in the only jury acquittal of terrorism offences in Canada stated, "I think the jury knew that looking at... articles is not a crime. It is not a crime to be curious about what was going on in Syria."⁹⁷ At the same time, such a reaction would require the jury to have some degree of empathy towards those charged with terrorism and to

⁹³ Judges have accepted that even innocent people may make rational decisions to plead guilty in the hope of receiving a less severe sentence. See *R v. Hanemaayer*, 2008 ONCA 580.

⁹⁴ For an examination of this evidence, see Anver Emon and Aaqib Mahmood in this volume.

⁹⁵ Justice Dawson stated: "Mr. Ansari testified at trial giving an innocent explanation for all of his activities. The jury obviously found that Mr. Ansari's testimony was not credible. I must say I reached the same conclusion. As I do not know the exact process by which the jury reached its verdict, or what findings of fact they made, I have made my own findings..." See *Ansari*, O.J. at para 13.

⁹⁶ Michael Nesbitt, "An Empirical Study of Terrorism Charges and Terrorism Trials in Canada Between September 2001 and September 2018," *Criminal Law Quarterly* 67, no. 1/2 (2019): 111-12.

⁹⁷ Paul Cherry, "Curiosity is not a Crime, Lawyers says of Acquittals," *Montreal Gazette*, December 20, 2017.

withstand the pressures from outside, and from within, the jury room to convict.

At least one accused of terrorism who was acquitted in a judge alone trial was successful in severing his trial from that of two co-accused, thus avoiding a jury trial after one of his original co-accused elected trial by jury and was subsequently convicted by a jury. Justice Mackinnon concluded:

The potential prejudice against the applicant in a joint trial is enormous. In my view, it cannot be cured by simple jury instructions... if carefully crafted jury instructions could cure every objection to severance, then there would never be need for an order of severance. In my view, the interests of justice, including the applicant Sher's right to a fair trial, require that he be tried separately.⁹⁸

This meant that Dr. Khurran Syed Sher was tried by a judge alone. He was acquitted of a conspiracy to facilitate terrorism, even though the judge concluded that “violent jihad”⁹⁹ had been discussed at the one meeting between the accused and the two others with whom he was originally charged and who were subsequently convicted.

Canada relies on juries less than the United States.¹⁰⁰ In the United States, juries decide whether the entrapment defence applies and, so far, they have been resistant to the defence in terrorism cases. American juries often find no entrapment after they hear political and religious evidence that suggests that the accused may have been predisposed to commit acts of entrapment.¹⁰¹

Entrapment was also raised and rejected by judges in the two other Toronto 18 terrorism trials.¹⁰² Entrapment was, however, successfully made out to a judge in the John Nuttall and Amanda Korody case after a jury had convicted them of terrorism offences in relation to planned pressure cooker bombs to be detonated during Canada Day celebrations at the British

⁹⁸ R v. Sher, 2012 ONSC 1792 at para 19.

⁹⁹ R v. Sher, 2014 ONSC 4790 at paras 3, 78. Justice Hackland concluded: “While I do not accept the accused’s testimony that he was committed to non-violence, had no interest in violent Jihad and was utterly surprised by what was said to him at the July 20th meeting, I am still not persuaded beyond a reasonable doubt that he genuinely intended to join the ongoing conspiracy being perpetrated by Ahmed and Alizadeh.”

¹⁰⁰ If the accused does not elect, then trial by jury remains the default. For a terrorism trial in which the accused refused to recognize the jurisdiction and played no role in selecting the jury, see *R v. Dughmosh*, 2019 ONSC 1036.

¹⁰¹ “Illusion of Justice: Human Rights Abuses in US Terrorism Prosecutions,” New York: Human Rights Watch Report, last modified July 21, 2014, <https://www.hrw.org/report/2014/07/21/illusion-justice/human-rights-abuses-us-terrorism-prosecutions>.

¹⁰² See Vincent Chiao in this volume.

Columbia legislature in Victoria.¹⁰³ It is not a stretch to conclude that American juries are more resistant to entrapment claims from alleged terrorists than Canadian judges.

The jury that convicted Steven Chand and Asad Ansari struggled for five, 12-hour days before they reached their guilty verdicts. They were conscripted to give ten weeks of their lives to perform a difficult and even traumatic task. It would be improper to allege that they engaged in misconduct after they performed such a difficult task and when they cannot effectively defend themselves by revealing their deliberations. That said, their exercise of public power, like all such actions, can and should be questioned in a democracy. It especially should be questioned in terrorism prosecutions where the entire society can be fearful and see themselves as potential victims of terrorism, and the accused are often seen as unpopular “others.”

B. The Jury is Here to Stay but Continues to Evolve

Some jurisdictions do not use juries and some, such as France, use a specialized professional judiciary to hear terrorism trials. The Air India Commission considered whether Canada should move in this direction. In the end, it concluded that trying terrorism cases with a panel of three trial judges would violate the *Charter* right of those facing five years imprisonment or more to a jury trial. The Commissioner of the Air India inquiry, Justice John Major, concluded: “terrorism prosecutions are already difficult enough without having to work with novel and unprecedented institutions such as a three judge trial panel” whose legitimacy may be questioned.¹⁰⁴ Because of its guarantee under subsection 11(f) of the *Charter*, the jury is a more or less permanent institution in Canada. This does not mean that it is not subject to change.

The Air India Commission rejected a recommendation by the families of the many victims in the Air India bombing that trial by jury be mandatory in terrorism trials, as it generally is in murder and treason trials. Part of this recommendation represented the families’ dismay at the 2005 decision of a trial judge to acquit two men of involvement in the Air India bombing. That trial judge himself would later say: “I would have loved a jury trial to have made the factual findings in that case” because “there’s

¹⁰³ R v. Nuttall, 2018 BCCA 479.

¹⁰⁴ Canada, *Bombing of Air India Flight 182*, 328–29.

better acceptance of a verdict from a jury in the community, whether they convict or acquit.”¹⁰⁵

For his part, Justice Major concluded:

There are good reasons why those accused of terrorism offences may want to elect trial by judge alone. The facts or allegations in a terrorism case may be both shocking and well-publicized. The trial may involve evidence, including that relating to the accused’s motives, which could have a significant prejudicial effect on the jury.¹⁰⁶

This suggests that Justice Major appreciated the reasons why the accused in two out of the three trials held in the Toronto 18 case elected trial by judge alone. One reason not stated by him, however, may also be a factor: the under-representation of racialized individuals on Canadian juries including the exclusion of permanent residents who are not citizens.

The Air India Commission left those charged with terrorism with the same difficult choice faced by the Toronto 18 of whether they would have trial by jury or trial by judge alone. It expressed concerns about juries having to struggle through long terrorism trials. It made many recommendations designed to make terrorism trials more efficient. It also recommended increased pay for jurors to ensure that juries represent “a broad cross-section of the public, not merely those individuals whose employers are willing or able to continue to pay them during prolonged jury duty.”¹⁰⁷ It also recommended increasing the number of alternative jurors to four, for a total of 16 jurors,¹⁰⁸ though subsequent amendments to the *Criminal Code* only increased the number of alternate jurors to two, for a total of 14.¹⁰⁹

C. The Bill C-75 Reforms

In 2019, Parliament made significant reforms to jury selection in light of concerns about what the victim’s family and subsequently the media publicized as an all-white jury that acquitted a white farmer Gerald Stanley of both murder and manslaughter for killing a Cree man, Colten Boushie. In stark contrast to the Toronto 18 jury trial, the composition of the jury became national news. In contrast, I could find no reporting about the racial composition of the Toronto 18 jury and am left simply with the trial

¹⁰⁵ Canada, *Bombing of Air India Flight 182*, 318.

¹⁰⁶ Canada, *Bombing of Air India Flight 182*, 330.

¹⁰⁷ Canada, *Bombing of Air India Flight 182*, 319.

¹⁰⁸ Canada, *Bombing of Air India Flight 182*, 323.

¹⁰⁹ *Criminal Code*, s. 643 as amended by S.C. 2011, c. 16, s. 12.

judge's cryptic comment that it was "relatively youthful and very multicultural."¹¹⁰

The most controversial jury reform in Bill C-75 was to abolish the peremptory challenges that in most terrorism trials would allow both the prosecutor and the accused to challenge 12 prospective jurors without giving any reasons. Defence counsel objected to this change saying that they used peremptory challenges in cases where they still had concerns after an unsuccessful challenge for cause about the impartiality of a juror. They also argued that they used peremptory challenges to make the jury more representative, especially in large cities.

One problem, however, was that Canada failed to develop an effective system to challenge discriminatory use of peremptory challenges, either by the prosecutor or the defence.¹¹¹ Although terrorism from the extreme right has not generally been prosecuted as terrorism in Canada, one could easily imagine an accused with far-right motives using peremptory challenges to remove visible minorities, and perhaps women, from juries.

Another problem with peremptory challenges is that accused are bound to lose battles with the Crown where the Crown desires to keep visible minorities off the jury and the accused wants visible minorities on the jury.¹¹² This suggests that in most places in Canada, a far-right person accused might be successful in using peremptory challenges to remove visible minorities from the jury, but an accused from a racialized minority might have less success in using peremptory challenges to ensure that juries included racialized minorities. In any event, the Supreme Court has affirmed that Parliament's decision to abolish peremptory challenges did not violate the accused's *Charter* rights, with some judges suggesting that more intensive questioning of prospective jurors for bias and anti-bias instructions to the jury may be warranted.¹¹³

¹¹⁰ R v. Ansari, 2010 CarswellOnt 11151 at para 10 (Ont Sup Ct). For further discussion, see Emon and Mahmood in this volume.

¹¹¹ Roach, *The Gerald Stanley and Colten Boushie Case*, 117-22.

¹¹² Christian A. Miller, "Peremptory Challenges During Jury Selection as Institutional Racism: An Investigation Within the Context of the Gerald Stanley Trial," *Criminal Law Quarterly* 67 (2019): 215.

¹¹³ R v. Chouhan, 2020 ONCA 40 aff'd in 2021 SCC 26 at paras 48-67, 119-21, 160-61. The author represented pro bono the David Asper Centre for Constitutional Rights which intervened in the Supreme Court of Canada in support of the abolition of peremptory challenges.

Ontario now uses more inclusive jury lists based on health care cards. At the time of the 2010 trial, Ontario still used lists based on property tax rolls.¹¹⁴ At the same time, the *Criminal Code* still excludes permanent residents and those who would need a translation from English from serving on juries.¹¹⁵ The trial judge will have new powers to stand aside prospective jurors not only on the traditional grounds that jury service will be a hardship but now also in order to promote public confidence in the administration of justice.¹¹⁶ So far, however, they have not used these new powers to increase the representativeness of juries.¹¹⁷

Under the Bill C-75 reforms, Canadian trial judges will replace two laypeople otherwise qualified as jurors in deciding whether a prospective juror who is challenged for cause is impartial. It remains to be seen whether this change will encourage trial judges to allow more than the three questions that Justice Dawson allowed with respect to racial and religious prejudice. Another challenge is whether trial judges in terrorism trials will allow questions designed to reveal how racial and religious prejudice might interact.¹¹⁸ Although Canadian judges have traditionally and instinctively recoiled at any suggestion that Canadian jury selection practices should follow American ones, increased questioning of prospective jurors in highly publicized terrorism trials would, in my view, be well-advised. One American judge has described how increased questioning of prospective

¹¹⁴ Ontario has moved from a jury list based in large part on tax information to one based on health care lists. *Juries Act*, R.S.O. 1990, c. J3, s. 4.1 as amended by S.O. 2019, c. 7, Sched 35, s. 4. At the same time, a judge in Brampton rejected an equality challenge to the old system (the one used in the Toronto 18 case) for infringing the rights of Black and visible minority accused. Justice Woolcombe concluded that “[t]he problem with focusing on distinctive perspectives, derived from specific racial characteristics such as being ‘black’, is that this wrongly leads to a focus on what characteristics require representation, rather than on the process used. The applicant does not have a right to the inclusion of any set percentage of people on the jury source list who share his particular characteristics.” See *R v. Hoffman*, 2019 ONSC 2462 at para 89.

¹¹⁵ *Criminal Code*, s. 638. This restriction has also been unsuccessfully challenged as violating the equality rights of visible minority accused, see *Church of Scientology, O.A.C.*; *Laus*, D.L.R. (4th).

¹¹⁶ *Criminal Code*, s. 633 as amended by S.C. 2019, c. 25, s. 629.

¹¹⁷ *R v. Campbell*, 2019 ONSC 6285 at para 35; *R v. Josipovic*, 2020 ONSC 6300 at para 29, concluding that use of new stand aside powers to make juries more representative was unworkable.

¹¹⁸ For my arguments that judges should allow more in-depth questions at challenges for cause, see Kent Roach, “Juries, Miscarriages of Justice and the Bill C-75 Reforms,” *Canadian Bar Review* 92, no. 2 (2020): 315.

jurors revealed prejudice towards Muslims and influenced the composition of a jury that in a second trial acquitted a Muslim accused of terrorism.¹¹⁹ Now that judges under the Bill C-75 reforms have to decide challenges for cause, it is hoped that they allow more questions to be asked of prospective jurors to better inform their judgments about impartiality.

V. CONCLUSION

Many of the recent changes to Canadian juries have been based on a concern about making juries more representative of all Canadian citizens and maintaining and broadening public confidence in their verdicts. Whether the changes will be successful given the deep, and sometimes subconscious, hold of stereotypes associating racialized accused and victims with crime and danger remains to be seen. The challenge seems particularly acute in high-profile terrorism cases where the accused are Muslim and visible minorities. In any event, those accused of terrorism offences in Canada will retain the difficult choice of deciding whether they prefer trial by jury or trial by judge alone. In the end, we will never know whether Steven Chand and Asad Ansari, and others accused of terrorism, would have been better off had they not opted for trial by jury.

¹¹⁹ A second jury was selected after the first jury hung with 11 jurors voting for conviction. Before the second trial, the judge allowed more questioning of prospective jurors and, in her words, “we tried much harder to tease out juror bias”. She concluded that this increased question, including changes to attitudes in the country as more time elapsed since 9/11, may have influenced the jury’s decision to acquit the accused at a second trial. See Hon. Marcia G. Cooke et al., “Trying Cases Related to Allegations of Terrorism: Judges’ Roundtable,” *Fordham Law Review* 77, no. 1 (2008): 19–20. On the limits of even more in-depth American *voir dire* questioning of prospective jurors, see Neil Vidmar, “When All of Us Are Victims: Juror Prejudice and ‘Terrorist’ Trials,” *Chicago-Kent Law Review* 78 (2003): 1143–178.