THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

March 2, 2010

Donald K. Piragoff
Senior Assistant Deputy Minister
Justice Canada
Senior Assistant Deputy Minister's Office
284 Wellington Street
Ottawa, ON K1A 0H8

Dear Mr. Piragoff,

Re: ***Report on Jury Reform***

I am writing on behalf of the Canadian Bar Association's National Criminal Justice Section (CBA Section). The CBA Section represents both Crown and defence counsel from every part of Canada. We appreciate the opportunity of responding to the Steering Committee on Justice Efficiencies and Access to the Justice System's *Report on Jury Reform*.

The CBA Section believes that jury trials are, and must remain a cornerstone of Canadian democracy. Any proposals for jury reform should not curtail the existing right to a jury trial.

You asked for our comments on three specific recommendations from the *Report*.

Recommendation #1

Amend the Criminal Code to facilitate the election of trial by a superior court judge alone by an accused charged with an offence listed in section 469 of the Criminal Code.

The CBA Section supports this recommendation. A person charged with a section 469 offence may elect to be tried by a superior court judge alone for several reasons, including the complexity of the trial, the anticipated length of the trial, pre-trial media attention or general considerations of greater efficiency. However, our support for facilitating the election of trial by judge alone does not detract from our strong belief that jury trials continue to perform an important function. We recognize too that the Crown has an appropriate role in assessing whether the best interests of the community are advanced by having a jury trial.

500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
tel/tél : 613.237.2925 | **toll free/sans frais** : 1.800.267.8860 | **fax/téléc :** 613.237.0185 | **info@cba.org** | **www.cba.org**

Section 469 says that every court of criminal jurisdiction can try indictable offences, other than those listed in the section (e.g. murder). Listed offences will be tried before a judge and jury, unless the accused and the Crown agree to trial by a judge alone. The recommendation proposes that an accused's election to be tried by judge alone be allowed at the outset, with the Crown having the option to require a jury trial under a provision like that in current section 568.

Section 568 allows the Attorney General to require a matter to be tried before a judge and a jury even if the accused has a right to elect the mode and forum of trial, and has elected a mode of trial other than judge and jury:

> *Even if an accused elects under section 536 or re-elects under section 561 or subsection 565(2) to be tried by a judge or provincial court judge, as the case may be, the Attorney General may require the accused to be tried by a court composed of a judge and jury unless the alleged offence is one that is punishable with imprisonment for five years or less. If the Attorney General so requires, a judge or provincial court judge has no jurisdiction to try the accused under this Part and a preliminary inquiry must be held if requested under subsection 536(4), unless one has already been held or the re-election was made under subsection 565(2).*

The CBA Section believes that those accused of the listed offences under section 469 should continue to have the right to a jury trial. However, the *Criminal Code* acknowledges that a jury trial is not necessary in every case involving a section 469 offence and we have offered several reasons why an accused may elect a judge alone trial.

Recommendation #2

Amend section 631 Criminal Code to provide for the systematic calling of prospective jurors by their number only and to control access by the parties to their personal information.

Anonymity should be the exception, and used in cases where the Crown establishes, for example, that the accused is a member of a criminal organization. As most jury trials do not raise concerns requiring anonymity, we suggest a more measured response is warranted. Some information about a prospective juror can be helpful to both the accused and the Crown, for example, to assist in identifying those with an undisclosed interest in the outcome or pre-existing hostilities towards the accused.

Certain provincial legislation disqualifies individuals from being jurors if charged with indictable offences or convicted of indictable offences in the last five years.[1] The Crown in these jurisdictions routinely asks police to check the jury list for criminal records. If the recommendation was adopted, provincial legislation would have to be amended to stop this practice, as otherwise the Crown may have information unavailable to the defence.

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[1] For example, see section 5 of the *Jury Act,* SNL 1991, ch. 16, as amended.

Recommendation #3

Amend section 640 of the Criminal Code to have challenges for cause decided by the judge rather than the two jurors who were last sworn.

The *Report* recommends that section 640 be changed because it is cumbersome and often leads to appeals. Our experience is that the existing system does not present a problem that justifies statutory amendment or reform.

Most criminal cases are dealt with in provincial courts, and of those criminal cases dealt with in the superior courts, there are relatively few jury trials. When jury trials do take place, most do not proceed on the basis of challenges for cause, and challenges for cause do not unnecessarily delay trials.

Courts value and rely upon the factual findings of a jury, given the common sense and community representation that jurors bring to their task. In our view, jurors are also well-situated to make determinations about challenges for cause. If there is a real concern about partiality, prejudice or bias, we believe that it enhances the actual and perceived legitimacy and fairness of the challenge for cause process for prospective jurors to be vetted by the same community representatives who will ultimately decide the facts of the case.

Thank you again for the opportunity to share the views of the CBA Section.

Yours truly,

(*Original signed by Gaylene Schellenberg for Josh Weinstein)*

Josh Weinstein
Chair, National Criminal Justice Section