

Jury Nullification?

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Jury nullification occurs when a jury intentionally disregards the directions as to law given by the judge and decides the case on some other basis. The concept is usually taken to mean a jury acquits an accused in spite of proven legal guilt. The concept of jury nullification is seldom raised in Canadian law. A recent Alberta case, which may well be considered by the Supreme Court of Canada, dealt with the concept of jury nullification -- the majority rejected its application but the Chief Justice, in a strong dissent, would have allowed it.

The case law is clear that jury nullification exists and is (grudgingly) recognized. The Supreme Court has held that, in very rare cases, jury nullification remains "the citizen's ultimate protection against oppressive laws and the oppressive enforcement of the law": *R v Morgentaler* [1988] 1 SCR 30 at 78.

Nevertheless, generally, jury nullification is not seen as a good thing. In *Morgentaler* the Supreme Court referenced, with approval, the decision of Lord Mansfield in *R. v. Shipley* (1784), 4 Dougl. 73, 99 E.R. 774, at p. 824 where the Court held:

So the jury who usurp the judicature of law, though they happen to be right, are themselves wrong, because they are right by chance only, and have not taken the constitutional way of deciding the question. It is the duty of the Judge, in all cases of general justice, to tell the jury how to do right, though they have it in their power to do wrong, which is a matter entirely between God and their own consciences.

To be free is to live under a government by law . . . Miserable is the condition of individuals, dangerous is the condition of the State, if there is no certain law, or, which is the same thing, no certain administration of law, to protect individuals, or to guard the State.

. . . .

In opposition to this, what is contended for? – That the law shall be, in every particular cause, what any twelve men, who shall happen to be the jury, shall be inclined to think; liable to no review, and subject to no control, under all the prejudices of the popular cry of the day, and under all the bias of interest in this town, where thousands, more or less, are concerned in the publication of newspapers, paragraphs, and pamphlets. Under such an administration of law, no man could tell, no counsel could advise, whether a paper was or was not punishable.

The very recent Alberta Court of Appeal decision in *R v Krieger* 2005 ABCA 202 raises an extraordinary fact pattern and discusses the possibility of jury nullification.

Krieger is a political activist who was charged with trafficking illegal drugs. The trial was before a Judge and Jury. Krieger admitted the elements of the offence and his claim of necessity lacked any semblance of reality. The trial judge directed the jury to convict and the Crown conceded the direction was in error. Two members of the jury told the trial judge their views were such that they felt uncomfortable convicting in spite of the judge's direction (indeed, they sought to be relieved of their oath and allowed to be released on the basis they could not follow the direction to convict). Ultimately the jurors overcame their scruples and convicted.

The Court of Appeal declined to allow the appeal noting that if the error had not occurred a properly instructed jury acting reasonably would have convicted the accused because he adduced no defence and admitted the elements of the offence. The curative proviso in the Criminal Code applied. In a

lengthy and very interesting dissent Chief Justice Fraser held the error could not be cured because jury nullification, while not to be encouraged, was a legitimate part of Canadian law and but for the trial judge's direction to convict the conviction was not certain.

The key passages from the dissent, relating to nullification, follow:

23. The subject of jury nullification – and what might at first blush appear to be an inconsistent approach to it under Canadian law – reflects an inherent and understandable tension between two competing forces. On the one hand, strong policy reasons exist for constraining the possibility of jury nullification. These include preservation of the rule of law, the fair and equal application of the law, the protection of the right to a fair trial for both the accused and the state, and the elimination of myths and stereotypes in decision-making. A criminal justice system would count for little if jurors were free to simply ignore the law or rely on improper myths and stereotypes in decision making. Therefore, trial judges have no obligation to raise the possibility of jury nullification, nor for that matter, to solicit it. The rule of law demands otherwise.

24. On the other hand, equally compelling justifications can be, and have been, advanced for jury nullification. When undertaken for the right reasons, jury nullification arguably constitutes a legitimate check by the people on the state's harsh enforcement of the law, and indeed perhaps on the substance of the laws themselves. It is for this reason that Canadian law does not prevent jury nullification.

25. Although the line between these two competing forces – the rule of law on the one hand and the citizen's ultimate check on the state on the other – may be a fine one, it still exists. Therefore, while a trial judge should instruct a jury that it has a duty to return a verdict of guilt if it is satisfied that all elements of an offence have been established (or admitted) beyond a reasonable doubt, and indeed should take steps to discourage jury nullification, a trial judge is not entitled to eliminate any possibility of jury nullification by directing a verdict of guilt. Where an accused has elected trial by jury, the judge is not the jury; thus, the judge has no right to usurp the jury's function. As explained by Kerans J.A. in *R. v. Gill, supra* at para. 37:

With respect, a jury can be told that it is its duty to return a verdict of guilt if appropriate facts have been found, but it cannot be ordered to find guilt as a consequence because the law permits – but does not encourage – an acquittal even in the teeth of the evidence... There can never be a directed verdict of guilt.

26. By directing a verdict of guilt in this case, the trial judge substituted his verdict for the jury's verdict and in the process thereby eliminated any possibility of jury nullification. In doing so, he erred in law.

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If you have a legal problem, you should not rely on this article alone but should speak to a lawyer.
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