



**Law Society**  
of Ontario

**Barreau**  
de l'Ontario

## **TAB 3**

# **The Six-Minute Criminal Court Judge 2020**

The Jury Address What Works and What Doesn't

**The Honourable John McMahon**  
*Superior Court of Justice*

January 25, 2020





# The Jury Address What Works and What Doesn't


***Mr. Justice John B. McMahon***


***January 25, 2020***



# Ten Tips for the Opening Address


1. Tell the story – avoid the simple recitation of evidence in a chronological order;
2. Make it clear that what you are telling them is not evidence;
3. Avoid boiler plate;

- 
4. Do not promise what you cannot deliver;
  5. Tell the jury about the warts in your case;
  6. Avoid any reference to any evidence whose admissibility is still challenged;
  7. Do not try to argue your case in your opening  
;An Opening is NOT a Closing

- 
8. Reference to the law – be careful and vet with the trial judge before reviewing the law;
  9. The defence opening – do not provide too much detail, particularly if the accused is going to testify;
  10. A good jury opening, in most cases, should be 15 minutes or less.

# The Closing Address

It is a commonly accepted viewpoint that the address to the jury is not as important as cross-examination or as strategy in a criminal trial. While there may be an element of truth in this assertion, I am convinced after practicing in the field of criminal law for almost thirty years, that the address to the jury often exerts a decisive influence on the outcome of a criminal prosecution. It is very seldom indeed that the cross-examination, however skilfully conducted, obviously destroys or answers the case for the prosecution.



An effective closing address must, of necessity, however, have as its foundation a carefully planned and skilfully presented case in order to provide the material upon which a convincing argument can be built.

G. Arthur Martin  
*“Address to the Jury in Criminal Cases”*  
(1968), *Crim. L.Q.* 34



# The Twin Objectives of a Good Closing Address


1. Persuade the jury of your position;
2. Dissuade the jury of your adversary's position.







# Tips to a Good Closing Address

1. Be yourself, do not try to emulate other counsel's style.
2. Utilize the pre-charge conference fully to vet defences and understandings of the law. If it is important, review the law to make sure your view coincides with that of the trial judge;
3. Keep it simple – make sure your submissions all address one of the two objectives;
4. Avoid conclusory statements and explain to the jury why they should accept your position;

- 
5. Use point argument – “members of the jury, there are 5 reasons why you should disbelieve the evidence of the Complainant in this case”;
  6. Avoid wasting time with boiler plate –


*“In my early years at the bar, I would spend about 40 minutes of a 45 minute closing on the introduction and the last 5 minutes on the facts. I trace the history of the jury system back to the period before the Norman conquest. Experience has taught me that jury verdicts are won by a convincing argument on the facts, the specified facts; they are not as a general rule swayed by broad sweeping declamation.”*


- 
7. Never give personal opinion or belief;
  8. Be fair with your recital of evidence and never overstate it;
  9. Provide the jury with a caveat it is THEIR recollection – NOT YOURS;
  10. Have a concise opening paragraph that succinctly sets out your position;

- 
11. Have a succinct closing paragraph which sets out your position and coincides with your first paragraph – do not give evidence or invite the jury to speculate;
  12. Do not attack the integrity of your adversary or suggest improper motive (unless there is an evidentiary foundation and you have vetted it with the trial judge).

# Things the Crown Cannot Do in its Closing Address

1. Rely upon the integrity of the office of the Crown Attorney or the *bona fides* of the prosecution (*R. v. Chambers* (1989), 47 C.C.C. (3d) 503; *R. v. F.S.* (2000), 144 C.C.C. (3d) 466 (On. C.A.);
2. Do not attack the integrity of the defence (*R. v. Schavinsky and Yashnev*, [2000] O.J. No. 3357 (C.A.); *R. v. C.D.* (2000), 145 C.C.C. (3d) 290 (On. C.A.)

- 
3. Do not address matters not in evidence and address the evidence accurately (*R. v. Yarri* 1995 Can Li 1751 (On. C.A.); *R. v. James*, [1998] O.J. No. 4350 (C.A.); *R. v. Tombran* (2000), 142 C.C.C. (3d) 380;
  4. Avoid inflammatory or intemperate comments “if the accused is acquitted, Canada may become a sick society like some large American cities like Detroit (*R. v. Rossick* (1970) 2 C.C.C. (2d) 351 (On. C.A.)

- 
5. Do not attempt to use the exercise of constitutional rights against the accused – pointing out to the jury in the closing address that the accused only came forward with his/her version of events long after the defence had been in receipt of full disclosure from the Crown and therefore could have easily concocted his/her evidence in accordance with that disclosure (*R. v. Peavoy* (1997), 117 C.C.C. (3d) 226 (Ont. C.A.)).

# Things the Defence Cannot do in its Closing Address

1. The Defence cannot give evidence or explanation as to why your client did not testify (*R. v. Giesecke*, [1993] O.J. 1398 (On. C.A.);
2. Counsel cannot attack the personal integrity of the Crown Attorney (*R. v. Trakas* (2008) ONCA 410);
3. Counsel cannot refer to specific cases of wrongful convictions such as *Morin* and *Sophenow*, nor can counsel suggest that there have been a parade of wrongful convictions (*R. v. Horan* (2008), ONCA 589, *R. v. Lane* (2008) ONCA 84);
4. Defence counsel, like the Crown can neither give evidence nor invite the jury to speculate.