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Law Reform Commission  
of Canada

Commission de réforme du droit  
du Canada

CRIMINAL LAW

# toward a unified criminal court

Working Paper 59

Canada

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CRIMINAL COURT

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Working Paper 59

TOWARD A UNIFIED  
CRIMINAL COURT

1989

## Notice

This Working Paper presents the views of the Commission at this time. The Commission's final views will be presented in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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## Preface

This Working Paper forms an essential part of the Law Reform Commission's forthcoming *Code of Criminal Procedure*. In our attempt to make this Code as comprehensive as possible, we have addressed the need to reform not only those matters at the core of criminal procedure, such as police powers, pre-trial procedures and the trial process, but also those subjects which are more structural in nature; i.e., the classification of offences, jurisdictional issues, and here, the court system itself. If a new *Code of Criminal Procedure* is to be as workable and effective as possible, it must address all issues which bear on the prosecution of crime. Thus, while reform of pre-trial and trial procedure is required and is the focus of much of the Commission's present work, the present Canadian system of criminal courts should also be subjected to close analysis in order to determine whether it is the best model within which to implement those reforms. Such values as fairness, efficiency and clarity are foremost in our reform proposals in those other areas. Whether our existing court structures inhibit or further those objectives is the subject of this Working Paper.

Legislative responsibility for criminal courts, including their structure, is shared by federal and provincial governments. While the federal Parliament has responsibility under the constitution for criminal law and procedure and can establish courts for administering federal law, it is the provincial legislatures which have jurisdiction over the administration of justice in the provinces, including the organization of courts of criminal jurisdiction. Reform of our criminal court system cannot, then, be undertaken completely by only one of the partners to Confederation. It has a sufficient federal aspect to permit us to make recommendations in the area, but their implementation will of necessity require provincial assent, co-operation and legislative action.

## Introduction

Reform of our court structures is a formidable undertaking. Our criminal courts are complex administrative organizations. They oversee the entire process of investigating and prosecuting crime — the granting of authority for the police to conduct searches or wiretaps, the issuance of process to compel a person to attend in court, bail matters, preliminary inquiries, the trial itself, and the appeal and review process. These multifarious responsibilities require management of a considerable support staff and control over large quantities of information. Any alteration in the court system would necessarily involve an upheaval in the operation of particular courts and in the interaction between them. There would also be a major impact on those who are familiar with, or work within, the present court system — accused, lawyers and witnesses.

Given the magnitude of the enterprise of reforming our court structures, it is perhaps surprising that reform has been undertaken at all in the past and that there are urgings for further change. Many provinces have reduced the number of levels of criminal courts in recent years. In a province where the three-level system is maintained, namely Ontario, there is presently a heated debate about the way in which the court system should be improved. The consensus, however, seems to be that an alteration in the criminal court structure would be desirable. Provincial Court judges and many academic writers believe that a unified criminal court is needed. The Canadian Bar Association — Ontario wants to see a merger of the District Court and High Court. The Ontario Courts Inquiry suggested that the District Court be phased out entirely. The Attorney General of Ontario has stated that the court system is in need of structural change. Each of these suggestions has been accompanied by a lively discussion of its merits.

Thus, we enter the debate on reform of our criminal courts fully aware of the enormity of the project and the sensitivity of the issues. Our approach is to analyze the existing situation in terms of its fidelity to the principles of criminal justice, its inherent logic, and its utility.

The philosophy articulated by the Ontario Law Reform Commission stated in 1973 in its *Report on the Administration of Ontario Courts* has guided us in analyzing the need for reform in this area:

Perhaps it should be stressed that the courts are not the private domain of judges and lawyers. They exist for people and in a very real sense belong to the people. That their functions should be clearly understood and accepted by the people and that they should be managed in the best interests of the people is surely beyond dispute.<sup>1</sup>

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1. Ontario Law Reform Commission, *Report on Administration of Ontario Courts Part I*, Toronto: (1973), at 16.

The focus of this Working Paper is the distribution of jurisdiction over criminal offences. Closely related to this subject is the jurisdiction to try matters under the *Young Offenders Act*.<sup>2</sup> The *Act* gives each province the power to designate the court that will act as “youth court.”<sup>3</sup> In the absence of a full treatment of the *Young Offenders Act*, we make no recommendations about the advisability of the present jurisdictional arrangements with respect to youth courts.

We begin by describing the present court system (Chapter One), then analyze its shortcomings (Chapter Two), consider the case for reform (Chapter Three) and make suggestions for improvement (Chapters Four and Five).

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2. S.C. 1980-81-82, c. 110.

3. *Ibid.*, s. 1. For example, in Ontario, the Provincial Court Family Division deals with *Young Offenders Act* matters. See the *Courts of Justice Act*, S.O. 1984, c. 11, s. 75. In Québec, it is the Court of Québec. See the *Courts of Justice Act*, R.S.Q. c. T-16, s. 83.

## CHAPTER ONE

### The Present Array of Courts and their Jurisdiction in Criminal Matters

There is at present significant diversity in the number of levels and the jurisdiction of criminal courts across Canada. The present diversity stems largely from the division of legislative responsibilities between the federal and provincial governments. While criminal law and procedure are matters of federal responsibility and, therefore, relatively uniform across the country, the administration of justice falls within the legislative competence of the provinces. The present court systems across the country are diverse and complex, yet the operation of the system as a whole can be described in relatively simple terms.

Criminal offences are classified in the *Criminal Code*. For some crimes, the accused can elect to be tried by judge and jury or by a judge without a jury. For these offences, the accused is entitled to request that a preliminary inquiry be held into the sufficiency of the evidence. If the accused is ordered to stand trial after the preliminary inquiry, the trial will normally be held in the County Court<sup>4</sup> or the Supreme Court.<sup>5</sup> If the offence is one for which a preliminary inquiry is not available or the accused elects to be tried without benefit of the preliminary inquiry, the Provincial Court<sup>6</sup> has jurisdiction to try the matter. Thus, depending on the nature of the charge<sup>7</sup> and the accused's election of mode of trial,<sup>8</sup> a criminal trial may take place in any one of these court levels, and may or may not involve a jury. The complexity of the present situation

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4. For sake of simplicity, courts at the level of County or District Courts are referred to throughout the paper (unless the context requires otherwise) as County Courts. In the three provinces in which this court level remains, it is referred to as the County Court in Nova Scotia and British Columbia and as the District Court in Ontario.

5. For sake of simplicity, courts at this level are referred to throughout this paper (unless the context requires otherwise) as the Supreme Court. In reality, this court level is called the Superior Court in Québec, the High Court in Ontario, the Queen's Bench in New Brunswick, Manitoba, Saskatchewan and Alberta, and the Supreme Court in Prince Edward Island, Nova Scotia, Newfoundland, British Columbia, the Yukon Territory and the Northwest Territories.

6. For sake of simplicity, courts at this level are referred to throughout the paper (unless the context requires otherwise) as the Provincial Court. This is the name given to this court level in all of the provinces but Québec, where it is called the Court of Québec. In the Yukon Territory and the Northwest Territories this court level is called the Territorial Court.

7. For example, murder can only be tried by a Supreme Court with a jury.

8. i.e., for those offences for which the accused may elect to be tried by a judge and a jury, a judge without a jury or a provincial court judge.

stems from the way in which offences are classified, the number of levels of courts trying them and the division of jurisdictional responsibilities among the respective courts.

## I. Levels of Court

There are two basic models of criminal court jurisdiction in Canada. The first is a three-level system; the second a two-level system. The three-level model is present now in only three provinces: Nova Scotia, Ontario and British Columbia. The two-level system operates in the remaining provinces and in both territories. Quebec's two-level system is a variant on the structure existing in other two-level jurisdictions. Its special characteristics will be discussed in greater detail later in this chapter.

Within the three-level criminal court structure the names given to the respective courts vary. For present purposes the three levels can be described simply as follows: (1) the Provincial Court hears the majority of criminal matters, except jury trials — its members are appointed by the province;<sup>9</sup> (2) the County Court hears a broad range of criminal matters and may sit with jury — its members are appointed by the federal government; (3) the Supreme Court hears mostly jury trials of serious crimes — its members are also appointed by the federal government.

Elsewhere than in Québec, the two-level system resembles the three-level structure without a County Court. The jurisdiction given to the County Court in three-level provinces is exercised by the Supreme Court.

Québec is unique among jurisdictions which operate with a two-level system. The Court of Québec<sup>10</sup> has a broader jurisdiction than Provincial Courts elsewhere. It exercises, in addition to the usual jurisdiction of the Provincial Court, some of the jurisdiction of the County Court. The other level of court in Québec is the Superior Court, which has a jurisdiction similar to that of the Supreme Court in a three-level province.

## II. Jurisdiction

The division of responsibilities between the levels of criminal courts in each jurisdiction is provided by the *Criminal Code*. It sets out the various classes of crimes and specifies the courts that may try them. A summary of the present assignment of criminal trial responsibilities within the various court systems is set out in Appendix A.

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9. Territorial Court judges are appointed by the Territories (see *supra* note 6).

10. Recently, Québec consolidated the provincially-appointed courts into a single court. *An Act to amend the Courts of Justice Act and other legislation to establish the Court of Quebec*. See S.Q. 1988, c. 21.

Some explanation of the *Code's* classification of offences is necessary before discussing the jurisdiction of courts over them. The *Code* distinguishes between indictable offences and summary conviction offences. The former tend to be the more serious crimes, with seriousness defined by potential length of incarceration of a person who is convicted. In many cases, an offence can be prosecuted either as an indictable offence or as a summary conviction offence. Within the indictable offences, there are three basic groups. First, there are offences that must be tried by a judge and jury before what the *Code* refers to as "superior courts of criminal jurisdiction." Crimes in this group are listed in Appendix B. Murder is the only crime in this group that is prosecuted with any frequency.

Second, there are those crimes for which an accused has a choice of mode of trial. The accused may elect to be tried by judge and jury after a preliminary inquiry, by a judge without a jury after a preliminary inquiry, or by a judge without a jury and with no preliminary inquiry. Crimes in this group are set out in Appendix C.

Third, there are indictable offences that may only be tried before a judge of the Provincial Court. These are set out in Appendix D.

Finally, there are the summary conviction offences which are always tried by the Provincial Court. They are listed in Appendix E.

This classification scheme, as mentioned, is set out in the *Criminal Code* and, therefore, is uniform across the country. However, because of the different court structures in the provinces and territories, the court hearing the trial of a particular crime may differ from jurisdiction to jurisdiction. The operation of the two basic models is as follows.

## A. Two-level Systems

Aside from Québec, there is consistency among the jurisdictions that have two levels of criminal courts: the Supreme Court hears all jury trials whether it has exclusive jurisdiction over the offence (see Appendix B) or the accused has elected to be tried by a jury (see Appendix C). Also, when an accused elects to be tried by a judge without a jury after a preliminary inquiry (see Appendix C) the Supreme Court will hear the trial. The Provincial Court in a two-level system hears trials of indictable offences within its exclusive jurisdiction (see Appendix D) and those for which an accused may elect to be tried by a judge without a jury and with no preliminary inquiry (see Appendix C). It also hears summary conviction trials (see Appendix E).

The Québec system departs from this pattern in an important respect. There, the Court of Québec<sup>11</sup> has a broader jurisdiction than Provincial Courts elsewhere. In

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11. *Ibid.*



addition to the matters normally dealt with by Provincial Courts in other jurisdictions, it also hears trials of those indictable offences which may be tried by a judge without jury after a preliminary inquiry (see Appendix C). In all the other provinces and territories with a two-level system, this jurisdiction is exercised by the Supreme Court. Thus, the court of Québec operates with a mixed jurisdiction when compared with its closest analogues in the other two-level provinces and the territories. It has all of the jurisdiction normally exercised by Provincial Courts, plus a portion of the jurisdiction usually reserved to Supreme Courts. As such, the Québec Superior Court hears all of the criminal jury trials in the province but no non-jury trials. All of the non-jury trials are held in the Court of Québec.

## B. Three-level Systems

In provinces with a three-level system, the Supreme Court hears those offences that must be tried by a jury according to section 469 of the *Code* (see Appendix B). In Nova Scotia, the Supreme Court also tries those indictable offences for which the accused has elected a jury trial (see Appendix C). In Ontario and British Columbia, either the Supreme Court or the County Court can hear elected jury trials according to the discretion of the prosecutor.<sup>12</sup>

In all of the provinces with a three-level structure, a judge of either the Supreme Court or the County Court may preside when the accused elects to be tried by a judge without jury after a preliminary inquiry (see Appendix C). Here again, the prosecutor determines which court will hear the matter.<sup>13</sup>

The Provincial Court in a three-level system hears trials of those indictable offences within its exclusive jurisdiction (see Appendix D) and those for which an accused has elected to have a non-jury trial with no preliminary inquiry (see Appendix C). It also hears summary conviction trials (see Appendix E).

## III. The Distribution of Business in Criminal Courts

One can draw some conclusions about the distribution of responsibilities for criminal law from the legal arrangements in the *Code* even in the absence of statistical support. In provinces with a three-level court system, it is clearly the Provincial Court and, to a lesser extent, the County Court, which shoulder the bulk of the criminal law case-load. The Supreme Court generally hears trials of that small number of crimes

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12. This depends upon the court in which Crown counsel prefers the indictment under s. 574. The fact that an accused has an election as to mode of trial does not mean that there is also a choice of forum: *Szpyt v. The Queen*, [1981] S.C.R. 248.

13. *Ibid.*

over which it has exclusive jurisdiction or, in some cases, for which the accused has elected a jury trial or a non-jury trial after a preliminary inquiry.

In most jurisdictions with a two-level system, the Supreme Court has an expanded role. It exercises the trial jurisdiction of the County Court in three-level provinces. Thus, there is a more even distribution of business between criminal courts in two-level systems compared to the three-level provinces, but Provincial Courts still hear the overwhelming majority of criminal cases. Again, Québec is an exception. The Court of Québec discharges an even greater proportion of the criminal caseload than Provincial Courts elsewhere since it exercises part of the jurisdiction otherwise given to the County Court in three-level provinces (i.e., jurisdiction to hear non-jury trials of indictable offences after a preliminary inquiry). Thus, whatever the court structure in place in the province, the *Criminal Code* allocates the bulk of the responsibility for trying criminal cases to the Provincial Courts.<sup>14</sup>

The available statistics on the distribution of the criminal case-load are patchy and incomplete. They do, however, support the general impression that the greater part of criminal law responsibilities fall to the Provincial Courts to discharge. Ontario provides the fullest statistical picture for a three-level province. The Ontario Provincial Court disposed of 96% of criminal charges in 1985. Even where the District Court has an equal jurisdiction (i.e., where an accused can elect to be tried by a judge without a jury in either court), the Provincial Court handles the majority of those charges (76%). One must still be cautious in the interpretation of these figures as the number of cases dealt with in the Provincial Court may be inflated by the number of guilty pleas entered there. In other words, while the number of cases dealt with by the Provincial Court is high, the actual proportion of court time spent by Provincial Courts on criminal cases out of the total time spent by all courts on criminal matters may be lower than the percentage of charges dealt with there (i.e., less than 96%), since it takes less time to receive a guilty plea and impose a sentence than it takes, for example, to hear a murder case before a jury.

Saskatchewan is an example of the division of criminal cases in a two-level system. There, the Provincial Court dealt with 99% of the criminal cases in the province in 1984. Thus, even in a two-level system with a regional Queen's Bench, the Provincial Court shoulders by far the greater part of the criminal case-load, according to the Saskatchewan statistics. In Québec, the Sessions Court and Provincial Court (the

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14. However, these are merely impressions drawn from the legal arrangements in the *Criminal Code*. To assess with accuracy the actual distribution of business in criminal courts, we need statistical data. Unfortunately, in our search for an empirical foundation for our recommendations, we discovered that statistical data on the Canadian judicial system are frequently incomplete, unavailable or without any standard format. Our efforts entailed a search through the available literature in the area, including annual reports of Attorneys-General, published court reports, unpublished provincial and federal studies, and a variety of comparative studies. That search was supplemented through contacts with court registrars and administrators, provincial prosecutors' offices, and the Canadian Centre for Justice Statistics. Judges, prosecutors, defence counsel, police and law teachers were consulted in an attempt to bolster our knowledge of court operations in the various jurisdictions. Nevertheless, the statistical picture remains unclear. We are able only to ground some of our impressions of the present institutional structures more firmly. We cannot give actual data for court activity in all cases. Appendix F is a description of the present situation, as complete as we are able to provide.

precursors of the Court of Québec) received 97% of the new cases filed in 1984. Again, conclusions based on any of these statistics must be qualified by the number of guilty pleas going to each court. It would appear, however, that in a three-level structure (Ontario), a two-level structure (Saskatchewan) and a modified two-level structure (Québec), it is always the Provincial Court that deals with the great majority of criminal charges.

#### IV. The Movement Toward Unification

The existence and recent increase in the number of two-level jurisdictions is evidence of a tendency toward simplification of our court systems. This trend is gaining momentum. A number of provinces have begun the process of simplifying their court structures and others have been urged to do so.

Amalgamations of County Courts with Supreme Courts have taken place in recent years in Prince Edward Island,<sup>15</sup> New Brunswick,<sup>16</sup> Alberta,<sup>17</sup> Saskatchewan,<sup>18</sup> Manitoba<sup>19</sup> and Newfoundland.<sup>20</sup> In all cases, the result has been a transfer of the jurisdiction of the County Court to the Supreme Court. British Columbia attempted to transfer its County Court judges to the Supreme Court, but the necessary amendment to the federal *Judges Act* was never passed. As such, the transfer was incomplete and the County Court continues to exist in British Columbia.<sup>21</sup>

Thus, there is a recent trend toward partial unification of criminal courts in Canada. Since 1972, when nine out of ten provinces had a three-level trial court structure, a dramatic change has occurred. Seven out of ten provinces now have a two-level court system. The federal government has co-operated in this alteration of the court structures in the provinces by passing (in all cases but for British Columbia's attempt) the amendments to federal legislation necessary to appoint the former County Court judges to the provincial Supreme Courts.

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15. *Supreme Court Reorganization Act*, S.P.E.I. 1975, c. 27.

16. *An Act to Amend the Judicature Act*, S.N.B. 1978, c. 32.

17. *Court of Queen's Bench Act*, S.A. 1978, c. 51.

18. *Queen's Bench Amendment Act, 1980*, S.S. 1979-80, c. 91.

19. *An Act to Amend the Queen's Bench Act*, S.M. 1982-83-84, c. 82.

20. *The Judicature Act, 1986*, S.N. 1986, c. 42, s. 147.

21. See P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill, 1987), at 269-70.

## CHAPTER TWO

### Defects of the Status Quo

The Canadian court system bears the characteristics and scars of its distinctive history and evolution. Despite change, the system remains cast in the mould of the nineteenth century. Further, it is fragmented by the often opposing demands of a federal system. The result is a multiplicity of trial courts and a consequent inability to centralize and rationalize administration and management.

#### I. The Complexity of the Judicial System

The diversity and complexity of the present system leads to jurisdictional confusion:

It would be difficult to imagine a Criminal Court system more complicated than the one now used in Canada. There are absolute and elective trial jurisdictions; there is a system of preliminary inquiry, applicable as law for some offences, applicable as a result of the accused's election for some other offences, and not applicable at all for yet another group of offences; then there are a variety of re-election provisions some of which require the consent of the Attorney General and some which do not. There is the final authority of the Attorney General to require the trial to be by judge and jury notwithstanding the election of the accused and imposed upon all of this is the right of the Crown to proceed by a preferred indictment. Lawyers have revealed that they are not familiar with the various methods of trial. While it may be inexcusable for a lawyer to fail to understand a court system it is doubted that the public have any understanding at all of our criminal trial system because of its complexity.<sup>22</sup>

The present two- and three-level structures generate confusion as to which court will hear which cases. Even lawyers have difficulty understanding the present system. Given this state of affairs, it is hardly surprising that the court structure is baffling to the public, to witnesses and to victims of crime as well.

The complexity and disparity in the jurisdiction of criminal courts can be shown by way of a simple example. An accused charged with breaking and entering would face a different court structure depending on the jurisdiction in which the trial was to take place. Since breaking and entering is an offence for which an accused can elect

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22. A. Cawsey, "Toward a Rationalization of Criminal Procedure," (1979), 3 Prov. J.J. 6.

the mode of trial,<sup>23</sup> there are the following possibilities. If an accused elected trial by judge and jury, the trial would proceed before:

- the Supreme Court in Nova Scotia;
- the Queen's Bench in New Brunswick;
- the Superior Court in Québec; or
- the District Court (or perhaps the High Court) in Ontario.

If the accused chose to be tried by a judge without a jury after a preliminary inquiry, the trial would proceed before:

- the County Court in Nova Scotia;
- the Queen's Bench in New Brunswick;
- the Court of Québec in Québec; or
- the District Court in Ontario.

If the accused chose to be tried by a judge without a jury and with no preliminary inquiry (i.e., by a provincial court judge), the trial would proceed before:

- the Provincial Court in Nova Scotia;
- the Provincial Court in New Brunswick;
- the Court of Québec in Québec; or
- the Provincial Court in Ontario.

The confusion caused by these variations is not attributable solely to differences in nomenclature, but to differences in the jurisdiction exercised by the various courts as well. Witnesses and victims may have little appreciation of why a particular trial takes place in one court as opposed to another. It is especially difficult to explain why cases move from one court to another — for example, when the accused makes a re-election as to the mode of trial in accordance with section 561 of the *Code*.

While it cannot be said that there is something inherently wrong with a court system that provides for up to three separate levels of trial court, the manner in which jurisdiction is parcelled out leaves grave reservations concerning the desirability of the *status quo*. Our multiple courts require the services of multiple administrations. Inevitable duplication and overlap is the result. While these court systems are not hermetically sealed from one another, a centralized and coherent administration to process efficiently the cases moving from one level to another is generally lacking. The end product is administrative complexity and inefficiency. Bureaucratic failings in the form of scheduling gridlock and delay are apparent even to the uninitiated.

## II. Delays in the Judicial Process

There is no doubt that delays in the initiation and completion of criminal proceedings are common in our present court system. The Report of the Ontario Courts Inquiry noted that in Ontario some regions had waiting periods of up to one year, even

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23. See Appendix C.

for the most minor of charges.<sup>24</sup> There is reason to believe that other regions and provinces experience similar difficulties.

Delays of this magnitude impair the effectiveness of our system of criminal justice and, in some circumstances, the rights of accused persons. The *Charter of Rights* guarantees in section 11(b) the right of all persons charged with an offence to be tried within a reasonable time. This right protects both liberty and security of the person by ensuring that accused persons are not held in detention for lengthy periods prior to trial and are not subjected excessively to other prejudicial consequences of having been charged with a crime, such as stigmatization, loss of privacy, stress, disruption of family life and employment, and costs.<sup>25</sup> Society's interest in minimizing delays relates to the general desire to see justice done. Delays in getting to trial can cause witnesses to have memory lapses. To the extent that criminal trials attempt to ascertain the truth, this task can be rendered more difficult as time passes. Further, there is a broad social interest in seeing that those charged with crimes come to trial quickly. This reinforces the public's confidence that our system of administering justice is a prompt and effective means of prosecuting crime.

Many causes of delay result from procedural anomalies that are not the concern of this Working Paper. For present purposes, we are concerned with delays produced by the actual structure of the courts.

The Ontario Courts Inquiry pointed to two kinds of delay that spring from the existence of multiple levels of criminal trial courts. Lawyers who must appear before more than one court will often have problems arranging to be present at a time when judges, witnesses and courtrooms are available. Further, in criminal cases, police witnesses may have the same scheduling problems as defence counsel since they must also appear in more than one court on a regular basis. Thus, delay can be caused by the scheduling problems of those who must appear before the court, rather than by the actual volume of cases in a particular court or court level. This kind of delay is exacerbated by the existence of multiple levels of trial courts.

Second, the existence of multiple levels of courts can result in inefficiencies. As the Ontario Courts Inquiry stated:

The administration of the courts is not integrated. Even where there may be more than one court in a building, each court has its own administrative structure and rarely does anyone working for one court have more than a hazy idea of what is going on in another court. The movement of paper from one court to another is a monumental task even though the administrative offices may be side by side, and paper moves regularly between the courts, as it does between the Provincial Court (Criminal Division) and the District Court. Clerks in one office may be working overtime on a regular basis, while in another office they may be idle. Courtrooms also become the exclusive possessions of certain courts, preventing any possibility, when there is an overflow of business, of using an empty courtroom "owned" by another court. When one court has no courtrooms available, it must shut

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24. *Report of the Ontario Courts Inquiry* (Chairman: T.G. Zuber, J.A.) Toronto: Queens Printer for Ontario, (1987), at 54.

25. See *Mills v. The Queen* (1986), 26 C.C.C. (3d) 481 (S.C.C.), per Lamer J. dissenting, at 539.

down, thereby creating or aggravating any backlog. It is almost trite to say that this is an inefficient method of managing an organization the size of the court system.<sup>26</sup>

Since cases often move from one court to another because of transfer or re-election of the mode of trial by the accused, each court dealing with a case must process it, complete its files, and perhaps prepare transcripts before the matter can proceed to another court. For example, delays occur in the transfer of a case from the Provincial Court to another court after an accused has been ordered to stand trial at the end of a preliminary inquiry. Further, there is little co-ordination of available court time between levels of court. As such, the existence of multiple levels of criminal trial courts has been referred to as "a natural mechanism for delay."<sup>27</sup>

A multi-level court structure also invites manipulation by lawyers who see some tactical advantage in either delay or speed. Elections as to mode or forum of trial can be made accordingly.

To some extent, the actions of court administrators and judges in the various court levels can actually work at cross purposes. For example, if the Provincial Court works efficiently to clear up a backlog of cases, those accused who seek delay will simply elect trial in another court which is already suffering a backlog of cases. Thus, the most efficient courts may remain so through a reduction in the volume of cases tried there, while delays worsen in the other courts in the system that are already overburdened.

Delay in a particular court or court level can actually cause new sources of delay to appear. In a backlogged court, the practice of double- and triple-booking cases may occur. This is based on an estimate of the proportion of cases that will not actually be tried on the scheduled date because of unavailability of witnesses or lawyers, a guilty plea by the accused, or stayed or withdrawn charges. In turn, lawyers may double- or triple-book their own appearances for a given day based on the likelihood that, for one reason or another, some of their appearances will be unnecessary. Because these practices of courts and lawyers are based only upon rough projections of the future need for court time, there are inevitable conflicts. Lawyers will have matters scheduled in two different courts at the same time. One of them must be delayed further.<sup>28</sup>

Despite the serious impact of delay on accused persons and the criminal process, it has become an all too common feature of our courts. There are, of course, many sources of delay. The Ontario Court Inquiry cited several causes of delay in the Provincial Court. The requirement that the accused make several appearances between

26. *Supra*, note 24, at 57-8.

27. *Report of the Provincial Criminal Court Judges' Special Committee on Criminal Justice in Ontario* (Vanek Report), (1987) at 30-1.

28. One Provincial Court judge in Toronto has forbidden the practice of double-booking in his court: "[I]f a lawyer is not present in his court at 10:00 a.m. to help set the agenda for the day, witnesses will be excused, and counsel will be directed to appear to show cause for his/her non-attendance. If the lawyer does not appear with just cause, the judge will consider the behaviour contemptuous — and double-booking is not just cause." Editorial, "Some lawyers are just too busy," *The Globe and Mail*, Mar. 28, 1988, at p. A6.

charge and trial, the preliminary inquiry,<sup>29</sup> and the difficulty in obtaining disclosure can all result in delays. The Inquiry pointed out that some defence counsel elect trial by judge and jury solely for the purpose of attracting the attention of a senior crown attorney so that disclosure and plea discussions can ensue. Many of these cases will return to the Provincial Court for trial or a plea of guilty once disclosure has occurred.

### III. The Apparent Hierarchy of Courts

Perhaps the most significant indicator of inefficiency in the system is delay. It is not, however, the only defect with which the present system must grapple. Another problem is the belief that inequality pervades the present court structures.

The existence of multiple levels of criminal trial courts contributes to a perception that there is a hierarchy of these courts with the Provincial Court at the bottom, the County Court in the middle, and the Supreme Court on top. Given that the bulk of criminal cases are tried in the Provincial Court, the perception that this court is at the low end of a qualitative hierarchy is an unhealthy reflection on our criminal justice system.

Professor Friedland pointed out in his 1968 study of "magistrates' courts" that, for many reasons involving title, salary and facilities, Provincial Court judges (then called magistrates) were accorded a low status. He noted a number of positive changes, including the increasing use of the title "judge" to indicate the importance of the office, but he continued:

These changes are very important. But they are not enough. A fundamental change in the position of the magistrate in the judicial hierarchy is necessary. He now suffers from an inferiority complex because the *Criminal Code* puts him in an inferior position by treating him as a third class judge — below the Supreme and County Court judge.<sup>30</sup>

This perception has been a concern of Provincial Court judges themselves. In 1979, the Canadian Association of Provincial Court Judges made a presentation to the Minister of Justice which contained a discussion of the problems resulting from a hierarchy of criminal courts:

A hierarchy of courts trying the same type of matters implies that the upper courts try a case better than other courts. If we accept the assumption that the County Court Judge is somehow superior to the Provincial Court Judge but both are surpassed by an even more superior High Court Judge, we must also accept that different qualities of justice are being

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29. In a study prepared for the Department of Justice, it was found that the preliminary inquiry increased the average elapsed time from charge to verdict from 42 days to 177 days, even though the inquiry itself normally lasted only one day: *Some Statistics on the Preliminary Inquiry in Canada*, (Ottawa: Department of Justice, 1984).

30. M.L. Friedland, "Magistrates' Courts: Functioning and Facilities," (1968-69), 11 *Crim. L.Q.* 52, at 71.



meted out. A hierarchy of courts with concurrent jurisdiction creates an impression of "good, better, best" justice.<sup>31</sup>

Of course, the assumption upon which this statement is based can be questioned. There is certainly no empirical evidence that County Court judges are superior in any way to Provincial Court judges, nor that Supreme Court judges are more competent than all the others. What is troubling, however, is that various characteristics of the respective court levels could lead to a public perception that a judicial hierarchy based on competence to try criminal cases does indeed exist.

One such characteristic is the facilities in which the courts are housed.<sup>32</sup> Various bodies have criticized the quality of available facilities over the years. Recently, the Vanek Report described conditions in Ontario, our richest province, in these terms:

Makeshift courtrooms exist in rented parish and legion halls, community centers, service clubs, tavern and lounge areas (complete with bar located in front of the judge's dais displaying a sign admonishing patrons to "return all glasses"), motel rooms and basements, and in police offices in which the apparent, close and unavoidable contact between the judge and police officers before court does not, in the eyes of the public, create an atmosphere of impartiality. In one instance health concerns caused the Department of Labour to order termination of the use of a facility until an adequate ventilation system was installed.

Recently, a building housing court facilities was vacated by the court as a result of an

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31. Canadian Association of Provincial Court Judges, "Presentation to the Hon. Jacques Flynn," Nov. 16, 1979.

32. Some of the unsatisfactory conditions in which magistrates' courts operated in Ontario were described in the McRuer Report:

In the County of Norfolk the court sits in Simcoe on Tuesdays and Thursdays. The courtroom is on the second floor, reached only by a long stairway. There is no satisfactory waiting room and the courtroom is overcrowded.

In the town of Listowel the magistrate's court is held on the same floor as the police quarters and a community recreation room. The quarters are said to be entirely inadequate, poorly located and noisy.

In Markdale no properly dignified accommodation is provided. The only consulting room available is used by barristers, probation officers and the local police officers.

In Walford the magistrate conducts the court in the basement of the public library. The room is a sort of furnace room. When the furnace comes on during the sessions of the court it is necessary either to turn it off or submit to the noise.

In several courtrooms the magistrate either has to share a room with police or have no room to remove his coat and hat, or consult in private with probation officers or those who may wish to discuss matters in private.

In Metropolitan Toronto the accommodation provided for magistrates for years can only be termed disgraceful. One court is held in a police station. Other courts are held in some that are not designed in any way to provide accommodation for courts. When accommodation for the magistrates' courts in which the administration of justice for the community is carried on is compared with accommodation that is provided for such operations as the work of the committees of a city council, the board of education and the other municipal and government offices in the city, one cannot come to any other conclusion than that those responsible have no concept of the elementary rights of accused persons and witnesses who may attend trials, and the rights of the public, to have justice administered with dignity and in circumstances that convey a respect for the law.

Report of the Royal Commission of Inquiry into Civil Rights (McRuer Report), (1968) Vol. II, at 538-9. Similar observations were made by the Ontario Law Reform Commission, *Report on the Administration of Ontario Courts* (1973), at 260-1. See also J.D. Bowlby, "A Criticism of Our Magistrates' Court System" (1965), 2 Ont. Mag. Q. 7, at 8 where the magistrates' courts are described as resembling "factory lunch rooms."

engineering study condemning it as unsafe for public use.

Security both for witnesses and the public generally is at a minimum and many facilities have no cells to hold persons in custody with the result that persons who may be dangerous are permitted to be in or are escorted through, public areas.

Facilities for the judge are such as to be beyond mere personal discomfort. "Chambers" are in some areas non-existent or in converted kitchens in which a telephone will be a luxury. None of these facilities is equipped with even the most minimal legal library and on frequent occasions when research becomes necessary in the course of a trial, the judge must either adjourn the trial in order to conduct the research at the base court library or yield to the temptation of rendering his verdict without appropriate consideration and research. Many of the facilities are without private washrooms for the judge who in those situations must wait, gowned, in line to use the public washroom off a general lobby. Having gained entrance to the washroom, he may find himself in the company of a person upon whom he has just imposed a term of imprisonment. Few of these facilities contain interview rooms and accordingly lawyers and crown attorneys may be found conducting discussions with witnesses in a general lobby area in the presence of the accused person or in a hall immediately adjacent to, and within hearing of the judge in his quarters.<sup>33</sup>

Obviously, these are matters of considerable concern. Inadequate facilities can raise security problems. When courts share facilities with police detachments, the public may confuse "the law enforcement and adjudicative aspects of the administration of justice."<sup>34</sup> The public's respect for the machinery of justice may diminish:

Court accomodation is only one aspect of the administration of justice, but it is an important one because it influences public perception of the quality of justice to be dispensed by a particular court. Poorly designed accomodation, inappropriate settings, and disorganized and chaotic public areas may lead the public to attribute the same casual and disorganized attitude to the Justice system itself. It is therefore crucial that the courts be appropriately and properly housed.<sup>35</sup>

However, what is of greater concern for present purposes is that the inadequate conditions referred to in all of these studies exist only in the Provincial Court. Thus, any public perception that justice is not being dispensed in a dignified and orderly fashion would be limited to those courts which hear the overwhelming majority of criminal cases. This would tend to reinforce the view that the quality of justice meted out in the other court levels is higher than that dispensed in the Provincial Court.

Another characteristic of the present court system that tends to fuel the perception that Provincial Court judges are less competent than the judges of the other court levels is the remuneration paid to the judges. As Professor Russell puts it:

The traditional practice of paying judges of the so-called lower courts much less than the judges of the intermediate and superior courts of the provinces may appear logical when the judicial system is viewed as a hierarchy. But the problem with translating this hierarchy of courts into a hierarchy of salaries is that we do not want the quality of justice to be hierarchically arranged. The quality of adjudication is likely to bear some relationship to the remuneration of the adjudicator. Commentators on our judicial system never tire of observing that most Canadians who experience the quality of justice at first hand do so in

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33. *Supra* note 27, at 38-9.

34. *Supra* note 30, at 56.

35. *Supra* note 24, at 243-4.

the lower courts. Accepting lower standards here in the courts used most often by Canadians from lower income brackets, is a significant source of social injustice in Canada.<sup>36</sup>

One cannot deny that in our society status and salary are often related, and that the salary which is now received by judges of the Provincial Courts may reflect adversely on those courts in three ways. First, it may lead to an inference that Provincial Court judges are less competent than other judges. Concomitantly, the respect for the Provincial Court held by those who appear before it will be reduced. Second, lower salaries may limit the field of suitable candidates who would be attracted to a Provincial Court appointment.<sup>37</sup> Third, lower salaries may lead to a perception that Provincial Court judges "are susceptible to pressure either from the provincial government who appointed them or from those who appear before them."<sup>38</sup>

The fact that the qualifications for appointment to Provincial Courts are often less strict than those for appointment to other criminal courts may also contribute to a public perception that Provincial Court judges are less able to try crimes than their counterparts in the other courts. The most demanding statutory qualifications are in effect in Québec<sup>39</sup> and Ontario.<sup>40</sup> Both provinces require a minimum of ten years membership in the bar. This is equal to the requirement in the Federal *Judges Act* for eligibility to serve on a federally-appointed court.<sup>41</sup>

Other provinces have less strict qualifications; New Brunswick, Prince Edward Island, Saskatchewan and Nova Scotia require five years experience at the bar.<sup>42</sup> Two provinces and one territory have somewhat more flexible five year pre-requisites. British Columbia and Manitoba each require five years practice at the respective provincial bar, but British Columbia allows "other legal or judicial experience"<sup>43</sup> and

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36. *Supra* note 21, at 157. The Vanek Report stated that the salaries paid to Ontario Provincial Court judges were 37 per cent lower than those paid to District and High Court judges. It concluded:

The fact that the annual income, pension and other benefits of Provincial and District Court Judges are determined by different governments is of little consequence to the accused or to the general public. What is important is the public's perception of the judges of each court. The differences in remuneration and benefits are now so vast that the conclusion the public must reach is inescapable. It is that there are two classes of judges, one decidedly inferior or incompetent in relation to the other yet, in respect of the criminal law, each judge performs essentially the same task.

37. A similar conclusion was reached by the Lang Commission on Judges' Salaries and Benefits in relation to federally-appointed judges. See "The Lang Report — Words to Live By" (1984), 8 *Prov. Judges J.* 2, at 2-3. The kind of gap that exists between judges of the provincially-appointed courts and those who are appointed by the federal government also exists to a lesser extent between County Court and Supreme Court judges.

38. Report of the Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* (Roger Ouimet, Chairman), (Ottawa: Queen's Printer, 1969) at 166.

39. *Courts of Justice Act*, R.S.Q. 1977, c. T-16, s. 87.

40. *Courts of Justice Act*, S.O. 1984, c. 11, s. 52(2).

41. *Judges Act*, R.S.C. 1970, c. J-1, s. 3, as amended by S.C. 1977-78, c. 25, s. 1.

42. *Provincial Court Act*, R.S.N.B. 1973, c. P-21, s. 3; *Provincial Court Act*, R.S.P.E.I. 1974, c. P-24, s. 2; *The Provincial Court Act*, R.S.S. 1978, c. P-30.1 (Supp.), s. 5(2); *Judges of the Provincial Court Act*, C.S.N.S. c. J-1, s. 5.

43. *Provincial Court Act*, R.S.B.C. 1979, c. 341, s. 5(2).

Manitoba allows "other equivalent experience"<sup>44</sup> to substitute for the five year requirement. Similarly, the Yukon requires five years experience at the bar of the territory or any province or "other legal or judicial experience."<sup>45</sup>

In the Northwest Territories, Newfoundland and Alberta, the standard for appointment is less strict than in the other jurisdictions. In the Northwest Territories an appointee must have three years experience at the bar of any province or territory.<sup>46</sup> Newfoundland and Alberta have no statutory requirements of membership in the bar. In Newfoundland appointees must be "fit and proper persons."<sup>47</sup> The only criterion in Alberta is that appointees be Canadian citizens.<sup>48</sup>

Thus, there is a wide variation in the statutory requirements for appointment to Provincial Courts across the country. This raises at least the apprehension that the quality of the application of criminal law may depend not only on the province in which the accused is tried, but also on the kind of court hearing the case. Anywhere in the country, an accused who elects trial in a court presided over by federally-appointed judges is assured that the judge has at least ten years experience at the bar. In many jurisdictions, an accused who elects to be tried in the Provincial Court may be tried by a less experienced judge.

Differences in the forms of addressing judges of the various court levels may also contribute to a perception that judges of certain courts, because they appear to merit greater respect in the manner in which they are addressed, have superior abilities. Judges of the Supreme Court are addressed as "my Lord" or "my Lady," or "your Lordship" or "your Ladyship." Judges of the Provincial Courts and the County Courts are addressed as "your Honour." As the Ontario Courts Inquiry pointed out, "the public is often confused and intimidated by the need to use [my Lord or my Lady]."<sup>49</sup> Further, it may be led to believe that the judges deserving this form of address are more knowledgeable and venerable jurists than those who are addressed merely as "your Honour."

In some respects, Provincial Court judges enjoy, or at least appear to enjoy, less independence from government than do judges of the other levels of criminal courts. Judicial independence is not a matter that relates to the comfort of judges themselves. In criminal cases, it is a principle that enhances public confidence in the use of the state's power to prosecute accused persons and punish those who are convicted. Without a judiciary independent from the government, the outcome of criminal cases would not have the degree of public acceptance that is necessary for the courts to

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44. *Provincial Court Act*, S.M. 1982-83-84, c. 52, s. 3(2).

45. *Territorial Court Act* R.S.Y.T. 1986, c. 169, s. 8.

46. *Territorial Court Ordinance*, Ord. of N.W.T. 1978, c. 16, s. 31.

47. *The Provincial Court Act*, 1974, S.N. 1974, c. 77, s. 23(a).

48. *Provincial Court Judges Act*, S.A. 1981, c. P-20.1, s. 2(2).

49. *Supra* note 24, at 251. The Inquiry recommended that "members of the Ontario appellate courts and the Superior Court be addressed as 'Your Honour.'" *Ibid.*

function effectively. If some courts are more independent than others, it may appear to the public that proceedings conducted in those courts are more fair and the verdicts reached more legitimate than those in the less independent courts.

There are many criteria by which the independence of a court may be measured. The protection of judges' tenure is one of the most important. Courts can only be independent if judges have no fear of being removed from the bench by a government that happens to dislike their decisions. The most secure form of judicial tenure is guaranteed to judges of those courts referred to as "Superior Courts" in section 99 of the *Constitution Act 1867* (i.e., the Supreme Court, High Court, Queen's Bench or Superior Court of the province). These judges hold office during good behaviour until age 75 and are removable by the Governor General only upon an address to both Chambers of Parliament. Judges of the County Courts now have the same form of tenure but they enjoy a somewhat smaller measure of security in that their protection is provided by statute<sup>50</sup> rather than by constitutional entrenchment. The Supreme Court suggested in the case of *R. v. Valente*<sup>51</sup> that the term "during good behaviour" was desirable in describing the tenure of judges in order to incorporate into Canadian law the extensive common law jurisprudence giving judges a maximum degree of independence.<sup>52</sup>

Some provinces have not provided the judges whom they have appointed with as much protection as federally-appointed judges enjoy.<sup>53</sup> For example, in Ontario, a Provincial Court judge can be removed on specified grounds, at least one of which is extremely vague — "conduct that is incompatible with the execution of his or her office."<sup>54</sup> Other provinces have similarly broad provisions. In Québec, a judge can be removed for having committed "an act derogatory to the honour, dignity or integrity of the magistracy."<sup>55</sup> In Nova Scotia, a judge who "acts in a manner contrary to the public interest or the better administration of justice in the Province" may be removed by the Governor in Council.<sup>56</sup> Provisions in the Newfoundland *Provincial Court Act*<sup>57</sup> giving the Minister of Justice power to remove the Chief Judge of the Provincial Court,<sup>58</sup> and giving judges in their first year at the bench appointments only "during pleasure,"<sup>59</sup> have been found to offend the guarantee in section 11(d) of the *Charter*

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50. *Judges Act* R.S.C. 1970, c. J-1, as amended by S.C. 1987, c. 21, s. 5.

51. (1985), 49 C.R. (3d) 97 (S.C.C.).

52. See W.R. Lederman, "The Independence of the Judiciary" (1956), Can. Bar Rev. 769, 1139.

53. In some provinces, the Judicial Council plays a role in deciding whether a judge should be disciplined or removed. See Peter McCormick, "Judicial Councils for Provincial Judges in Canada" (1986), 6 Windsor Yearbook of Access to Justice 160, at 170-6.

54. *Courts of Justice Act*, S.O. 1984, c. 11, s. 56.

55. *Courts of Justice Act*, R.S.Q. c. T-16, s. 263(c).

56. *Judges of the Provincial Court Act*, C.S.N.S. c. J-1, s. 6(4).

57. S.N. 1974, c. 77.

58. *Ibid.*, s. 19.

59. *Ibid.*, s. 21.

that a person charged with an offence will be tried by an independent and impartial tribunal.<sup>60</sup>

Another factor influencing the degree of independence of judges is the manner in which their salaries, benefits and pensions are determined. For judges to be independent, it is necessary for them to have a certain degree of financial security which cannot be impaired by the government. The procedure governing federally-appointed judges is clear. It is set out in section 100 of the *Constitution Act, 1867*:

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in cases where the Judges thereof are for the time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

Subsection 33(1) of the federal *Judges Act*<sup>61</sup> states that these monies are to be paid out of the Consolidated Revenue Fund.

In the *Valente* case, LeDain, J. referred to two common objections to the way in which remuneration may be determined and allocated for provincially-appointed judges as compared to the procedure in the federal domain: (1) remuneration may not be determined by the legislature, and (2) it may not be a charge on the Consolidated Revenue Fund.<sup>62</sup> The former objection is based on an apprehension that the legislative branch will be less inclined to interfere with the financial security of judges than the executive. Where the legislature as a whole determines remuneration publicly, it is less likely that the public will perceive the judiciary as being susceptible of favouring the government's position in litigation as a means of ingratiating themselves with those who hold the purse strings. The latter objection relates to the security of the resources upon which judicial remuneration depends. If salaries are taken from the Consolidated Revenue Fund there is no danger of the executive appropriating government resources in a fashion so as to impair judges' financial security. Also, it "prevent[s] any routine or frivolous discussion of the conduct of judges by Parliament in financial debate."<sup>63</sup>

In *Valente*, LeDain, J. held that the Ontario procedure of setting Provincial Court judges' salaries by regulation did not so affect their independence as to disqualify them from hearing criminal cases. Nevertheless, he acknowledged that it was preferable to have remuneration set by the legislature as a charge on the Consolidated Revenue Fund.<sup>64</sup>

Thus, the differences in the manner in which the independence of judges of the various court levels is protected may also contribute to a public perception that the Provincial Courts do not dispense a quality of justice equal to that displayed in the other criminal courts. A court which is perceived to be less independent than others

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60. *Re Fleming and The Queen* (1985), 24 C.C.C. (3d) 264 (Nfld. S.C.).

61. R.S.C. 1970, c. J-1.

62. *Supra* note 51, at 121.

63. Lederman, *supra* note 52, at 792.

64. *Supra* note 51, at 121-2.

will not attract the same measure of public respect and confidence and may, as the Ouimet Committee pointed out, leave the judges of such a court open to criticism for being susceptible to pressure by government litigants.<sup>65</sup>

Limits on the jurisdiction of Provincial Courts may also reinforce the notion that these courts are inferior to the other criminal courts. Provincial Court judges cannot try murder cases. Nor can they preside at jury trials. For that category of offences for which the accused can elect the mode of trial, the accused can choose to be tried by judge and jury, by judge without a jury, or by a Provincial Court judge without a jury.<sup>66</sup> The language in the *Criminal Code* distinguishes between a “judge” and a “Provincial Court judge.” Prior to 1985, there was an even clearer distinction in the Code between “judges” and “magistrates.”<sup>67</sup> However, the language in the Code still contributes to a perception, at least outside Québec,<sup>68</sup> that a Provincial Court judge is not a “judge” in the same sense as are the judges of the other levels of court. The judges of those other courts hear the most serious cases, preside at jury trials, and are “judges” for purposes of the *Criminal Code*. While it is true that there are some offences that can only be tried by Provincial Courts (see Appendix D), these are relatively minor criminal matters. Provincial Courts also try all summary conviction matters, which are also fairly minor crimes (see Appendix E).

Finally, the fact that other levels of court have a supervisory role to play with respect to the decisions of Provincial Courts gives the impression that the other levels are vested with greater wisdom and powers of judgement in criminal law matters. Appeals from summary conviction matters are heard by the County Court where it exists and by the Supreme Court elsewhere.<sup>69</sup> Review of Provincial Court decisions through the prerogative writs is conducted by the Supreme Court. Thus, other levels of criminal courts, which often have concurrent jurisdiction with Provincial Courts to try criminal cases, can in fact reverse or quash a decision of these courts in criminal matters.

#### IV. Conclusions

While each of these factors tending to create an impression of hierarchies may not be so serious as to merit reform on its own, cumulatively they cause us considerable concern. It would be possible, of course, to remedy many of the harmful consequences of the perception of hierarchies through reform of the individual factors that contribute to that perception without reforming the structure of the courts at all. Thus, the

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65. *Supra* note 38, at 166.

66. See s. 536 *Criminal Code*.

67. Section 536 was amended by S.C. 1985, c. 19, s. 96.

68. In Québec, judges of the Court of Québec are “judges” for purposes of section 536. See s. 552(b) *Criminal Code*.

69. See s. 812 *Criminal Code*.

impression that hierarchies exist could be eradicated largely by increasing salaries, improving facilities, making qualifications more stringent, adopting uniform forms of address, protecting judicial independence equally, removing jurisdictional anomalies, and rationalizing the review and appeal processes. The question that remains is whether these steps would go far enough toward improving our court systems in the absence of more fundamental, structural reform.

Confusion, complexity, inequality and inefficiency are all serious defects in themselves. When there is a confluence of such features, other negative side-effects are to be expected. Among these must be the possible deterioration in public respect for the courts as an institution and increased costs in the administration of justice. Both of these matters defy ready measurement:

How does one measure the cost in terms of loss of respect by the community for a system of justice which its members do not understand and in which the hand of the law is too slow in overtaking an offender?<sup>70</sup>

The Commission stated its view in Working Paper 56, *Public and Media Access to the Criminal Process*, that public understanding of the criminal process was necessary, not only for the proper functioning of the administration of criminal justice, but to the democratic process itself:

The administration of criminal justice is a significant responsibility of government. Citizens will only be informed about the discharge of that responsibility if they have access to the process itself or to information about it. In order to know whether its criminal laws are good laws, the public must have access to criminal proceedings, either directly or through the free expression of information by the media.... Our opinions about the quality of our laws and the performance of those who make, interpret and enforce them rest on the information we receive. The democratic process itself depends upon our ability to form these opinions.<sup>71</sup>

Unnecessary complexity in our court systems makes it more difficult for the public to comprehend our criminal laws and procedures. In turn, this makes it less likely that the public will form the knowledgeable opinions about criminal justice that are essential for its improvement and basic to the democratic process itself. The respect that the public has for its system of criminal justice is also likely to suffer.

A complex and inefficient court system obviously has its costs, both monetary and human. However, just as statistics on the allocation of cases between the various court levels are generally unavailable, we have had difficulty in finding budgetary statistics on the present court structures.<sup>72</sup> Further, even if these figures were available, it would be extremely difficult to measure the economic benefits of structural court reform. There can be no doubt that a simpler, more coherent, and more efficient judicial system

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70. Vanek Report, *Supra* note 27, at 67.

71. Law Reform Commission of Canada, *Public and Media Access to the Criminal Process*, Working Paper 56, Ottawa: LRCC, 1987, at 5-6.

72. We understand, however, that figures compiled by the Canadian Centre for Justice Statistics will soon be available.



would have fiscal advantages. In addition, the human costs that are brought about by delays in the present system could be ameliorated:

Costs in terms of the dissipation of judicial, administrative and correction resources which are outlined above are costs which to some degree can be measured. What cannot be measured are the secondary effects — the human cost of needless lengthy pre-trial incarcerations, the cost to justice itself when witnesses cannot be found many months, occasionally years after the event.<sup>73</sup>

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73. *Supra* note 27, at 67.

## CHAPTER THREE

### Reforming Criminal Procedures

In Report 32, *Our Criminal Procedure*,<sup>74</sup> we identified certain basic principles that our system of procedural justice should recognize.

We envision a criminal process governed by rules, simply and clearly expressed; a process which seeks fairness, yet promotes efficiency; one which practises restraint and is accountable, yet protects society; and one which encourages the active involvement and participation of the citizen. These basic attributes are the essence of our principles.

There are two basic principles that the present court structures offend — the principles of efficiency and clarity. There are other principles that may be offended by an overly complex system of criminal courts. For example, there may be unfairness to an accused whose trial is delayed because of a backlog in a particular level of court. It may also be difficult to encourage the participation of individuals in the criminal justice system if the system is overly complex and confusing. But these latter effects are really incidental to the direct impact that the present court structures have on the principles of efficiency and clarity.

As part of its efforts to reform comprehensively the law of criminal procedure, the Commission has made numerous recommendations to improve both the efficiency and clarity of the present law. As stated in *Our Criminal Procedure*:

Efficiency is linked to another principle, that of clarity. If those charged with administering justice within the state have a clear understanding of the nature and scope of the powers with which they have been entrusted the possibility of error in the exercise of those powers should be reduced and correlative benefits should accrue in terms of the efficiency of the system.<sup>75</sup>

Thus, if we can remove confusion from our legal system, there may be a correlative impact on its efficiency. The following is a brief description of the reform proposals that the Commission has made as a means of remedying two of the principal faults identified in the previous chapter — delay and confusion.

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74. Law Reform Commission of Canada, *Our Criminal Procedure* Report 32, (Ottawa: LRCC, 1988).

75. *Ibid.*, at 24.

## I. Reducing Delay

As a means of reducing delays in criminal cases, we propose in a forthcoming working paper that specific procedural provisions be enacted as part of the *Criminal Code* in order to promote trial within a reasonable time. This would include the imposition of time limits following the laying of charges, during which proceedings should be commenced. For crimes punishable by imprisonment for two years or less, the time limit should be six months. For crimes punishable by imprisonment for more than two years, the time limit should be one year.

We also suggest that the *Criminal Code* provisions on elections and re-elections should be simplified in order to reduce delays caused by multiple elections. As mentioned in Chapter Two, delay is often caused by transfers of cases between courts resulting from changes in the accused's election of mode of trial. We suggested that no re-elections should be allowed after an informed election has been made. This means that once an accused has had an opportunity to consult with counsel and consider the consequences of a particular mode of trial, there should be no need to permit movement of the case to another court.

As a further means of expediting the period between charge and trial, we suggested that pre-hearing conferences between counsel should take place prior to criminal trials to settle minor but time-consuming matters. Such issues as the nature and likely duration of any pre-trial motions, agreements on the facts of the case, and administrative matters, such as who will be acting as counsel in the case, can be dealt with more expeditiously at a meeting in the presence of a judge than they could be otherwise.

Another significant measure suggested by the Commission for reducing pre-trial delay is disclosure. In Report 22, *Disclosure by the Prosecution*,<sup>76</sup> we proposed that disclosure should be a mandatory requirement prior to the commencement of criminal proceedings. The specific obligations of the prosecutor should be set out in legislation in order for the accused to have full knowledge of the prosecution's case. Lack of disclosure can cause an accused to make an uninformed election or plea. A re-election or change in plea can in turn result in procedural delays. Further, full disclosure can result in expedited preliminary inquiries or their complete waiver since the accused's need for the preliminary inquiry as a means of obtaining evidence to be relied on by the prosecution is reduced.

While these means of reducing delay are necessary, we must ask whether they are sufficient in the absence of structural reform of the courts. We address this question later in the chapter.

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76. Law Reform Commission of Canada, *Disclosure by the Prosecution* Report 22, (Ottawa: LRCC, 1984).

## II. Simplifying Procedures

The Commission has suggested many ways of simplifying criminal procedures, from the powers of arrest and bail laws to pre-trial and trial proceedings. Simplifying the law of procedure has its intrinsic merits. The distribution of powers and duties in our criminal law is made more clear and the unfolding of a criminal prosecution is, therefore, made more efficient as a result.

What concerns us most for present purposes are reforms that would assist in alleviating the jurisdictional confusion that typifies our present system of courts. In that connection, our recommendations in Working Paper 54, *Classification of Offences*,<sup>77</sup> are significant. We proposed that crimes be divided into two categories — those punishable by imprisonment for more than two years and those punishable by imprisonment for two years or less.

This would be a marked contrast from the present law. At present, there are two broad categories of offences — summary conviction and indictable. Some offences are “hybrids;” that is, they can be prosecuted by summary or by indictable procedures. Among the indictable offences there is a further breakdown according to the court with jurisdiction to try them. (See Appendices A, B and C.)

Thus, it was the Commission’s conclusion that only two kinds of crimes should be distinguished for purposes of determining various procedural incidents of criminal prosecutions. The more serious class of crime would encompass the most egregious forms of prohibited conduct. An accused charged with one of these crimes would be entitled to the fullest protections of the procedural law, including the right to a jury trial. An accused charged with a less serious crime would be entitled to substantial procedural protections, but not to the full panoply of safeguards associated with the more serious crimes (e.g., there would be no right to a jury trial).

Simplifying the classification of offences does not have a direct effect on the confusion associated with the complex jurisdictional arrangements in the present *Code*. It does, however, open the door to jurisdictional reform. The question that arises is the following: If there should exist only two categories of crimes with different procedural incidents, how many different kinds of criminal courts should there be to try them, and how many different ways should there be of trying them? We suggested that the more serious crimes should give rise to an entitlement to be tried by a jury. What other differences should there be? Should there be different kinds of judges for each? These questions involve a consideration of the need to reform the structure of the courts in a way which is compatible with and furthers the reform proposals we have made in other areas. This will be addressed in the next section.

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77. Law Reform Commission of Canada, *Classification of Offences* Working Paper 54, (Ottawa: LRCC, 1986).

### III. The Need to Reform Court Structures

Simplifying procedures and reducing delays would obviously alleviate some of the defects in the present system. We must now ask whether they would go sufficiently far toward improving the present law as to render reform of court structures unnecessary. Also, we must consider the best means of addressing the other defects identifiable in the present situation; that is, the problems resulting from the impression that there exists a judicial hierarchy in criminal trial courts.

We must not underestimate the seriousness of delay in our present system. As Langdon Prov. Ct. J. stated in dismissing charges against a young offender:

We have an archaic, three-level judicial system which somehow clanks along in the 20th century although it was designed for the 15th; however, it works. That is a thing that could be addressed, but Parliament has seen fit not to address it.<sup>78</sup>

Similarly, Ontario Chief Justice Howland stated that in 1987 judges had been forced to let people charged with crimes go free rather than face trial after lengthy delays in 16 cases in the Brampton area, where delay is a chronic problem.<sup>79</sup> Recently, he reported that the figure had increased to 56 during 1988, with a total 282 stayed prosecutions in the province of Ontario.<sup>80</sup> Indeed, there is a high frequency of challenges based on the right in section 11(b) of the *Charter* to be tried within a reasonable time. In the years 1982 to 1985 there were 259 challenges based on section 11(b) in the reported cases. In 27 per cent of those cases, the challenge was successful.<sup>81</sup> It is with some regularity, therefore, that the trials of accused persons are so seriously delayed that courts have found a breach of the constitution to have taken place and have either terminated the proceedings, or ordered some other remedy.

Chief Justice Howland called on the provincial government to expend greater resources on criminal justice in order to alleviate the present burdensome case-load. However, as the Ontario Attorney General pointed out, not all of the problems can be solved by increasing the numbers of judges, courtrooms and prosecutors:

Last year I noted that many of the most fundamental problems that confront the operation of our system are in fact structural. We have learned that the provision of more judges and more courtrooms does not in itself solve our problems.<sup>82</sup>

While there is still a need to increase resources in the present system as a means of conquering the problem of delay along with structural reform, a more efficient court

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78. *R. v. Tony M.*, unreported. Comments reproduced in Middlemiss, "Ont. judge blames government for 'systemic' court delays", *Ontario Lawyers Weekly*, August 7, 1987, p. 2.

79. "Case backlog lets accused go free: judge," *Ottawa Citizen*, January 8th, 1988, p. A-1.

80. *Reports on the Administration of Justice in Ontario on the Opening of the Courts for 1988*, L.S.V.C. Gazette, Vol. 23, No. 1, p. 5.

81. F.L. Morton and M.J. Witney, "Charting the Charter, 1982-1985: A Statistical Analysis," (1987), *Canadian Human Rights Yearbook* 65, at 73, Table 5.

82. *Supra* note 70.

structure would reduce the need for more personnel and facilities. In our view, delay is so serious a problem in our criminal justice system that it ought to be confronted not simply through streamlined criminal procedures, but through more fundamental, structural change. The inefficiencies caused by multiple court levels must be addressed head-on. They will only be perpetuated in the absence of reform of the court structure itself. The effect of reforming other areas of criminal procedure will be limited or perhaps defeated if the present court system is ill-equipped to carry them out. Further, a more rational court structure would provide a better vehicle within which to implement better case-flow management techniques which may act to increase efficiency even further.<sup>83</sup>

Jurisdictional confusion cannot be dealt with in the absence of reform of the court system. While a simplified classification of offences would make it clearer that the courts would have the power to try only two types of cases, it would remain unclear why a variety of courts is necessary and why their powers are distinct.

It would be possible, at least in theory, to remedy many of the conditions that fuel a perception that a hierarchy of criminal courts exists. Salaries could be equalized, facilities could be made more uniform, qualifications for judicial appointments could be standardized, judges could all be addressed in the same manner, judicial independence could be protected equally in all courts, differences in jurisdiction could be removed, and review and appeal procedures could be made more rational. These reforms would, even in the absence of structural change, help erase the perception that a judicial hierarchy exists. They would not, of course, make procedures any more efficient, so delay would still need to be addressed. Further, they would probably result in even more confusion among members of the public. By remedying the problems caused by hierarchies in this fashion, multiple levels of indistinguishable courts would be created, which would generate confusion in itself. Finally, there would appear to be no policy justification for creating multiple levels of criminal courts that would exercise identical criminal trial jurisdiction. If there is any case to be made for the existence of more than one level of criminal court, it must be based on a belief that some courts should be functionally different from others. There would be no point in having multiple court levels if they all performed the same functions.

Thus, to our minds, reform of our criminal court system is justified by the need to reduce delay by all possible means, to eliminate the complexity and confusion inherent in the present structures, and to remove the characteristics of the system that perpetuate the appearance of hierarchies. There are several different models that could replace the present court structures in the provinces. In the next chapter we discuss the alternatives and their respective merits.

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83. See P.S. Millar and C. Baar, *Judicial Administration in Canada* (Montréal: McGill University Press, 1981), at 235-55, for a discussion of caseflow management.

## CHAPTER FOUR

### Models for Reform

While our court structures require amendment, this kind of reform will be extremely difficult to carry out. A study paper on court structures prepared for the Commission stated:

... [I]f one were asked to set about devising a criminal court system and could begin with a clean slate, there is little doubt that the result would be a one court system — perhaps even a Federal Court system. But of course the slate is not clean and we are not starting afresh. Not only do we have a multi-court criminal system but it is one that has been in existence for a long time. That means that the physical and human resources of the present system cannot be ignored; it means as well that the views and expectations of those operating in the present system, whether justified or not, must be taken into account; and it means that the constitutional basis of our present system and for any proposal for change must be carefully examined.<sup>84</sup>

Thus, proposals for reform of our court structures must be realistic and take account of the magnitude of the impact that a change in court structures would have on the criminal justice system.

Much of the discussion preceding this chapter involved observations on the failings of a system of criminal courts that was comprised of “multiple-levels”. Implicitly, then, we have been suggesting that reform should be directed toward a reduction in the number of levels of court. Since seven provinces and both territories already have a two-level system, any reduction in the number of court levels in those jurisdictions would involve a movement toward a single court of criminal jurisdiction. This is an option that will be explored below. However, while many of the defects of the present system appear to suggest the creation of a unified criminal court as a solution, we did not approach this study with any predilections toward a unified court model. The following are the options that we have considered.

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84. D. Roberts, “The Structure and Jurisdiction of the Courts and Classification of Offences,” unpublished study paper prepared for the LRCC (1973), at 38-9.

## I. Courts of Concurrent Jurisdiction

Earlier, we pointed out that there was no apparent policy justification for maintaining multiple levels of criminal courts with identical jurisdiction. To do so would be to perpetuate the delay and confusion which typifies the present system. There would be little or nothing gained in having two or three courts doing exactly the same thing under different names.

However, a more realistic alternative perhaps would be to create a single court structure that would incorporate the administration and personnel of the existing criminal courts. Judges of the present courts would preside at trials in the new court. There would be no alteration in the existing structures since the new court would be superimposed on the existing situation. This approach would have the advantages of a single administration and complete jurisdiction over criminal matters. It would reduce delay and eliminate jurisdictional confusion. It would also avoid much of the upheaval that would necessarily accompany an alteration in the existing structures.

This avenue for reform would involve the operation of the existing courts concurrently, much as they do now with respect to a large number of criminal offences. There would no longer be any possibilities for transferring cases from court to court, since a single "umbrella" court would have overall jurisdiction over, and management of, all criminal cases.

There is a precedent for this kind of structural reform. The Crown Court in the United Kingdom was created in 1972<sup>85</sup> and given complete jurisdiction to try all indictable offences. The Assizes and Quarter Sessions Courts were, therefore, abolished. Presiding at criminal trials in the new court are judges of the High Court or Court of Appeal, Circuit Judges, and so-called "recorders," who are barristers and solicitors acting as part-time Crown Court judges. These various judges do not, however, have equal jurisdiction. The Lord Chief Justice is given power under the *Act* to distribute jurisdiction among the three categories of judges.<sup>86</sup> In fact, in the U.K. there are four classes of crimes. First, the serious offences of murder, treason and genocide may only be tried by a High Court judge. Second, manslaughter, infanticide, abortion, rape, sexual intercourse with a girl under 13, incest, and sedition are tried by a High Court judge unless the judge permits another judge to do so. Third, the other indictable offences may be tried by a High Court judge, a Circuit Court judge, or a recorder. Fourth, the other minor indictable offences and hybrid offences may be tried by any judge of the Crown Court.

This kind of reform may be viable in the Canadian context. It would permit court administration to be amalgamated and more tightly managed. Delays would no doubt be reduced. There may not be any constitutional obstacles to the creation of the

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85. *The Courts Act, 1971*, (U.K.) 1971, c. 23.

86. *Ibid.*, s. 4(5).



umbrella court since there would be no real alteration in the jurisdictional responsibilities in the present *Criminal Code*. It would require federal and provincial cooperation and compatible legislation, but may not require constitutional reform. We note, however, that this kind of administrative consolidation has not taken place in any province to date.

For three reasons, we do not believe that a court model based merely on an integration of the management of courts of concurrent jurisdiction is the most sound alternative. First, an appearance of judicial hierarchies would be perpetuated. Distinctions between judges appointed by the province and those appointed by the federal government would remain. Second, while confusion about which court would have jurisdiction to try criminal offences would be erased, this would simply be replaced by a slightly different kind of confusion as to which class of judge would have jurisdiction to try a particular kind of crime. Finally, this approach would, for the most part, simply mask or "paper over" the problems in the present system. It would not address directly the problems resulting from the existence of multiple levels of criminal courts. Thus, while a co-ordinated system of courts of concurrent jurisdiction may represent an improvement over the present situation, it would not, however, have sufficient merit as a solution to the more serious problems arising from our present court systems.

## II. The Québec Model

The trend in Canada is toward a reduction in the number of levels of criminal courts. Most provinces have moved to a two-level system because it is simpler and more logical than a three-level structure. Merger of County Courts with Supreme Courts has not required constitutional amendment or caused major upheavals in the administration of justice.

The two-level system existing in most of the provinces and the territories is not, however, without shortcomings. It does not eradicate the problems arising from an apparently hierarchical system. In fact, in most two-level systems, the Provincial Courts have the same attributes and jurisdiction as the Provincial Courts in three-level systems. Thus, a two-level structure may simply replace a three-level hierarchy with a two-level one. The same can be said of jurisdictional confusion. There is, perhaps, less confusion in a two-level system about where criminal cases are heard than there is in a three-level system, but confusion does indeed still exist.

There is a modification to the two-level system which, to our minds, has much to commend it. As discussed earlier, the province of Québec operates with a two-level court structure, but gives an expansive jurisdiction to the Court of Québec. This court has jurisdiction to try all those offences in the *Code* for which an accused may elect trial by a judge without a jury. This step has several advantages. First, it elevates the status of the judges of the Court of Québec. It effectively removes the distinction

between a “provincial court judge” and a “judge,” at least for purposes of a trial without a jury. Second, it reduces confusion by creating a clear functional distinction between the levels of court. The Court of Québec hears all non-jury trials. The Superior Court hears all jury trials. Third, it eliminates some sources of delay. There is no need for undue delay between first appearance before the Court of Québec and a trial when an accused elects trial by judge alone. Similarly, fixing a trial date after a preliminary inquiry is simpler. There are fewer scheduling conflicts for lawyers and witnesses since all but jury trials take place in one court. A re-election from a jury trial to a non-jury trial can be made before a judge at the preliminary inquiry since that judge is also vested with the jurisdiction of a judge alone. The Québec system allows for a single judge to preside at both the preliminary inquiry and the trial. While this raises concerns about the impartiality of the trial judge, there appear to have been few problems with this arrangement in Québec. Even though a judge may be exposed to some evidence at a preliminary inquiry that is not tendered or admitted at trial, judges generally seem to be capable of putting that evidence out of their minds and deciding cases on their merits, just as they do at trial when evidence subjected to a *voir dire* is ruled inadmissible.

Finally, there would appear to be no constitutional obstacles to such an arrangement even though it would involve the transfer to a court staffed by provincially-appointed judges of a jurisdiction normally reserved to a federally-appointed court. On the face of it, this seems to raise an issue relating to the power of the federal government under section 96 of the *Constitution Act, 1867* to appoint judges of those courts that have the jurisdiction of the superior courts at common law.<sup>87</sup> However, the fact that the Court of Québec and its precursors, the Provincial Court and Sessions of the Peace Court, have long exercised this jurisdiction without challenge is an indication that there is no offence done to section 96 thereby.

The province of Québec has recently unified the courts within its appointing authority i.e., the Provincial Court, the Sessions Court and the Youth Court. By virtue of *An Act to amend the Courts of Justice Act and other legislation to establish the Court of Québec*<sup>88</sup> these courts have been amalgamated into a single unified court with plenary jurisdiction over matters previously dealt with by the three separate courts. Thus, the Québec model of criminal courts is compatible with initiatives to rationalize and make more efficient the provincially-appointed courts.

The Québec model is also compatible with the re-classification of offences we proposed in Working Paper 54. We suggested that there should exist only two categories of crimes. One of the main procedural incidents that would distinguish them would be the entitlement to a jury trial. Crimes punishable by imprisonment for two years or less would not be tried by judge and jury. Trial by judge and jury would be an option for an accused charged with a crime punishable by imprisonment for more than two years. Thus, the Québec model would answer the question we posed earlier: If there should exist only two classes of crime, how many court levels should exist to try them? The

87. A fuller discussion of section 96 is included in the next section.

88. *Supra*, note 10.

answer would be two, according to the Québec structure — one court would hear jury trials and the other non-jury trials.

There appears to be some momentum for reform along these lines. The Report of the Ontario Court Inquiry recommended reform of the Ontario criminal courts along the lines of the Québec model:

It is the recommendation of this Inquiry that the criminal jurisdiction of the Ontario Provincial Court be enlarged to correspond with the Provincial Court of Québec [now the Court of Québec] so that the majority of all judge alone trials can be heard in the Provincial Court.<sup>89</sup>

The Report cites two reasons for this recommendation. It states that the existence of an election of trial by a judge alone, as opposed to trial by a provincial court judge, is a vestige of the era when the provincial magistracy was not legally trained. Further, it was intended to give an accused an option to be tried for an indictable offence in an expeditious fashion. However, the existence of this option can now in fact be used to achieve delays through the system of elections and re-elections. As such, it has outlived much of its usefulness.

Thus, the Québec system offers a desirable model for reform of the court structures in existence in the other provinces and the territories. It does, however, have some shortcomings. Since it is not a completely unified system, there would still be delays in transferring cases from one court to another. It would also legitimise the perception of a limited judicial hierarchy in that it would withhold the jurisdiction to try cases with a jury from the Provincial Court. It is an improvement on the two- and three-level systems since it would give an expanded jurisdiction to the Provincial Court and a concomitant increase in its status. But it would still display a lack of confidence in the ability of Provincial Court judges to try the most serious offences, such as murder.

### III. The Unified Court

The problems with the foregoing models suggest a unified court as a solution. A model made up of courts of concurrent jurisdiction was criticized because it would constitute a mere appearance of uniformity while preserving most of the problems inhering in the present structures. The shortfall of the Québec model is related solely to its preservation of two levels. Why not, then, simply create one criminal court with complete jurisdiction over criminal matters?

A unified court has the potential to solve all of the problems in the present system discussed earlier. Delays would be reduced to a minimum since there would be no transfers of cases between courts. Also, a unified system would be ideally suited as a vehicle for introducing sophisticated case-flow management principles and techniques

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89. *Supra*, note 1 at 93.

into our courts. A single court would have responsibility for a criminal case from the point at which a charge is laid until its disposition. There would be no allowance for gamesmanship through the election and re-election process, since the only choices would be whether to have a preliminary inquiry and, in serious cases, whether to have a jury trial. Obviously, there would be no confusion as to the jurisdiction of the court or the powers of the particular presiding judges. The court would have complete criminal jurisdiction and the judges would all have equal powers. There would be no disparities between judges since they would all have the same status, salaries, independence, facilities, forms of address, qualifications and jurisdiction. There would be no possibility, therefore, of the public regarding some criminal courts and judges as being less competent than others.

The merits of a unified court are patent. The more difficult question is how to implement it. There are two kinds of obstacles: constitutional issues and practical difficulties.

All of the courts in a province are constituted by the Lieutenant Governor in Council under the authority of section 92(14) of the *Constitution Act, 1867*:

92. In each province the Legislature may exclusively make laws in relation to matters coming within the classes of subject next hereinafter enumerated, that is to say, —

...

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

Although the provinces have exclusive authority to establish all provincial courts, that authority does not extend to the appointment of all of the judges in those courts. Some appointments are made by the Governor General under section 96 of the *Constitution Act, 1867*:

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Section 96 has been interpreted by the courts as containing not only an appointment power vested in the Governor General, but a reservation of substantive jurisdiction to the courts named in it.<sup>90</sup> In other words, since the federal government has the power to appoint judges to the various courts named in section 96, any attempt to usurp the substantive jurisdiction of those courts is itself violative of section 96, since it would deprive the federal government of the ability to appoint judges with power to exercise the jurisdiction normally reserved to those courts. It appears also that the federal government is bound by section 96. In the case of *McEvoy*,<sup>91</sup> the New Brunswick

90. See P. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1985) at 420-4 for a discussion of the jurisprudence under s. 96 in relation to criminal courts.

91. *Reference Re Establishment of a Unified Criminal Court of New Brunswick* (1981), 62 C.C.C. (2d) 165 (N.B. C.A.), reversed: *McEvoy v. A.G. of N.B. and A.G. Can.* (1983), 4 C.C.C. (3d) 289 (S.C.C.). In a challenge to the jurisdiction of Provincial Courts to hear non *Criminal Code* matters, the Ontario Court of Appeal has endorsed *McEvoy*. See *Re Regina and Trimarchi* (1987), 63 O.R. (2d) 515 (C.A.).

Court of Appeal upheld a New Brunswick plan to create a unified criminal court to be staffed by provincially-appointed judges on whom criminal jurisdiction would be bestowed by Parliament. The Supreme Court of Canada reversed the decision on the basis that section 96 prevented a total transfer of criminal jurisdiction from section 96 courts to the Provincial Court, even with federal consent and co-operation.

For present purposes, the constitutional question is this: Can a unified court with jurisdiction to try all criminal offences, including those normally tried by courts staffed by federally-appointed judges, be created without breaching section 96 of the *Constitution Act, 1867*? We believe that the answer is yes and that there are two possible ways of doing so.

The first method would be for the provinces and territories to establish the unified criminal court. The court could be staffed by judges presently sitting on the Provincial Court. As well, judges of the existing County Courts and Supreme Courts could be appointed to the unified court if they wished to hear criminal cases. Allowing the provinces to create the court would be consistent with the power in section 92(14) to constitute, maintain and organize courts of criminal jurisdiction. The only remaining problem is section 96. The *McEvoy* case presents an obstacle to having the unified court staffed exclusively, or even predominantly, by provincially-appointed judges. If, however, these judges were appointed in accordance with the governing sections of the *Constitution Act, 1867*, there would be no apparent conflict with section 96.

Section 96 requires that the Governor General appoint the judges of certain courts, including the provincial superior courts. Since the unified court would exercise some of the jurisdiction normally reserved to the superior courts (such as the power to hear jury trials) its judges should be appointed by the Governor General. Other provisions of the *Constitution Act, 1867* would also apply. Section 97 requires that judges appointed by the Governor General to serve on courts constituted by the provinces must be selected from the bars of those provinces. Section 99 contains the guarantee of tenure during good behaviour, the means of removing judges of the superior courts, and the retirement age of 75 years. Section 100 provides that the salaries of judges appointed by the Governor General "shall be fixed and provided by the Parliament of Canada." Thus, to avoid the problem presented in the *McEvoy* case, the judges of the unified court could be federally-appointed. If that were so, certain guarantees of judicial independence set out in the constitution would apply to those appointees.

Another means of avoiding the *McEvoy* problem would be for the federal government, rather than the provinces, to establish the unified court. Section 101 of the *Constitution Act, 1867* provides:

**101.** The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance, and organization of a General Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the laws of Canada.

This would appear to permit the federal government to establish a new court and, presumably, to appoint the judges who would serve on it.<sup>92</sup> However, there may still be a section 96 issue; that is, can the federal government establish a court that would usurp some of the jurisdiction of the provincial superior courts? It may be that the federal government must also abide by sections 96 to 100 in appointing the judges of such a court.<sup>93</sup> To our minds, the route of creating a court under section 101 is a less attractive solution to the section 96 issue than simply appointing judges to a provincially-created unified court in accordance with sections 96 to 100. Having a unified criminal court created by the provinces is more consistent with the division of powers under the *Constitution Act, 1867*. Section 92(14) clearly gives the provinces the power to create criminal courts. For the federal government to move into this domain would certainly violate the spirit if not the letter of the federal-provincial partnership in criminal justice matters. Moreover, it may, in fact, serve no real purpose if the requirements of section 96 would have to be observed in any case. Recourse to section 101 to create a unified court would, however, be available as a last resort if it were impracticable for the provinces to do so.

In stating that the problem arising from *McEvoy* could be solved by appointing judges to a unified court under section 96, we are not suggesting that it would be necessary for the province to relinquish all of its present power to appoint judges to criminal courts. Rather, there could be a shared power of appointment between the federal and provincial governments, so long as the appointment ultimately satisfied the requirements of sections 96 to 100 of the *Constitution Act, 1867*.

There are practical difficulties in creating a unified court. There would be some dislocation of personnel and a variety of logistical problems relating to the availability and use of court facilities. Some new facilities may have to be built and existing facilities may have to be modified (for example, to permit space for jurors). However, the existence of a unified court would not necessarily involve complete centralization of court resources and administration. A better managed criminal court system could, in fact, result in more flexibility in the placement of courts in the community. Nor would it be necessary for all judges to be placed in one courthouse. The existing facilities used by the other levels of criminal courts would continue to be utilized. Better management of criminal cases could result in a more rational use of available space. When one court is suffering a backlog, extra judges could be assigned from other regions to make use of courtrooms that would otherwise be vacant. While creation of a unified court would involve a considerable re-allocation of physical and human resources, the rewards in terms of efficiency are potentially great.

Another problem relates to the relationship of the judges of the unified criminal court to judges of other courts. If the unified criminal court were, for example, a

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92. It would also have the power to prosecute offences in the new court according to *A.-G. of Canada v. Canadian National Transportation Ltd. et al.* (1983), 3 D.L.R. (4th) 16 (S.C.C.); *R. v. Wetmore and A.-G. of Ontario et al.* (1983), 2 D.L.R. (4th) 577 (S.C.C.).

93. See R. Elliott, "Is Section 96 Binding on Parliament?" (1982), 16 U.B.C. L. Rev. 313, at 344-5 for a presentation of this argument.

division of the Provincial Court, there would be disparities between the salaries and benefits given to unified court judges and those given to the judges of the civil and family divisions of the Provincial Court, since the unified court judges would be entitled to the incidents of a section 96 appointment. It would be anomalous for there to be such a wide variation within a single court. On the other hand, if the unified criminal court were a completely separate court or a division of the Supreme Court, there would be no such disparity, since the judges on the new court would have a status equivalent to that of the other section 96 judges. There would, however, be other problems in the latter scenario. The unified criminal court would not be administered together with the other local courts, such as the civil and family divisions of the Provincial Court. This would weaken or even defeat the advantages that flow from the present arrangement in most jurisdictions where the provincially-appointed courts are under a single administration. In particular, it would be at odds with the creation of the Court of Québec which unifies the former Provincial Court, Sessions Court and Youth Court.<sup>94</sup> Obviously, the creation of a unified criminal court should not operate to neutralize attempts by the provinces to make improvements in their own domain.

Thus, the fact that for constitutional purposes the unified criminal court should be appointed in accordance with section 96 results in practical difficulties. These difficulties stem from the present overall court structures in the various jurisdictions. Because there are multiple levels of courts dealing with non-criminal matters, it is difficult to imagine a unified criminal court fitting within that structure. There are two possible responses to this problem. First, unification of criminal courts may only be viable if *all* judges in the provinces and territories are given equal status. This could be accomplished either by simply giving all judges of the courts appointed by the provinces and territories parity with federally-appointed judges, without any change in the structure of the courts, or by unifying all of the courts in the provinces and territories. If there were complete unification of those courts, there would be no discrepancies between judges and the administration of the courts could be co-ordinated. In the 1970s the Law Reform Commission of Canada recommended creation of Unified Family Courts in order to remove jurisdictional anomalies in family law matters.<sup>95</sup> Here we suggest unification of criminal courts. If these suggestions were adopted and if civil courts were unified on the same reasoning, all of the courts would be consolidated in each jurisdiction and all judges of those courts would have equal standing, remuneration and independence. While it is not strictly the place of a federal law reform body to make recommendations regarding civil matters, these being within the legislative competence of the provinces, we recognize that an overall reform of court structures may improve the viability of a unified criminal court.

The second possible response to the problem of placing the unified criminal court within the existing court structures is a constitutional one. It would be a simple logistical matter for the unified criminal court to exist as a division of the Provincial Court. In effect, this would amount to a transfer to the criminal divisions of the

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94. See *supra*, note 10.

95. Law Reform Commission of Canada, *The Family Court*, Working Paper No. 1, (Ottawa: Information Canada, 1974).

existing Provincial Courts the criminal trial jurisdiction of the County and Supreme Courts. While this would solve many of the practical difficulties caused by unification, it raises, as noted earlier, a constitutional issue. For the unified court to exercise exclusive criminal jurisdiction, its members must be appointed in accordance with section 96. Thus, for this second alternative to operate, an amendment to section 96 would be necessary to allow the members of the unified court to be appointed by the province. Upgrading the status, remuneration and independence of the court could then take place, with judges of the civil and family divisions receiving equal treatment. Although this would make the unified criminal court essentially a provincially-appointed court, the mechanism for making appointments to the court could still involve the federal government. In essence, this approach would amount to an amendment of section 96 to solve the problem posed by *McEvoy*. Needless to say, whichever solution is adopted, the establishment of the unified criminal court would require significant expense and a good deal of federal-provincial consultation and co-operation.

If a unified criminal court were created, reform of other aspects of criminal procedure would also be necessary. Some powers to issue process in the *Code* would require amendment. For example, the jurisdiction of a “superior court of criminal jurisdiction” or a section 552 judge to authorize electronic surveillance would have to be amended to empower judges of the unified court to do so. Also, the process of reviewing the decisions of judges of the unified court through the prerogative writs would have to be addressed. At present, Supreme Courts review the decisions of Provincial and County Court judges. Supreme Court decisions are not amenable to judicial review by way of the writs. In our forthcoming Working Paper on Extraordinary Remedies, recommendations for statutory reform of the process of judicial review will be made and account will be taken of the implications of the unified court model. Finally, the question of the appropriate appeal mechanism from a unified court will have to be addressed. Our future Working Paper on criminal appeal procedure will propose modifications to the present appeal process and suggest appropriate reforms in light of our proposals in this paper.

It is our conclusion that notwithstanding the expense and logistical difficulties, a unified criminal court is the best solution to the problems in the present court structure. It is also consistent with our recommendations on the classification of offences. We would include in the *Criminal Code* only “real crimes” — offences that would be punishable by imprisonment. While some procedural incidents would depend on whether the crime was serious or minor, the process of prosecuting all crimes would be essentially the same. Consistent with this approach, there should be no need for different judges or different courts to try the crimes contained in the *Criminal Code*.

There would be substantial transitional difficulties in moving to a unified court system, but these do not appear to be insurmountable. Indeed, they would be off-set by the enormous advantages of a unified system in terms of efficiency, clarity, and an enhanced public respect for the administration of criminal justice.



## CHAPTER FIVE

### Recommendations and Commentary

#### I. Criminal Court

##### RECOMMENDATION

**1. (1) Every province and territory should create a single court or court division called the Criminal Court.**

**(2) The *Criminal Code* should confer exclusive jurisdiction on the Criminal Court to try all crimes.**

##### Commentary

The creation of a unified criminal court is obviously our principal recommendation. A necessary corollary recommendation is that the *Criminal Code* confer exclusive jurisdiction on the new court to try all crimes. This is provided in Recommendation 1(2). A uniform name should be given to the unified criminal court in all of the provinces and territories. Our suggestion is that it be called simply the Criminal Court. This would reflect the fact that all crimes would be tried in that court and minimize the confusion that arises from the variety of names given to criminal trial courts across the country. Of course, to make it clear which Criminal Court one was speaking of, the name of the particular province or territory could form part of the court's name — e.g., the Criminal Court of Manitoba, or the Criminal Court of the Yukon Territory.

Our justifications for Recommendation 1 are set out fully in previous chapters. It is unnecessary to repeat all of them here. However, the following is a summary of our reasons.

The creation of a single court with exclusive criminal trial jurisdiction is a necessary and important step in an overall effort to rid our criminal justice system of excessive delays. We have urged in other areas of criminal procedure that measures be taken to simplify and rationalize the process of prosecuting crimes, but those measures

cannot be effective if an overly complex court system exists. We also believe that it is important to simplify the court structure so that the public, as well as participants in the process, such as accused persons, witnesses, jurors, and even lawyers, have a clearer understanding of our criminal justice system, including where criminal cases will be heard. Finally, the existence of a single criminal court will ensure that there can be no perception that some criminal courts are inferior to others.

The most redeeming feature of a unified court is its simplicity. If one were designing a completely new criminal court system, a unified criminal court would be the model most likely to be chosen by the public and participants alike. It also offers the most potential for efficiency in administration of both human and physical resources. It would lend itself to centralization but allow for flexibility in the placement of courts and judges. New case-flow management techniques<sup>96</sup> could be implemented much more easily and effectively in a structurally simple court system than in the present multi-layered, overlapping structure. We have not made specific recommendations for introducing new management techniques into the administration of criminal courts, but we recognize their importance as an additional means of combatting court delay.

The *McEvoy* case itself represents an attempt on the part of one Canadian jurisdiction to simplify the criminal court system through creation of a unified court. The legislation put forward by the Attorney General of New Brunswick proposed that "the legislature constitute a court of Unified Criminal Jurisdiction to exercise complete criminal jurisdiction, including all *Criminal Code* offences, all other federal offences and all provincial offences."<sup>97</sup> Although both the Attorney General of New Brunswick and the Attorney General of Canada argued in *McEvoy* that section 96 did not prevent Parliament from conferring on the new court such a jurisdiction, the Supreme Court held that the New Brunswick proposal would have ousted completely the constitutionally-protected jurisdiction of provincial superior courts. Nevertheless, it is clear from *McEvoy* that there is some measure of support for a unified court model in at least one province and on the part of the federal government. The sole obstacle to carrying out the plan was section 96.

The province of Québec moved in 1988 to unify the criminal courts within its jurisdiction — the Provincial Court, the Court of Sessions of the Peace and the Youth Court. The Brazeau Report<sup>98</sup> had recommended in 1987 that unification of these courts should be undertaken in order to improve the image of the courts by reinforcing the independence of the judiciary, increase the efficiency of the legal system, and make the courts more accessible to the citizen.<sup>99</sup> Unification would also allow judges to move

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96. See Baar, *supra* note 82, at 195-234.

97. *Supra* note 90, 62 C.C.C. (2d), at 169.

98. *Rapport du Comité sur la Révision de la Loi sur les Tribunaux Judiciaires* (Chairman: M<sup>r</sup> Claude Brazeau), May 14, 1987.

99. *Ibid.* at 21.

more easily from one court division to another or to transfer to another district.<sup>100</sup> The recommendations of the Brazeau Report were implemented through creation of the Court of Québec.<sup>101</sup>

Others have also suggested the creation of a unified court as a solution to many of the problems in the present system. Professor Friedland's study of the magistrates' courts in the late 1960s recommended a unification of most of the criminal trial jurisdiction of the three levels of criminal courts in Ontario.<sup>102</sup> The Ouimet Committee foresaw this kind of structural reform as well.<sup>103</sup> A study paper prepared for the Law Reform Commission of Canada in the 1970s also proposed a unified court model.<sup>104</sup> Professor Russell's recent text on *The Judiciary in Canada* contains numerous references to the need for reform of court structures and suggests a unified court model as a solution:

Even if we make some progress in relieving the massive case-load burden on the criminal courts, the need for an extensive high-quality adjudicative service to determine guilt or innocence and impose sentence will remain. But a strong case can be made for the proposition that Canada will not have such a service for the trial of all serious offences until we abandon the hierarchical system of inferior and superior trial courts which has long been a hallmark of the judicial branch of government in Canada.

... But the key objective of the unified criminal court proposal is to move away from a hierarchically organized system of trial courts. Where the prime function is to determine guilt or innocence and the appropriate sentence, there should not be an inferior and superior form of justice.<sup>105</sup>

Provincial Court judges have long advocated the creation of a unified court. The 1979 presentation to the Minister of Justice by the Canadian Association of Provincial Court Judges stated:

The courts of criminal jurisdiction in Canada require fundamental changes to permit them to serve Canadians today in an efficient and economical way. The present hierarchy of criminal trial courts pays homage chiefly to tradition. It is cumbersome, fraught with built-in delays, archaic, needlessly expensive and a waste of judicial and administrative manpower.<sup>106</sup>

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100. *Ibid.*, at 22.

101. *Supra*, note 10.

102. *Supra* note 30, at 72. Friedland proposed that capital offences and very minor offences not be tried in the unified court. Capital offences should be tried by a Supreme Court judge and jury. Minor offences could be tried by lay magistrates.

103. *Supra* note 38, at 165.

104. Roberts, *supra* note 83.

105. Russell, *supra* note 21, at 215-6.

106. Canadian Association of Provincial Court Judges, Committee on Court Structure, presentation to the Hon. Jacques Flynn, Minister of Justice (Ottawa, 1979), at 1-2.

The presentation concluded that creation of a unified criminal court was “the only way to minimize the delays, the cost and the complications which encumber our present system.”<sup>107</sup> Ontario Provincial Court judges reached the same conclusion in 1987.<sup>108</sup>

Other countries have also considered implementation of a unified court model.<sup>109</sup> The Crown Court in England is an existing model of a unified criminal court that was described in the previous chapter. In the United States, the President’s Commission on Law Enforcement and Administration of Justice undertook a study of the criminal courts and concluded that there was no need to have a variety of courts trying criminal cases, even though there may be some justification for classifying offences for other purposes:

While the grading of offences as felonies, misdemeanors, and petty offences is an appropriate way of setting punishments, is dictated by history and constitutional provisions, and is necessary for such procedural purposes as grand jury indictment and jury trial, the Commission doubts that separate judicial systems are needed to maintain these distinctions. A system that treats defendants who are charged with minor offences with less dignity and consideration than it treats those who are charged with serious crimes is hard to justify. The unification of these courts and services may provide a sound way to bring about long overdue improvement in the standards of the lower courts.<sup>110</sup>

The President’s Commission went on to recommend that “[f]elony and misdemeanor courts and their ancillary agencies — prosecutors, defenders, and probation services — should be unified.”<sup>111</sup>

As discussed in Working Paper 54, we recommended that the present classification of offences be simplified considerably. The *Criminal Code* should contain only “crimes”; that is, offences for which a prison sentence is a possible punishment. The only distinction would be between serious crimes (punishable by imprisonment for more than two years), which could be tried by a judge and jury, and less serious crimes (punishable by imprisonment for two years or less), which would always be tried by a judge alone. The President’s Commission in the United States recommended unification of criminal courts even in the absence of reform of the classification of offences. The case for unification is even stronger, then, if the classification of offences in the *Criminal Code* were simplified along the lines suggested in Working Paper 54.

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107. *Ibid.*, at 4.

108. *Supra* note 27, at 72-7.

109. See C. Baar, “Inter-Court Relations in Comparative Perspective: Toward an Ecology of Trial Courts” (1987), 12 *Justice System Journal* 19 for a historical and comparative discussion of the trend toward unification of trial courts in western society.

110. President’s Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (Washington: U.S. Government Printing Office, 1967), at 129.

111. *Ibid.*

## II. Appointments

### RECOMMENDATION

#### Alternative A

**2. (1) *Judges of the Criminal Court should be appointed by the Governor General in accordance with the Constitution Act, 1867.***

#### Alternative B

**2. (1) *Section 96 of the Constitution Act, 1867 should be amended to allow the provinces and territories to make appointments to the Criminal Court.***

**(2) As a transitional measure, judges from the Criminal Division of the Provincial Court should be appointed to the Criminal Court. Other judges who presently sit in section 96 courts and who wish to serve in the Criminal Court should be entitled to be appointed to it.**

**(3) Education and training on presiding at jury trials should be made available to Provincial Court judges.**

**(4) For future appointments to the Criminal Court, the provincial and territorial governments should put forward binding nominations for two out of every three vacancies, with the federal government making the third.**

**(5) Salaries of Criminal Court judges should be equivalent to those paid to provincial Supreme Court judges.**

#### Commentary

Our recommendations regarding judicial appointments to the Criminal Court attempt to ensure that the requirements of the Constitution are abided by, that there will be a readily available pool of expert candidates for the new court and that there is a fair mechanism for making future appointments to the court that reflects the partnership of the federal and provincial governments in the administration of criminal justice. We put forward alternative suggestions for the appointment process.

As discussed in Chapter Four, one approach is to have judges of the Criminal Court appointed by the Governor General under section 96 of the *Constitution Act, 1867* since the court will be exercising in part a jurisdiction traditionally left to the provincial superior courts. This is our Alternative A. As a necessary incident to appointment under section 96, the other relevant provisions of the Constitution should also apply. Thus, the guarantee of tenure during good behaviour in section 99 and the

fixing of judicial salaries by Parliament in section 100 should apply to those appointed to the Criminal Court. In addition, the requirement that salaries be paid out of the Consolidated Revenue Fund and the statutory qualifications for appointment contained in the federal *Judges Act* would also apply, since Criminal Court judges would be federally-appointed. Thus, judges of the Criminal Court would enjoy a greater degree of independence than the members of most Provincial, Territorial and Sessions Courts now have. There would also be a uniformly high standard of qualification for appointment to serve on the court.<sup>112</sup> Thus, not only would there no longer be any possibility of some criminal courts being viewed as inferior to others, since there would only be one criminal trial court, members of the Criminal Court would have independence, status and respect equal to the other federally-appointed judges. However, as discussed in Chapter Four, this will itself result in disparities between the Criminal Court and the provincially-appointed courts unless the judges are to receive equal status, remuneration and independence or structural reform of the other provincial courts is undertaken at the same time.

Alternative B, an amendment to section 96 of the *Constitution Act, 1867*, would permit creation of the unified criminal court even in the absence of reform of the other provincial courts. According to this approach, the Criminal Division of the Provincial Court would be transformed into the unified Criminal Court, would remain in essence a provincially-appointed court, yet would have jurisdiction to try all criminal offences, even those traditionally left to the provincial superior courts. Enhancement of salaries, benefits and independence could proceed thereafter with judges of the other divisions of the Provincial Court receiving equivalent treatment. The *McEvoy* case demonstrated that creation of a unified criminal court was favoured by both provincial and federal governments. If that political will continues to exist, amendment of section 96 is a viable solution to the difficulties in implementing a unified court.

The new Criminal Court should be made up of judges who have an interest and expertise in criminal law. The natural place one would look for candidates for the new court is to the courts which presently try the overwhelming majority of criminal cases — the Criminal Divisions of the Provincial and Territorial Courts and the Court of Québec. Judges appointed to these courts are usually drawn from the criminal defence bar or prosecutors offices. They have practical experience in criminal matters and preside at trials of a wide variety of criminal offences, including some of the more serious crimes in the *Criminal Code*, such as manslaughter, sexual assault, and attempted murder. While they presently do not preside at jury trials, we have not been convinced that the additional duty of instructing jurors on the law to be applied in a particular case would be beyond the abilities of this group of judges. For those who wish to acquire or enhance the skills necessary for instructing jurors, we suggest in Recommendation 2(3) that supplementary educational programmes be made available. For those who would rather not preside at jury trials, administrative discretion may be exercised to accommodate this preference.

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112. i.e., Ten years membership in the bar: *Judges Act*, *supra* note 41.

Thus, to our minds, Provincial Court judges are well-suited for appointment to the Criminal Court. Some, of course, may not meet the requirements in the federal *Judges Act*, because the standards of eligibility in their province or territory are less stringent than those applying at the federal level. However, it would not appear to us to be desirable to make distinctions between judges from the respective courts on grounds of experience, abilities or otherwise. As a pragmatic, transitional measure, as well as a matter of principle, all of the judges who presently sit in courts that shoulder the greatest weight of the criminal case-load should be appointed to the Criminal Court as a matter of course. Any attempt to screen out candidates on any grounds would be to imply that some of these judges are, and therefore have been, incompetent to hear criminal trials. This would not only be an unhealthy exercise, but would probably result in very few, if any, disqualifications.

Furthermore, the jurisdiction of Provincial Courts has increased greatly since Confederation to the point where it is the court with the broadest jurisdiction, including the power to try some of the most serious of crimes. In the 1892 *Criminal Code*,<sup>113</sup> there were 136 crimes that had to be heard by Supreme Courts. This number has gradually diminished. There is now a total of nine substantive offences, only one of which is prosecuted with any frequency; i.e., murder (see Appendix B). This reduction in the crimes reserved to the jurisdiction of Supreme Courts has resulted in a parallel expansion in the jurisdiction of Provincial Courts. Thus, the selection of Provincial Court judges to staff the Criminal Court is consistent with the historical trend to invest Provincial Courts with greater jurisdiction.

In recommending that Provincial Court judges should receive Criminal Court appointments immediately, we are not, of course, precluding judges from the County or Supreme Courts, from being appointed. Judges from those courts already meet the federal qualifications for appointment and, therefore, they should be entitled to be appointed to the new court should they so desire.

Recommendation 2(4) refers to the process of selecting future judges for the court once the initial appointments have been made. Obviously, judges sitting presently on federally-appointed courts would have preference as candidates for appointment should they so desire it. Also, while membership on the Criminal Court would be full-time, there should be some possibility of movement to other courts or court divisions, subject to the administrative discretion of the Chief Judge or Justice involved. This kind of movement would offer variety and the benefits of cross-fertilization from other branches of law. These are benefits that a completely segregated and specialized court system could not provide.

Recommendation 2(4) suggests a shared appointment mechanism. Two out of every three appointments to the Criminal Court would be made by the provincial and territorial governments; the third would be made by the federal government. To our minds this is a reasonable arrangement given what each level of government would gain and lose in the balance. The provinces and territories now exclusively select the

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113. S.C. 1892, c. 29.

judges that hear most of the criminal cases. Thus, in the unified system, they should have a significant role to play in determining who will receive appointments to the Criminal Court. On the other hand, to give the provinces complete control over the selection of candidates would be to deny the federal government any role in choosing those who would preside at criminal trials, a power which it presently enjoys through the appointment of judges to the County and Supreme Courts. Thus, it should also be able to select suitable candidates for the Criminal Court. Since the Provincial Courts currently deal with the great majority of criminal matters and their members are appointed by the provinces and territories, the dominant role in the appointment of judges to the Criminal Court should be performed by the provinces and territories. While the proportion of criminal matters presently dealt with by federally-appointed judges is relatively small, their involvement in the administration of criminal justice is significant in that they hear trials of some of the most serious crimes and have a supervisory role to play in relation to decisions of Provincial Courts. Thus, the participation of each level of government in the appointment process should not be determined solely by the relative numbers of criminal matters dealt with by the provincially-appointed and federally-appointed courts. It should also reflect the functions performed by the different court levels. While the formula we suggest is somewhat arbitrary, we believe that a two-third/one-third division of appointing authority is reasonable and reflects the present equilibrium in the allocation of responsibilities for criminal justice matters between the two levels of government.

The formula we propose for appointing judges to the Criminal Courts differs from the arrangement agreed to by the provinces and the federal government under the Meech Lake Accord in relation to appointments to the Supreme Court of Canada. According to that arrangement, the provinces would submit a list of qualified candidates to the federal government. The appointment would be made by the federal government from the list prepared by the provinces.<sup>114</sup> In other words, the candidate would have to be acceptable to both levels of government in order to receive an appointment.

While this may be a desirable procedure for the national court of last resort, which has ultimate jurisdiction to resolve constitutional disputes between levels of government, it is not an appropriate means of staffing a criminal court for two reasons. First, since a candidate requires approval from both levels of government, it is possible that the field of suitable nominations will be relatively small and that the process of selection could become quite drawn out. This is not likely to pose problems with respect to appointments to the Supreme Court of Canada since vacancies occur relatively rarely. On the other hand, the need for appointments to the Criminal Court will arise with some frequency. The mechanism for appointing candidates to it must permit appointments to be made regularly and swiftly. Second, while the Meech Lake method of appointment gives the province a role to play in the process, it does not reflect the degree of provincial participation consistent with the provinces' responsibilities in criminal justice matters. The provinces and territories now make appointments to the courts that hear the majority of criminal cases. They should continue to have a major role in the appointment of judges to the Criminal Court.

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114. See P. Hogg, *Meech Lake Constitutional Accord Annotated* (Toronto: Carswell, 1988), at 33-5.



There is no reason, however, why the use of nominating committees to identify suitable candidates for judicial appointment (as recently proposed by the Minister of Justice)<sup>115</sup> should not apply to nominations to the Criminal Court made by the federal government. The provinces and territories would be left to determine the most appropriate means of identifying meritorious candidates for their nominations to the Criminal Court.

We have not to this point discussed the payment of salaries to Criminal Court judges. We suggest parity with judges of the Provincial Supreme Courts, no matter which appointment mechanism is followed, to reflect the fact that the Criminal Court should have equal status with federally-appointed courts. Any arrangement arrived at for payment of these salaries should reflect the shared burden between the provinces and the federal government for the administration of criminal justice. The cost should be split between the two levels of government. No one level should shoulder the entire expense since the benefits of the new court structure would be mutually felt. While this increase in salaries would obviously be costly, the result of unification will be a reduction of expenses through a more efficient system of administration of justice and a more tightly co-ordinated administrative apparatus. Further, the recommendations the Commission makes in other areas such as the classification of offences, trial within a reasonable time, and disclosure by the prosecution would, if adopted, simplify and expedite the criminal process. Thus, the increase in judicial salaries should not be regarded as a net outlay of scarce provincial and federal resources. Rather, it should be seen as part of an overall effort to improve the quality and image of our criminal justice system. In our view, in the long-term, there will be fiscal advantages in so doing and perhaps a reduction in the number of judges and administrators required in our criminal court system.

### III. Intermediate Reform

#### RECOMMENDATION

**3. (1) Unification of criminal courts could, as an interim measure, be allowed to proceed in stages.**

**(2) In provinces with a three-level system of criminal courts, the number of levels should be reduced to two, consisting of a Provincial Court and a Supreme Court.**

**(3) Under a two-level system of criminal courts, the *Criminal Code* should confer jurisdiction on the Provincial Court to hear all non-jury trials.**

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115. See "New Judicial Appointments Process", An Address to the Law Day Dinner, April 14, 1988 by Hon. Ray Hnatyshyn. The Minister proposed that nominating committees be composed of a nominee of the provincial or territorial law society, a nominee of the provincial or territorial branch of the Canadian Bar Association, a puisne judge of the federally-appointed bench for the jurisdiction, a nominee of the provincial or territorial Attorney-General and a person named by the federal Minister of Justice.

**(4) Within a period fixed by statute, all courts exercising criminal jurisdiction should ultimately be amalgamated in a single unified court.**

**(5) During the interim period fixed by statute, the administration of the criminal courts should be co-ordinated, rationalized and, to the fullest extent possible, centralized.**

### Commentary

We put forward Recommendation 3 as a suggestion for introduction of a unified court in two stages. Some provinces or territories may regard the establishment of a unified Criminal Court as entailing too many administrative and logistical difficulties to be carried out in one fell swoop. Rather than have those jurisdictions reject structural reform altogether, we suggest that they move toward unification in increments.

In provinces with a three-level system this would involve moving from three levels to two. This is consistent with the trend over the past several years in Canada to reduce the number of court levels. Many provinces have taken this step without major difficulties. This reduction should be accomplished through dissolution of the County or District Court. Its jurisdiction is, for the most part, concurrent with that of the other two levels. Thus, it is the court that lends itself most readily to merger with another level.

Once the three-level provinces move to two levels, we suggest that the Provincial Courts in those provinces be given jurisdiction to hear all non-jury trials. Similarly, the Provincial Courts should be assigned this power in two-level jurisdictions outside Québec. This would, in effect, introduce the Québec court model to all the other provinces and territories. We discussed the merits of the Québec system in the previous chapter. Not only does it contain a logical division of jurisdiction, it is also compatible with the ultimate unification of all levels of criminal trial courts. While there are some shortcomings in the Québec model, it represents a vast improvement over the present structure in the other jurisdictions. The next step would be simply to convert the Provincial Court into our suggested model of a unified Criminal Court by conferring on it jurisdiction to hear jury trials.

While unification of criminal courts can be carried out in stages, the ultimate goal should be complete unification of trial courts. This should proceed within a specified time frame. During that time, reform of the administration of the criminal courts should be carried out to ensure that the benefits of a unified court can be fully realized. This requires that the administrative practices of criminal courts be rationalized, co-ordinated and (to the fullest extent possible) centralized. The importance of this endeavour as a corollary to structural reform of the courts cannot be overstated.

## CHAPTER SIX

### Summary of Recommendations

#### Criminal Court

**1. (1) Every province and territory should create a single court or court division called the Criminal Court.**

**(2) The *Criminal Code* should confer exclusive jurisdiction on the Criminal Court to try all crimes.**

#### Appointments

##### Alternative A

**2. (1) *Judges of the Criminal Court should be appointed by the Governor General in accordance with the Constitution Act, 1867.***

##### Alternative B

**2. (1) *Section 96 of the Constitution Act, 1867 should be amended to allow the provinces and territories to make appointments to the Criminal Court.***

**(2) As a transitional measure, judges from the Criminal Division of the Provincial Court should be appointed to the Criminal Court. Other judges who presently sit in the s. 96 courts and who wish to serve in the Criminal Court should be entitled to be appointed to it.**

**(3) Education and training on presiding at jury trials should be made available to Provincial Court judges.**

(4) For future appointments to the Criminal Court, the provincial and territorial governments should put forward binding nominations for two out of every three vacancies, with the federal government making the third.

(5) Salaries of Criminal Court judges should be equivalent to those paid to provincial Supreme Court judges.

#### Intermediate Reform

3. (1) Unification of criminal courts could, as an interim measure, be allowed to proceed in stages.

(2) In provinces with a three-level system of criminal courts, the number of levels should be reduced to two, consisting of a Provincial Court and a Supreme Court.

(3) Under a two-level system of criminal courts, the *Criminal Code* should confer jurisdiction on the Provincial Court to hear all non-jury trials.

(4) Within a period fixed by statute, all courts exercising criminal jurisdiction should ultimately be amalgamated in a single unified court.

(5) During the interim period fixed by statute, the administration of the criminal courts should be co-ordinated, rationalized and, to the fullest extent possible, centralized.

## APPENDIX A

### Distribution of Criminal Trial Jurisdiction

Three-level Jurisdictions	Two-level Jurisdictions (Except Québec)	Québec
<i>Provincial Courts:</i> – summary conviction offences  – indictable offences within absolute jurisdiction or where accused so elects	<i>Provincial Courts:</i> – summary conviction offences  – indictable offences within absolute jurisdiction or where accused so elects	<i>Court of Québec:</i> – summary conviction offences  – indictable offences within absolute jurisdiction or where accused elects judge alone (with or without preliminary inquiry)
<i>County Courts:</i> – indictable offences where accused elects judge alone or at instance of prosecutor after accused elects judge and jury (only in B.C. and Ontario)		
<i>Supreme Courts:</i> – indictable offences within exclusive jurisdiction or where accused elects judge and jury	<i>Supreme Courts:</i> – indictable offences within exclusive jurisdiction or where accused elects judge alone or judge and jury	<i>Superior Court:</i> – indictable offences within exclusive jurisdiction or where accused elects judge and jury

## APPENDIX B

### Offences Within the Exclusive Jurisdiction of Superior Courts<sup>1</sup>

<i>Criminal Code</i>	<i>Offence</i> <sup>2</sup>
1. s. 47	Treason <sup>3</sup>
2. s. 49	Alarming Her Majesty
3. s. 51	Intimidating Parliament or Legislature
4. s. 53	Inciting to mutiny
5. s. 61	Seditious offences
6. s. 74	Piracy
7. s. 75	Piratical acts
8. s. 119(1)(a)	Bribery of a judicial Officer
9. s. 235	Murder <sup>4</sup>

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1. See s. 427, *Criminal Code*. Offences in this group are normally tried by judge and jury, but an accused may, with the consent of the Attorney General, waive the jury trial. See s. 430.

2. Includes the offences of attempting to commit crimes 1 to 7, and conspiracies to commit crimes 1 to 9.

3. Includes being an accessory after the fact to treason.

4. Includes being an accessory after the fact to murder.

## APPENDIX C

### Electable Offences<sup>1</sup>

<i>Criminal Code</i>	<i>Offence</i>
s. 50	Assisting alien enemy to leave Canada, or omitting to prevent treason
s. 52	Sabotage
s. 57(1)	Forging of or uttering forged passport
s. 57(2) <sup>2</sup>	False statement in relation to passport
s. 57(3)	Possession of forged passport
s. 58	Fraudulent use of certificate of citizenship
s. 62	Offences in relation to military forces
s. 65	Riot
s. 68	Offences relating to proclamation of Riot Act
s. 69	Peace officer neglecting to suppress riot
s. 70(3)	Contravening proclamation against military training
s. 71	Duelling
s. 73 <sup>2</sup>	Forcible entry or detainer
s. 76	Highjacking
s. 77	Endangering safety of aircraft
s. 78	Taking offensive weapon or explosive on aircraft

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1. See s. 536, *Criminal Code* — accused may elect trial by judge and jury, by judge alone or by Provincial Court judge.

2. May also be prosecuted by summary conviction. See Appendix E.

s. 80	Failure to use reasonable care in use of explosive
s. 81	Intentional injury or damage with explosive
s. 82	Unlawful possession of explosive
s. 85	Use of firearm during commission of offence
s. 86(1) <sup>2</sup>	Pointing a firearm
s. 86(2) <sup>2</sup>	Careless use or storage of firearm
s. 87	Carrying weapon or imitation for dangerous purposes
s. 89 <sup>2</sup>	Carrying concealed weapon without permit
s. 90(1) <sup>2</sup>	Possession of prohibited weapon
s. 90(2) <sup>2</sup>	Possession of prohibited weapon in motor vehicle
s. 91(1) <sup>2</sup>	Possession of unregistered restricted weapon
s. 91(2) <sup>2</sup>	Possession of restricted weapon elsewhere than where authorized
s. 91(3) <sup>2</sup>	Possession of restricted weapon in motor vehicle
s. 93 <sup>2</sup>	Transfer of firearm to person under 16
s. 94 <sup>2</sup>	Wrongful delivery of firearms
s. 95 <sup>2</sup>	Importing or delivering prohibited weapon
s. 96(1) <sup>2</sup>	Delivery of restricted weapon to person without permit
s. 96(3) <sup>2</sup>	Importing restricted weapon
s. 97(1) <sup>2</sup>	Delivery of firearm to person without certificate
s. 97(3) <sup>2</sup>	Acquisition of firearm without certificate
s. 100(12) <sup>2</sup>	Possession of firearm in breach of order
s. 103(10) <sup>2</sup>	Possession of firearm in breach of order
s. 104(1) <sup>2</sup>	Failure to deliver found weapon



s. 104(2) <sup>2</sup>	Failure to report lost weapon
s. 104(3) <sup>2</sup>	Defacing or possessing weapon with defaced serial number
s. 105 <sup>2</sup>	Offences relating to sale of firearms
s. 113(1) <sup>2</sup>	False statement to procure certificate
s. 113(2) <sup>2</sup>	Tampering with certificate
s. 113(3) <sup>2</sup>	Breach of conditions in certificate
s. 119(1)(b)	Bribery of judicial officer, M.P. or M.L.A.
s. 120	Bribery of public officers
s. 121(1)	Frauds upon the government
s. 121(2)	Contractor influencing election
s. 122	Breach of trust by public officer
s. 123(1), (2)	Municipal corruption
s. 124	Selling or purchasing office
s. 125	Influencing appointments
s. 126	Disobeying a statute
s. 127	Disobeying court order
s. 128	Misconduct in executing process
s. 129 <sup>2</sup>	Obstructing or failing to assist public or peace officer
ss. 131, 132	Perjury
s. 136	Giving contradictory evidence
s. 137	Fabricating evidence
s. 138	Offences relating to affidavits
s. 139(1) <sup>2</sup>	Obstructing justice by indemnifying surety
s. 139(2)	Obstructing justice by other means

s. 140 <sup>2</sup>	Public mischief
s. 141	Compounding or concealing indictable offence
s. 142	Corruptly taking reward for return of goods
s. 144	Prison breach
s. 145(1) <sup>2</sup>	Being at large without excuse
s. 145(2) <sup>2</sup> , (3) <sup>2</sup> , (4) <sup>2</sup> , (5) <sup>2</sup>	Breach of undertaking recognizance, summons, etc.
s. 146	Permitting or assisting escape
s. 147	Rescue or permitting to escape
s. 148	Assisting prisoner of war to escape
s. 151 <sup>2</sup>	Sexual interference of a person under the age of 14
s. 152 <sup>2</sup>	Invitation to sexual touching of a person under the age of 14
s. 153 <sup>2</sup>	Sexual exploitation of a young person
s. 155	Incest
s. 159 <sup>2</sup>	Anal intercourse
s. 160 <sup>2</sup>	Bestiality
s. 163 <sup>2</sup>	Corrupting morals
s. 165 <sup>2</sup>	Tied sales of obscene publications
s. 166 <sup>2</sup>	Breach of restrictions on publications about judicial proceedings
s. 167 <sup>2</sup>	Immoral theatrical performance
s. 168 <sup>2</sup>	Mailing obscene matter
s. 170	Procuring by parent or guardian
s. 171	Householder permitting defilement
s. 172	Corrupting children

s. 176(1)	Obstructing clergyman
s. 180	Common nuisance
s. 181	Spreading false news
s. 182	Offences relating to dead body
s. 184	Interception of private communication
s. 191	Possession of device for intercepting private communications
s. 193	Disclosure of private communication
s. 212	Procuring
s. 215 <sup>2</sup>	Failure to provide necessities
s. 218	Abandoning child
s. 220	Criminal negligence causing death
s. 221	Criminal negligence causing bodily harm
s. 236	Manslaughter
s. 237	Infanticide
s. 238	Killing unborn child in act of birth
s. 239	Attempted murder
s. 240	Accessory after the fact to murder
s. 241	Counselling, aiding suicide
s. 242	Failure to obtain assistance in childbirth
s. 243	Concealing body of child
s. 244	Causing bodily harm
s. 245	Administering noxious thing
s. 246	Overcoming resistance to commission of offence

s. 247	Traps likely to cause bodily harm
s. 248	Interfering with transportation facilities
s. 249(1), (2) <sup>2</sup>	Dangerous operation of vehicle, etc.
s. 249(3)	Dangerous operation of vehicle etc., causing bodily harm
s. 249(4)	Dangerous operation of vehicle etc., causing death
s. 251	Sending unseaworthy vessel etc.
s. 252 <sup>2</sup>	Failure to stop at scene of accident
s. 253 <sup>2</sup> (s. 255(1))	Impaired operation of motor vehicle etc.
s. 253 (s. 255(2))	Impaired operation of motor vehicle etc., causing bodily harm
s. 253 (s. 255(3))	Impaired operation of motor vehicle etc., causing death
s. 254(5) <sup>2</sup>	Refusal to provide breath or blood sample
s. 262	Impeding attempt to save life
s. 264.1(1)(a) <sup>2</sup>	Uttering threat to cause death or serious bodily harm
s. 264.1(1)(b) <sup>2</sup> , (c) <sup>2</sup>	Uttering threat to cause property damage or injury to an animal
s. 266 <sup>2</sup>	Assault
s. 267(1)	Assault causing bodily harm or with weapon
s. 268(1)	Aggravated assault
s. 269	Unlawfully causing bodily harm
s. 270 <sup>2</sup>	Assaulting peace officer, resisting arrest, impeding person executing process
s. 271 <sup>2</sup>	Sexual assault
s. 272	Sexual assault with weapon, threats of bodily harm
s. 273	Aggravated sexual assault

s. 279.1	Hostage taking
s. 280	Abduction of person under 16
s. 281	Abduction of person under 14
s. 282 <sup>2</sup>	Abduction in contravention of custody order
s. 283 <sup>2</sup>	Abduction where no custody order
s. 287(1)	Procuring miscarriage
s. 287(2)	Woman procuring own miscarriage
s. 288	Supplying noxious things
s. 290, s. 291	Bigamy
s. 292	Procuring feigned marriage
s. 293	Polygamy
s. 294	Pretending to solemnize marriage
s. 295	Unlawful marriage
s. 296	Blasphemous libel
s. 300, 301	Publishing defamatory libel
s. 302	Extortion by libel
s. 318	Advocating genocide
s. 319 <sup>2</sup>	Promoting hatred
s. 334(a)	Theft over \$1,000
s. 336	Breach of trust
s. 337	Public servant refusing to deliver property
s. 338	Fraudulently taking cattle or defacing brand
s. 339(1)	Taking possession of drift lumber
s. 340	Destroying documents of title

s. 341	Fraudulent concealment
s. 342 <sup>2</sup>	Theft, forgery, etc. of credit card
s. 342.1 <sup>2</sup>	Unauthorized use of computer
s. 344	Robbery
s. 345	Stopping mail with intent
s. 346	Extortion
s. 348	Breaking and entering
s. 349	Unlawfully being in dwelling-house
s. 351(1)	Possession of house-breaking instruments
s. 351(2)	Disguise with intent to commit offence
s. 352	Possession of instruments for breaking into coin machines
s. 353(1)	Selling etc. auto master key without licence
s. 355(a)	Possession of property of value over \$1,000 obtained by crime
s. 356	Theft from mail
s. 357	Importing property obtained by crime
s. 362(2)(a)	False pretence leading to theft over \$1,000
s. 362(3)	Obtaining credit by false pretence
s. 363	Obtaining execution of valuable security by fraud
s. 367(1)	Forgery
s. 368(1)	Uttering forged document
s. 369	Making bill paper, seals, etc.
s. 370	Printing counterfeit proclamation etc.
s. 371	Making false telegram etc.

s. 372(1)	Making false messages with intent to injure or alarm
s. 374	Drawing document without authority etc.
s. 375	Obtaining something based on forged document
s. 376(1)	Counterfeiting stamps etc.
s. 376(2)	Making counterfeit mark, etc.
s. 377	Damaging documents
s. 378	Offences in relation to registers
s. 380(1)(a)	Fraud over \$1,000
s. 380(2)	Fraud affecting public market prices
s. 381	Using mails to defraud
s. 382	Fraudulent manipulation of stock market transactions
s. 383(1)(a), (b)	Gaming in stocks or merchandise
s. 384	Broker reducing stock by selling for his own account
s. 385	Fraudulent concealment of title documents
s. 386	Fraudulent registration of title
s. 387	Fraudulent sale of real property
s. 388	Issuing misleading receipt
s. 389	Fraudulent disposal of goods
s. 390	Fraudulent receipts under the <i>Bank Act</i>
s. 392	Disposal of property to defraud creditors
s. 394	Fraud in relation to minerals
s. 396	Offences in relation to mines
s. 397	Falsifying books or documents
s. 399	False return by public officer

s. 400	False prospectus etc.
s. 402	Trader failing to keep accounts
s. 403	Personation with intent
s. 405	Acknowledging instrument in false names
s. 412 <sup>2</sup>	Trade mark offences
s. 415 <sup>2</sup>	Offences in relation to wreck
s. 417(1)	Removing distinguishing marks
s. 417(2) <sup>2</sup>	Unlawful dealing in stores bearing distinguishing marks
s. 418	Selling defective stores to Her Majesty
s. 420 <sup>2</sup>	Dealing in military stores
s. 422 <sup>2</sup>	Criminal breach of contract
s. 424	Threat to commit offence against internationally protected person
s. 426	Secret commissions
s. 430(2)	Mischief causing danger to life
s. 430(3) <sup>2</sup> , (5) <sup>2</sup> , (5.1) <sup>2</sup>	Mischief in relation to property etc.
s. 431	Attack on premises etc. of internationally protected persons
s. 433(1), (2)	Arson
s. 434	Setting fire
s. 436(1)	Negligently setting fire
s. 437 <sup>2</sup>	Making false alarm
s. 438(1)	Interfering with saving of wrecked vessel
s. 439(2)	Interference with marine signals
s. 440	Removing natural bar without permission



s. 441	Occupant injuring building
s. 443	Interfering with boundary marks
s. 444	Injuring cattle
s. 449	Making counterfeit money
s. 450	Possession etc. of counterfeit money
s. 451	Possession of clippings etc. from coins
s. 452	Uttering etc. counterfeit money
s. 453	Uttering coins
s. 455	Clipping and uttering clipped coins
s. 458	Dealing in instruments of counterfeiting
s. 459	Conveying instruments for coining out of mint
s. 460	Advertising and dealing in counterfeit money
s. 463(a), (b) <sup>3</sup>	Attempts, being accessory after fact to indictable offences
s. 463(d) <sup>2</sup>	Attempts, accessory after the fact to hybrid offences
s. 464(a) <sup>3</sup>	Counselling an indictable offence
s. 465(1)(b)	Conspiracy to prosecute innocent person
s. 465(1)(d)	Conspiracy to commit indictable offence

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3. See also Appendix D.

## APPENDIX D

### Offences Within the Absolute Jurisdiction of Provincial Courts<sup>1</sup>

<i>Criminal Code</i>	<i>Offences</i>
s. 201(1)	Keeping common gaming house
s. 202	Betting, pool-selling, book-making, etc.
s. 203	Placing bets for others
s. 206(1)	Offence in relation to lotteries and games of chance
s. 209	Cheating at play
s. 210(1)	Keeping common bawdy house
s. 259(4) <sup>2</sup>	Driving while disqualified
s. 334(b) <sup>2</sup>	Theft under \$1,000
s. 355(b) <sup>2</sup>	Possession of property under \$1,000 obtained by crime
s. 362(2)(b) <sup>2</sup>	False pretence leading to theft under \$1,000
s. 380(1)(b) <sup>2</sup>	Fraud under \$1,000
s. 393(1)	Fraud in relation to fares
s. 393(2)	Bribing fare collector
s. 430(4) <sup>2</sup>	Mischief in relation to property
s. 463(b), (d) <sup>2,3</sup>	Attempts or accessory after the fact in relation to the above indictable or hybrid offences
s. 464(a) <sup>3</sup>	Counselling above offences

1. See s. 553, *Criminal Code*.

2. May also be prosecuted by summary conviction. See Appendix E.

3. See also Appendix C.

## APPENDIX E

### Summary Conviction Offences

<i>Criminal Code</i>	<i>Offences</i>
s. 54	Assisting deserter
s. 56	Assisting deserter from R.C.M.P.
s. 57(2) <sup>1</sup>	False statement to procure passport
s. 66	Unlawful assembly
s. 73 <sup>1</sup>	Forcible entry or detainer
s. 83	Engaging in prize fight
s. 86(1) <sup>1</sup>	Pointing firearm
s. 88	Possessing weapon while attending public meeting
s. 89 <sup>1</sup>	Carrying concealed weapon without permit
s. 90(1) <sup>1</sup>	Possession of prohibited weapon
s. 90(2) <sup>1</sup>	Possession of prohibited weapon in motor vehicle
s. 91(1) <sup>1</sup>	Possession of unregistered restricted weapon
s. 91(2) <sup>1</sup>	Possession of restricted weapon elsewhere than where authorized
s. 91(3) <sup>1</sup>	Possession of restricted weapon in motor vehicle
s. 93 <sup>1</sup>	Transfer of firearm to person under 16
s. 95 <sup>1</sup>	Importing or delivering prohibited weapon
s. 96(1) <sup>1</sup>	Delivery of restricted weapon to person without permit

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1. May also be prosecuted by indictment. See Appendix C.

s. 97(1) <sup>1</sup>	Delivery of firearm to person without certificate
s. 97(3) <sup>1</sup>	Acquisition of firearm without certificate
s. 100(12) <sup>1</sup>	Possession of firearm in breach of order
s. 103(10) <sup>1</sup>	Possession of firearm in breach of order
s. 104(1) <sup>1</sup>	Failure to deliver found weapon
s. 104(2) <sup>1</sup>	Failure to report lost weapon
s. 104(3) <sup>1</sup>	Defacing or possessing weapon with defaced serial number
s. 105 <sup>1</sup>	Offences relating to sale of firearms
s. 113(1) <sup>1</sup>	False statement to procure certificate
s. 113(2) <sup>1</sup>	Tampering with certificate
s. 113(3) <sup>1</sup>	Breach of conditions in certificate
s. 113(4) <sup>1</sup>	Failure to surrender certificate
s. 129 <sup>1</sup>	Obstructing or failing to assist public or peace officer
s. 130	Personating peace officer
s. 134	Making false statement
s. 139(1) <sup>1</sup>	Obstructing justice by indemnifying surety
s. 140 <sup>1</sup>	Public mischief
s. 143	Advertising reward and immunity
s. 145(1) <sup>1</sup>	Being at large without excuse
s. 145(2) <sup>1</sup> , (3) <sup>1</sup> , (4) <sup>1</sup> , (5) <sup>1</sup>	Breach of undertaking recognizance, summons, etc.
s. 151 <sup>1</sup>	Sexual interference of a person under the age of 14
s. 152 <sup>1</sup>	Invitation to sexual touching of a person under the age of 14
s. 153 <sup>1</sup>	Sexual exploitation of a young person

s. 159 <sup>1</sup>	Anal intercourse
s. 160 <sup>1</sup>	Bestiality
s. 163 <sup>1</sup>	Corrupting morals
s. 165 <sup>1</sup>	Tied sale of obscene publications
s. 166 <sup>1</sup>	Breach of restrictions on publications about judicial proceedings
s. 167 <sup>1</sup>	Immoral theatrical performance
s. 168 <sup>1</sup>	Mailing obscene matter
s. 173	Indecent acts
s. 174	Public nudity
s. 175(1)(a), (b), (c), (d)	Public disturbance, indecent exhibition, loitering, disturbing the peace
s. 176(2), (3)	Disturbing religious worship
s. 177	Trespassing at night
s. 178	Possession etc. of offensive volatile substance
s. 179	Vagrancy
s. 201(2)	Being found in common gaming house
s. 206(4)	Purchase of lottery ticket
s. 210(2)	Being found in common bawdy house
s. 211	Transporting person to bawdy house
s. 213	Soliciting
s. 215 <sup>1</sup>	Failure to provide necessities
s. 249(1), (2) <sup>1</sup>	Dangerous operation of vehicle etc.
s. 250	Failure to keep watch on person towed
s. 252 <sup>1</sup>	Failure to stop at scene of accident

s. 253 <sup>1</sup> (s. 255(1))	Operation of motor vehicle while impaired etc.
s. 254(5) <sup>1</sup> , (s. 255(1))	Refusal to provide breath or blood sample
s. 259(4) <sup>2</sup>	Operation of motor vehicle etc. while disqualified
s. 263(3)(c)	Failing to safeguard opening in ice or excavation on land
s. 264.1(1)(a) <sup>1</sup>	Uttering threat to cause death or serious bodily harm
s. 266 <sup>1</sup>	Assault
s. 270 <sup>1</sup>	Assaulting peace officer, resisting arrest, impeding person executing process
s. 271 <sup>1</sup>	Sexual assault
s. 282 <sup>1</sup>	Abduction in contravention of custody order
s. 283 <sup>1</sup>	Abduction where no custody order
s. 319 <sup>1</sup>	Promoting hatred
s. 334(b) <sup>2</sup>	Theft under \$1,000
s. 335	Taking motor vehicle without consent
s. 339(2)	Dealing in marked drift lumber
s. 342 <sup>1</sup>	Theft, forgery, etc. of credit card
s. 342.1 <sup>1</sup>	Unauthorized use of computer
s. 353(4)	Failing to keep record of transaction in auto master keys
s. 355(b) <sup>2</sup>	Possession of property under \$1,000 obtained by crime
s. 362(2)(b) <sup>2</sup>	False pretence leading to theft under \$1,000
s. 364(1)	Fraudulently obtaining food and lodging
s. 365	Pretending to practice witchcraft
s. 372(2)	Indecent telephone calls

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2. May also be prosecuted by indictment. See Appendix D.

s. 372(3)	Harassing telephone calls
s. 380(1)(b) <sup>2</sup>	Fraud under \$1,000
s. 393(3)	Unlawfully obtaining transportation
s. 398	Falsifying employment record
s. 401(1)	Obtaining carriage by false billing
s. 404	Personation at examination
s. 412 <sup>1</sup>	Trade mark offences
s. 413	Falsely claiming royal warrant
s. 415 <sup>1</sup>	Offences in relation to wreck
s. 417(2) <sup>1</sup>	Unlawful dealing in stores with distinguishing marks
s. 419	Unlawful use of military uniforms or certificates
s. 420 <sup>1</sup>	Military stores
s. 422 <sup>1</sup>	Criminal breach of contract
s. 423	Intimidation
s. 425	Offences by employers
s. 427(1)	Issuing trading stamps
s. 430(3) <sup>1</sup> , (4) <sup>2</sup> , (5) <sup>1</sup> , (5.1) <sup>1</sup>	Mischief in relation to property etc.
s. 437 <sup>1</sup>	False alarm of fire
s. 438(2)	Interfering with saving of wreck
s. 439(1)	Interfering with marine signal etc.
s. 442	Interfering with boundary lines
s. 445	Injuring or endangering animals
s. 446(2)	Causing unnecessary suffering to animals
s. 446(6)	Possession of animal in breach of order

s. 447	Keeping cock-pit
s. 454	Manufacturing or possessing slugs and tokens
s. 456	Defacing current coins
s. 457	Printing of circulars etc. in likeness of notes
s. 463(c)	Attempts, being accessory after fact to summary conviction offence
s. 463(d) <sup>1, 2</sup>	Attempts, being accessory after fact to hybrid offences
s. 464(b)	Counselling a summary conviction offence
s. 465(1)(e)	Conspiracy to commit summary conviction offence
s. 486(5)	Breach of exclusion order or publication ban — trial
s. 487.2	Breach of publication ban — search warrants
s. 517.2(2)	Breach of publication ban — bail hearing
s. 539(3)	Breach of publication ban — preliminary inquiry
s. 648	Breach of publication ban — jury trial
s. 649	Disclosure of jury proceedings
s. 740	Failure to comply with probation order
s. 811	Breach of recognizance



## APPENDIX F

### The Statistical Picture across Canada

For the province of Newfoundland, statistics are available for the criminal case-load of the District Court only. In 1982, 2,735 criminal cases were initiated in the District Courts of St. John's and Gander. While the Newfoundland Supreme Court has concurrent jurisdiction to hear non-jury trials after preliminary, it appears that these cases usually go to the District Court. Thus, the number includes both jury trials and judge alone trials by election.

In Prince Edward Island, there was a total of 1,106 criminal cases dealt with by the Provincial and Supreme Court in 1984-85. It appears that the vast majority of cases were dealt with by the Provincial Court since in 1985 only 23 non-jury trials and one jury trial were heard by the Supreme Court.

We have no statistics for Nova Scotia. It appears, however, that the County Court, rather than the Supreme Court, hears non-jury trials after a preliminary even though the two courts have concurrent jurisdiction under the Code.

We have no statistics for New Brunswick.

In Quebec, of the new criminal cases filed in 1984, 99,292 went to the Provincial Court and 97,049 went to the Sessions Court. The Superior Court received 4,226 new cases in 1984. It appears, then, that the Provincial Court and Sessions Court, now combined in the Court of Québec, hear most criminal matters in Quebec.

In Ontario, a total of 379,582 criminal charges were disposed in 1985 by all three levels. The Provincial Court dealt with 366,125, the District Court 13,199 and the High Court 258. The District Court hears all of the elected non-jury trials after preliminary, although the High Court has concurrent jurisdiction to do so. For indictable offences, over which the Provincial Court and District Court both have jurisdiction, the Provincial Court in 1984 heard 76%.

We have no statistics for Manitoba.

In Saskatchewan, there were 116,462 cases tried in Provincial Court in 1984. By comparison there were 629 cases tried in that year in the Queen's Bench.

In Alberta, 196,600 criminal cases were filed in Provincial Court in 1984-85. There were 3,780 cases tried in the Queen's Bench in the same period.

In British Columbia, there was a total of 89,716 criminal cases dealt with by the Provincial Court in 1985. Of these, 5,611 were disposed of by the Supreme Court and the County Court by way of trials and appeals. The County Court and Supreme Court both have jurisdiction to hear non-jury trials after a preliminary, but the County Court appears to hear most, if not all, of these cases.

We have no data on the Yukon Territory.

This is a descriptive summary of the available statistics. An inventory of the statistics the Commission has gathered is contained in Peter Morrison, "Toward a Statistical Study of the Canadian Criminal Court System" (1986), unpublished study paper of the Law Reform Commission of Canada.