

**A SINGLE TRIAL COURT FOR ALBERTA:  
CONSULTATION PAPER**

**July 4, 2003**

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## TABLE OF CONTENTS

INTRODUCTION .....	1
LIST OF ISSUES.....	5
CHAPTER 1: HISTORY AND LITERATURE.....	7
CHAPTER 2: ACCESS TO JUSTICE .....	12
Issue 1: Geographical and Temporal Access – Does our two-tier system deny persons adequate access to the courts?.....	12
Issue 2: Comprehensibility: Is the two-tier trial court system excessively complex?.....	14
Issue 3: Expeditious Processes – Does the current system create avoidable delay? .....	14
CHAPTER 3: CURRENT JUDICIAL ACTIVITIES AND A SINGLE TRIAL COURT.....	17
Issue 4: Does the current system improperly distinguish between criminal trial courts that are functionally equivalent?.....	17
Issue 5: Does the current system improperly distinguish between civil trial courts that are functionally equivalent?.....	20
Issue 6: Do the different legal statuses of judges of the Provincial Court and the Court of Queen’s Bench create the perception or reality of unequal justice?.....	21
Issue 7: Should the Provincial Court and the Court of Queen’s Bench deal with different types of cases? .....	22
Issue 8: Would a single trial court replicate the court structures that currently exist?.....	23

CHAPTER 4: PROSPECTIVE JUDICIAL ACTIVITIES AND A SINGLE TRIAL COURT ...	25
Issue 9: Is increased judicial specialization desirable, and does the current system obstruct specialization?.....	25
Issue 10: Does the current system encourage the “fragmentation” of issues and would a single trial court repair fragmentation? .....	27
 CHAPTER 5: MANAGEMENT OF RESOURCES AND A SINGLE TRIAL COURT .....	29
Issue 11: Would unification improve the rational management of court-support/administrative resources?.....	29
Issue 12: Would a single trial court improve the management of judicial resources? .....	29
Issue 13: Would a single trial court create an “administrative nightmare”? .....	30
 CHAPTER 6: REVIEW, APPEALS, AND A SINGLE TRIAL COURT .....	31
Issue 14: Would a unified court structure tend to encourage appeals from trial decisions? .....	31
Issue 15: How would current “Provincial Court to Court of Queen’s Bench” appeals be handled by a single trial court?.....	32
Issue 16: What mechanism would a single trial court use for bail reviews? .....	32
Issue 17: What implications would a single trial court have for preliminary inquiries? .....	33
Issue 18: Would unification entail the loss of other rights of judicial review? .....	34
 CHAPTER 7: EVIDENCE OF OTHER JURISDICTIONS.....	35
Issue 19: Is Nunavut a good comparator jurisdiction for Alberta?.....	35
Issue 20: Is California a good comparator jurisdiction for Alberta? .....	36
 CHAPTER 8: A SINGLE TRIAL COURT AS A CATALYST FOR CHANGE.....	38
Issue 21: Would a unified court serve as a catalyst for needed reform? .....	38

CHAPTER 9: CONSTITUTIONAL ISSUES .....	39
Issue 22: Would the elimination of the Provincial Court violate accuseds’ constitutional rights?.....	39
Issue 23: How, if at all, should the judicial appointments process be amended for a single trial court? .....	40
Issue 24: If the federal government were to absorb responsibility for judicial compensation, how should the Province maintain its financial contributions to the administration of justice? .....	41
CHAPTER 10: THE STRUCTURE OF A SINGLE TRIAL COURT .....	42
Issue 25: Should a residual Provincial Court be retained? .....	42
Issue 26: Should a single trial court have a “Divisional” structure? .....	42
Issue 27: Should a single trial court be accompanied by the establishment of a new intermediate appellate court or should provision be made for panels of single trial court judges to hear certain appeals or review matters?.....	43
APPENDIX A: WORKING BIBLIOGRAPHY .....	44

# A SINGLE TRIAL COURT FOR ALBERTA: CONSULTATION PAPER<sup>1</sup>

## INTRODUCTION

[1] In 1999, the Alberta Government sought the advice and direction of the public on a wide range of justice issues during Alberta's first Summit on Justice. One of the messages the Government received was to simplify the justice system. Delegates felt that the system created delays, discouraged access, and, in some cases, resulted in citizens being denied justice. Since then, the Government has sought to improve the justice system through streamlining processes and through making better use of available resources.

[2] Alberta has two trial courts – the Provincial Court and the Court of Queen's Bench – which both deal with criminal, family, and other civil matters. The concurrent trial jurisdiction shared by the two courts leads naturally to the question of whether one trial court could be doing the work now done by two. The purpose of this paper is to encourage consideration of whether trial court unification is a viable option.

### Principles

[3] An assumption on which this paper proceeds is that, as a matter of public policy and the proper administration of justice, legal institutions should not be changed unless the benefits of change outweigh the costs. The principles by which the "benefits" and "costs" of a court system may be judged include the following:

- (a) the court system must, most importantly, ensure the just disposition of cases brought before it, in accordance with the rule of law and all parties' constitutional rights;
- (b) the court system must promote equality and equal protection of the law (geographical accessibility and consistency of services and their quality);
- (c) the court system must be rationally defensible (at least one aspect of the rule of law, as opposed to the rule of arbitrariness, is that legal institutions can be rationally justified);
- (d) the court system must be sufficiently transparent and must permit the appropriate accountability of its participants; and

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- (e) the court system must be as economic efficient as possible while achieving the foregoing goals.

## Overview

[4] With these principles in mind, this paper shall address the following main issues bearing on trial court unification in Alberta:

- some background to the single trial court proposal – a brief history and literature review (Chapter 1);
- access to justice – including geographic and temporal access, comprehensibility, and delay (Chapter 2);
- conclusions from current judicial activities – whether the two trial courts exhibit a formal distinction without a practical difference (Chapter 3);
- prospective judicial activities – whether a single trial court will promote innovative judicial programs (Chapter 4)
- management of resources – whether a single trial court would permit better management of not only court services and facilities, but would permit better deployment of judges (Chapter 5);
- review and appeals – whether a single trial court would eliminate crucial appeal and review rights or whether statutory equivalents may be created (Chapter 6);
- other jurisdictions – whether Nunavut and California provide some evidence that single trial courts work (Chapter 7);
- whether, on the whole, a single trial court would be a catalyst for positive change in the administration of justice in Alberta (Chapter 8);
- constitutional issues bearing on the establishment of a single trial court (Chapter 9); and
- a proposed structure of a single trial court for Alberta (Chapter 10).

[5] This paper shall not address procedural reform in civil cases. Procedural reform is currently being explored by various committees of the Rules Project, under the auspices of the Alberta Law Reform Institute. Except as regards preliminary inquiries and review and appeal procedures, this paper shall not address criminal procedure issues. The single trial court is not intended to alter criminal processes – it is should be emphasized that the single trial court is not a

first step or any step towards the elimination of the preliminary inquiry.

[6] One might object that court organization cannot be properly considered without a full discussion of procedure. The Ontario Joint Committee on Court Reform observed, for example, that Law Reform Commission of Canada's proposal for a single trial court was part of its recommendations for substantive criminal law and criminal procedure reform: "it is apparent that [the Law Reform Commission's] recommendation of a single trial court is but one piece of a larger picture, rather than a concept that is sought to be superimposed on the status quo."<sup>2</sup> Certainly court organization and procedure are intertwined. But while court organization and procedure may not be separate, they are at least sufficiently distinct that they may be discussed, considered, and even reformed independently. Procedural reform is often discussed without reference to court organization reform. Addressing court organization reform on its own, then, should neither be startling nor inappropriate.

[7] Another qualification is that the options explored in this paper are embraced by a context of limited resources. A possible solution to nearly all of the issues considered below would be to spend more money, to increase resources for the Provincial Court, the Court of Queen's Bench, or other elements of the administration of justice in the Province. Entirely aside from the question of whether increased spending fixes problems, this paper proceeds on the hypothesis that the justice system will not receive large increases in resources in the foreseeable future. The challenge, then, is to put systemic resources to best use.

\* \* \* \*

[8] A single trial court is not Government policy, offered for ratification. Instead, it is a proposal, put before the bench, the bar, and the broader community for discussion and comment. Once input has been received through the consultation processes that have been undertaken, the single trial court proposal shall be set aside, revised, or pursued, as evidence, analysis, law, and sound public policy dictate.

[9] This paper attempts to deal with the crucial issues relating to a single trial court for Alberta. If issues have been missed, please let us know.

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<sup>2</sup>“Excerpts from Joint Committee on Court Reform: Submission to the Attorney General of Ontario Re: Unified Criminal Court” (1990), 11:3 *Criminal Lawyers' Association Newsletter* 9.

We encourage you to comment in our consultation meetings, or by contacting us by e-mail, mail, or fax. Please direct your comments to

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## LIST OF ISSUES

Issue 1: Geographical and Temporal Access – Does our two-tier system deny persons adequate access to the courts?

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## CHAPTER 1: HISTORY AND LITERATURE

[10] Court reform is likely as old as courts themselves. In our tradition, the notions of court unification and consolidation might be traced back as far as 1066 C.E., and certainly to the development of centralized courts in England in the 19<sup>th</sup> century.<sup>3</sup> Some more modern materials are listed in Appendix A to this paper.

### 1. United States Experience

[11] The modern literature respecting court unification took its cue from Roscoe Pound's 1906 address to the American Bar Association, "The Causes of Popular Dissatisfaction with the Administration of Justice."<sup>4</sup> Since 1906, a large American literature has developed. The American materials are useful conceptually, and set out varieties of consolidation and unification options and arguments.

[12] Well-publicized trial court unification programs have been successful in California<sup>5</sup> and Michigan.<sup>6</sup> Some considerations bearing on California as a model for Alberta are set out in Chapter 7 below.

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<sup>3</sup>See, respectively, H. G. Hanbury, *English Courts of Law*, 4<sup>th</sup> ed., D. C. M. Yardley, ed. (London: Oxford University Press, 1967); H. Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985).

<sup>4</sup>C. Baar, "Trial Court Consolidation: Michigan in Context" (2001), 85:3 *Judicature* 134. This article contains a good brisk review of the American literature.

<sup>5</sup>See California Courts: The Judicial Branch of California, online: <http://www.courtinfo.ca.gov/courts/trial/about.htm> and the materials listed in Appendix A, "California."

<sup>6</sup>See the materials listed in Appendix A, "Michigan."

[13] The American materials and the American experiences of unification must be approached with caution. The starting point for court organization reform in the United States is somewhat different than our own. In many States, a multiplicity of decentralized general and specialized jurisdiction State trial courts grew up, with overlapping, concurrent jurisdictions.<sup>7</sup> (This starting point contrasts with our present arrangement of only two trial courts, with limited concurrent civil jurisdiction and extensive concurrent criminal jurisdiction, with the bulk of criminal cases disposed of by the Provincial Court.) Consolidation became a rational and practical necessity. Consolidation efforts were often deployed in political contexts different than our own: consolidation was to bring court processes under centralized court control and out of the hands of legislators and political bodies.<sup>8</sup> Different States have approached consolidation and unification in different ways, achieving different degrees of unification.

## 2. Commonwealth Experience

[14] Both the United Kingdom and New Zealand are engaged in court and procedural reform. The Right Honourable Lord Justice Robin Auld was appointed by the Lord Chancellor, the Home Secretary and the Attorney-General to conduct a review into the workings of the criminal courts. He recommended the establishment of a “unified Criminal Court.”<sup>9</sup> Sir Robin’s recommendation was rejected: “Our view is that the benefits identified from establishing a Unified Criminal Court can be realised through a closer alignment of the magistrates’ courts and the Crown court, without a complete reordering of the court system . . . .”<sup>10</sup>

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<sup>7</sup>C. Baar, “The Zuber Reform: The Decline and Fall of Court Reform in Ontario” (1988), 8 *Windsor Yearbook of Access to Justice* 105 at 122 - 123.

<sup>8</sup>H. O. Lawson, “State Court System Unification”, 31 *Am. U.L. Rev.* 273 (1982).

<sup>9</sup>The Right Honourable Lord Justice Auld, Review of the Criminal Courts of England and Wales (September 2001), online: <http://www.criminal-courts-review.org.uk/auldconts.htm>, Chapter 7.

<sup>10</sup>Secretary of State for the Home Department, the Lord Chancellor, and the Attorney General, *Justice for All* (July 2002) at 20, online: [http://www.cjsonline.org.uk/library/pdf/responses\\_to\\_Auld.pdf](http://www.cjsonline.org.uk/library/pdf/responses_to_Auld.pdf)

[15] The New Zealand Law Commission has also rejected the unification of the New Zealand trial courts.<sup>11</sup>

### **3. Canadian Experience**

#### **(a) Literature and Proposals**

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<sup>11</sup>The Law Commission of New Zealand, *Seeking Solutions: Options for Change to the New Zealand Court System* (December 2002), <http://www.lawcom.govt.nz>.

[16] The Canadian literature respecting court unification is less developed than the American.<sup>12</sup> The initial unification probe was by Friedland in his 1969 article respecting the Magistrates courts.<sup>13</sup> In 1989, following some studies in the 1970s, the Law Reform Commission of Canada recommended trial court unification in a Working Paper.<sup>14</sup> This recommendation was not pursued by Ottawa. Some enthusiasm for unification was spurred in the 1990s through the efforts of Ontario's Attorney General Ian Scott, as part of his court reorganization efforts.<sup>15</sup> In June 1990, at a Federal/Provincial/Territorial meeting for Ministers responsible for Justice, most Provincial and Territorial Ministers supported a single trial court for criminal and family matters.<sup>16</sup> During this period, Carl Baar contributed some path-breaking research respecting trial court unification.<sup>17</sup> The Canadian Bar Association, through its Court Reform Task Force,<sup>18</sup> and the Canadian Judicial Council, by resolution, opposed moving to a single trial court. In 1993, New Brunswick proposed the establishment of a Unified Criminal Court Pilot Project. The project was not undertaken. In January 2000, Ontario Attorney-General James Flaherty spoke in favour of a unified criminal court.<sup>19</sup> The most significant recent event from the perspective of the unification literature was the *Trial Courts of the Future Conference*, held in Saskatoon, Saskatchewan on May 16 and 17, 2002. This conference brought together a number of presenters and papers dealing with unification. The tone of the Conference was strongly in favour of the unification program.

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<sup>12</sup>The Family Court unification movement literature is the great exception to this rule. In Alberta alone, Family Court unification literature stretches back to the 1960s, and continues to this day. See, for example, the Institute of Law Research and Reform, *Report No. 25, Family Law Administration: The Unified Family Court* (University of Alberta: April, 1978) and *Unified Family Court Task Force - Report and Recommendations*, online: [http://www4.gov.ab.ca/just/pub/Family\\_Court/part2.htm](http://www4.gov.ab.ca/just/pub/Family_Court/part2.htm)

<sup>13</sup>M. L. Friedland, "Magistrates' Courts: Functioning and Facilities" (1968), 11 *Criminal Law Quarterly* 52. For his view of developments since then, see M. L. Friedland, "The Provincial Court and Criminal Law," (Trial Courts of the Future Conference, Saskatoon; May 16 and 17, 2002).

<sup>14</sup>Law Reform Commission of Canada, Working Paper 59: *Toward a Unified Criminal Court* (Ottawa, 1989) 9.

<sup>15</sup>The Honourable I. Scott, "The Concept of a Single Court" (November 17, 1989); see D. Stockwood, "In Conversation: Ian Scott" (1993), 12 *The Advocates' Society Journal* 4.

<sup>16</sup>Press Release, 830 - 374/026.

<sup>17</sup>In particular, C. Baar, *One Trial Court: Possibilities and Limitations* (Ottawa: Canadian Judicial Council, 1991) 96. Baar has also done extensive research respecting American unification programs and court administration. Baar is the leading scholar in this area.

<sup>18</sup>*Report of the Canadian Bar Association Task Force on Court Reform in Canada* (1991).

<sup>19</sup>C. Baar, "Background Paper on Trial Court Reorganization," (Trial Courts of the Future Conference, Saskatoon; May 16 and 17, 2002).

**(b) Single Trial Court Initiatives**

**(i) New Brunswick**

[17] New Brunswick sought to constitute a unified criminal trial court in the early 1980s, relying on provincially-appointed judges. This initiative was rejected as unconstitutional by the Supreme Court.<sup>20</sup>

**(ii) Quebec**

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<sup>20</sup>*McEvoy v. New Brunswick*, [1983] 1 S.C.R. 704; New Brunswick Justice, “A Proposal for a Unified Criminal Court Pilot Project in New Brunswick” (April 1994), p. 6; G.T.G. Seniuk and N. Lyon, “The Supreme Court of Canada and the Provincial Court in Canada” (2000), 79 *Canadian Bar Review* 1 at 23.

[18] In 1988, Quebec unified its Provincial Court, the Court of the Sessions of the Peace, the Youth Court, and the Expropriation Tribunal, creating the Court of Quebec.<sup>21</sup> This Court, with Provincially-appointed judges, has three Divisions – Youth, Civil, and Criminal and Penal. Generally, the Civil Division hears cases in which the amount in dispute is less than \$30,000. This Division has a Small Claims Division, and also hears some administrative review matters. The jurisdiction of the Criminal and Penal Division has been described as follows:

Within the limits established by law, the Criminal and Penal Division hears proceedings undertaken under the Criminal Code, the Code of Civil Procedure or any other penal law. In criminal matters, it hears cases with respect to offences punishable by summary procedure under Part XXVII of the Criminal Code, as well as trials that come under the jurisdiction of a provincial court judge or a judge without a jury. Such cases include theft, breach of a driving prohibition, simple assault in the form of threats or harassment without bodily injury and, if the accused opts for a trial with only a judge, prosecutions for criminal acts that do not fall under the exclusive jurisdiction of the Superior Court.

In fact, the Criminal and Penal Division hears all proceedings with the exception of those that take place before a tribunal composed of a judge and a jury. In penal matters, it hears proceedings instituted for offences against provincial and federal legislation.<sup>22</sup>

### **(iii) Nunavut**

[19] Nunavut became Canada's third territory in 1999. It has a single trial court, with federally-appointed judges. The *Criminal Code* establishes special rules for criminal proceedings in Nunavut. For example, judges of the Nunavut Court of Justice hear preliminary inquiries, as well as trials. Instead of prerogative writ mechanisms, statutory mechanisms are provided to review (e.g.) the conduct of preliminary inquiries, by a single judge of the Court of Appeal of Nunavut.<sup>23</sup> Some considerations bearing on Nunavut as a model for Alberta are set out in Chapter 7 below. One might observe that the *Criminal Code* provisions applying to proceedings in Nunavut could be used as models for single trial courts in other Provinces or Territories.

### **(iv) Unified Family Courts**

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<sup>21</sup>The Honourable H. St-Louis, C.J., "Reform of the Trial Courts in Quebec," Trial Courts of the Future Conference, Saskatoon; May 16 and 17, 2002) at 3.

<sup>22</sup>Justice Québec, *The Court of Québec*, The Criminal and Penal Division, online: <http://www.justice.gouv.qc.ca/english/tribunaux/quebec/crim-a.htm>.

<sup>23</sup>See *Criminal Code*, s. 573.1.

[20] The best known and most widespread unification efforts have resulted in the creation of Unified Family Courts. Alberta will be the eighth province to begin implementation of a Unified Family Court. Family Court unification has been considered to be justified on a number of grounds: The divided, overlapping, and conflicting judicial, legislative, and constitutional aspects of family law litigation have caused confusion and delay, and have contributed to less than optimal resolutions of important human problems.<sup>24</sup> Practitioners and judges have felt that judges require specialized knowledge to deal properly with family law litigation, and too much time has been spent in bringing non-specialized judges up to speed. Jurisdictional splits have contributed to fragmented judicial approaches to intimately connected issues.<sup>25</sup>

[21] Of course, Family Court unification cannot be simply assumed to serve as an analogy or forerunner for full trial court unification. It must be determined whether the types of difficulties prompting Family Court reorganization (e.g. confusion and delay, the need for specialization, the need for more “holistic” remedies) also arise respecting other types of litigation; and it must be determined whether a single trial court would be the best solution for these difficulties. Even proponents of a single trial court have been wary of relying too heavily on the Unified Family Court example: “[T]he rationale for the creation of the unified family court does not necessarily apply to the unified criminal court . . . . We agree that the need to discuss criminal court reform has little to do with the unified family court.”<sup>26</sup>

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<sup>24</sup>Unified Family Court Task Force, *supra* note 12, “Problems Arising From Present Court Structure.”

<sup>25</sup>“Trial Courts for the Future: An Alberta Vision” (Alberta Justice Briefing Document, December 12, 2002) at 1.

<sup>26</sup>Ontario Conference of Judges’ Subcommittee on Court Reform, “Criminal Court Reform in Ontario” (January 2002) at 10.

## CHAPTER 2: ACCESS TO JUSTICE

[22] Litigants and potential litigants should have appropriate “access to justice.” “Access to justice” has at least five aspects – geographical and temporal access, comprehensibility, expeditious processes, access to legal representation, and cost.<sup>27</sup> While the latter two issues do form part of a comprehensive evaluation of access to justice, they do not directly concern the single trial court; hence, these issues – important as they are – shall not be pursued below.

### **Issue 1: Geographical and Temporal Access – Does our two-tier system deny persons adequate access to the courts?**

[23] Geographical access is an obvious aspect of access to justice. If no courts are present within a convenient distance from persons (either permanent or circuit sites), to that extent their access to justice is impaired: distance may reduce access. Moreover, the presence of court sites is one thing; adequate days of operation is another. If courts are “closed” for excessive periods throughout the year, persons again are denied access to justice.

[24] In Alberta, “the Provincial Court . . . sits in 75 locations . . . [while] the Court of Queen’s Bench sits . . . in 13 locations . . . . This is particularly problematic for residents in remote and aboriginal communities where transportation problems may be a barrier.” Moreover, “unlike the Provincial Court, which conducts trials year round, the Court of Queen’s Bench [generally] does not conduct trials during the summer months of July and August.” Finally, “ancillary services available to parties wishing to access the [Court of Queen’s Bench] are limited for the most part to 11 Queen’s Bench locations.”<sup>28</sup>

[25] One might suggest that judges of a single trial court could sit in all 75 current Provincial Court locations and could hold trials all year long. This could substantially improve the access of Albertans to superior court judicial services. This could enhance jury trials: if trials could be held in the communities from which charges arose, accuseds could truly have juries of their peers – instead of juries of residents of other locales.

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<sup>27</sup>The “cost” aspect of access to justice would concern such matters as filing fees, legal fees, and the availability of Legal Aid. Cost issues intersect with “access to representation” issues. Responses to these issues could not be solely Governmental proposals: costs challenges must be addressed (on the profession side alone) by stakeholders ranging from individual practitioners, local and provincial organizations, and Law Societies, to national organizations. Addressing these issues falls far outside the scope of this paper.

<sup>28</sup>“Trial Courts for the Future,” *supra* note 25 at 4 - 5.

[26] Would a single trial court improve geographical or temporal access to justice? In responding to this issue, one might consider the following matters:

- Do the current court availabilities actually deny persons access to justice? (i.e., does the demand for judicial services exceed the current supply?) What evidence supports a conclusion of an “access to justice shortfall”?
- If Albertans should have enhanced geographical and temporal access to justice, would access be better provided by establishing a single trial court?
  - · On the “single trial court judge” approach, it would not be necessary to send two judges to each location, one a member of the Provincial Court, the other a member of the Queen’s Bench. One person could do both jobs. It would not matter what the actual demand for superior court services were at a particular time at a particular place. If the demand were there, the judge could provide the services.
  - · Alternatively, the Queen’s Bench could hold trials in the summer. More judges could go on circuit, and to more remote circuit points. Court staff could be sent to more sitting points, to process court documents.
  - · Would the demand for judicial services support an increased Queen’s Bench presence? If not, could that demand nonetheless support a “single trial court judge” approach?
- In a “wired” environment, is the geographical aspect of access to justice no longer a practical concern, at least for pre-trial matters?
  - · May pre-trial civil matters be dealt with through (e.g.) video linkages?
  - · May pre-trial criminal matters be dealt with through “virtual appearances”?<sup>29</sup> To what extent would “e-presence” as opposed to actual presence impair the rights of the accused?
  - · What are the costs of substituting e-presence for actual presence, not only in financial terms, but in terms of effects on litigants and the preservation of public trust in the courts?
  - · To what extent (if any) would electronic access to the courts diminish the

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<sup>29</sup>See s. 650 of the *Criminal Code*, and the provisions added by the *Criminal Law Amendment Act, 2001* – ss. 650.01, 650.02 and 848: S.C. 2002, c. 13, ss. 60, 61, 84.

need for either a single trial court or increased Queen’s Bench sittings?

- · Would increased electronic access be compatible with or make the most sense within a single trial court system?

- Whether the court structure remains as it is or is modified, should expanded court hours (e.g. “night court”) or expanded sittings times (e.g. weekends) be considered? Why or why not?

## **Issue 2: Comprehensibility – Is the two-tier trial court system excessively complex?**

[27] The comprehensibility of the legal system is an aspect of “access to justice.” If persons cannot understand the system or are confused by the system, this would disincline them to use the system or could cause them to use the system in ways contrary both to their interests and to the public interest. It is true that a legal system serving any large democratic State must have some degree of complexity. Our commitments to accountability and transparency entail, though, that ordinary persons should be able to understand our institutions – at least generally. Excessive complexity is undesirable. It is also true that our two-tier court system is not the simplest imaginable. Is our current system, with trials both in the Provincial Courts and in the Court of Queen’s Bench too complex and confusing?

[28] In responding to this issue, one might consider matters such as the following:

- Is the two-tier trial court system more confusing or no more confusing than other aspects of the legal system? (e.g. the roles of provincially and federally appointed prosecutors; the jurisdiction of municipally-employed police officers; the different roles of Parliament, Provincial legislatures, municipalities, and entities such as school boards)

- What evidence do we have that concurrent trial jurisdiction in civil matters causes lawyers or members of the public any confusion?

- What evidence do we have that the role of Provincial Court judges in the criminal justice system causes lawyers or members or the public any confusion?

- If persons are confused or lack understanding about the justice system, does that confusion relate to the two-tier system, or does the confusion or lack of understanding relate more to substantive law and procedure?

- If the two-tier system is inherently confusing, would a single trial court be less confusing? To what extent would the answer to this question depend on the structure of a single trial court?

## **Issue 3: Expeditious Processes – Does the current system create avoidable delay?**

[29] If judicial procedures take too long to resolve matters, in effect, persons lose access to the benefits of a judicial system: justice delayed is justice denied. Justice, however, has no exact time line. The time required to resolve a matter depends on a host of factors – e.g., the complexity of the issues, the complexity of procedures, resources available to the court system and to the parties, the conduct of the parties in the course of the litigation, and the number of cases to be processed by the system. Delay may be so severe that it denies an accused the right to a trial within a reasonable time, a right protected under s. 11(b) of the *Charter*. But even if delay does not reach the level of constitutional intolerability, it should still be reduced to the lowest feasible level.

[30] Does the two-tier trial court system contribute to improper delay? Would a single trial court reduce delay? In considering these issues, one might consider the following matters:

- Does the two-tier system contribute to any delay respecting civil cases? How?
- Does a two-tier system reduce delay in civil and criminal cases, by creating two different tracks for trials?
- Since the single trial court system is to preserve the preliminary inquiry, to what extent would the constitution of a single trial court reduce delay?
- Does the current system of elections and re-elections contribute to delay? Alternatively, does the current system of elections and re-elections reduce delay?
  - · How often do re-elections occur?
  - · When are re-elections made? (e.g. the majority may be made only after committal following a preliminary inquiry)
  - · Does re-election create delay? (i.e., would the time to completion following re-election exceed the time to completion if no re-election had been made)
- Some research links the two-tiered system and delay in criminal cases. Carl Baar compared some Canadian jurisdictions to some American jurisdictions. He found delay in Canadian lower court intake processes as compared with those processes in other jurisdictions. He concluded that “having two independently operating trial courts sequentially handling major criminal cases adds in practice to the time those cases take to move from initiation to disposition.”<sup>30</sup> To what extent can Baar’s findings be explained by the operation of other factors, such as (e.g.) legal cultural or practice-based factors,

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<sup>30</sup>Baar, *One Trial Court*, *supra* note 17 at 102; see 97 - 102.

delays in obtaining funding for counsel, or delays relating to the provision of full disclosure?

· To what extent could our two-tier system reduce delay, without altering court structure? Note that Baar has suggested that delay may be more a product of management than of structure:

[t]his [conclusion] does not mean that a unified criminal court would automatically reduce delay, but does mean that the new framework should be able to develop effective means to reduce the elapsed time of cases previously handled by two trial courts. Conversely, however, American data show that a two-level trial court ... is capable of substantially reducing delay, once judges and court administrators focus on the process as a whole rather than only one of the two steps.<sup>31</sup>

· To what extent is delay the result of procedures rather than court structures? How should the response to this issue govern the pursuit of a single trial court?

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<sup>31</sup>*Ibid.*

### CHAPTER 3: CURRENT JUDICIAL ACTIVITIES AND THE SINGLE TRIAL COURT

[31] Current judicial activities in the Provincial Court and the Court of Queen's Bench are relevant to the single trial court issue. If judges of the Provincial Court and the Court of Queen's Bench are engaged in very similar activities, this could suggest that the formal differences between the courts are not warranted. The two trial courts could be founded on a distinction without a difference. To the extent that the two courts do deal with different types of cases, this could lead to a different sort of concern – a perceived “devaluation” of some types of litigation and of some types of litigant. However, as a rejoinder to contentions that the current divisions of judicial labour support a single trial court, it may be argued that the two-tier system corresponds to the practical needs of a judicial system; a single trial court would be forced to replicate the features of our current system. Hence, reform should not be pursued.

#### **Issue 4: Does the current system improperly distinguish between criminal trial courts that are functionally equivalent?**

[32] It may be claimed that judges of the Provincial Court have become the functional equals of judges of the Court of Queen's Bench. This claim has two aspects: first, judges of the Provincial Court share the qualifications of judges of the Court of Queen's Bench, and the Provincial Court has developed a legal and constitutional status nearly equal to the Court of Queen's Bench; second, the Provincial Court has become, practically, the main criminal trial court in Canada.

#### **Legal Status**

[33] Candidates for Provincial Court judge positions must satisfy the same qualifications criteria as candidates for Court of Queen's Bench judge positions. A Provincial Court judge position is in no sense a “junior” position. Outstanding practitioners have been appointed to the Provincial Court.

[34] The Provincial Court itself is approaching the constitutional and legal status of the Court of Queen's Bench.<sup>32</sup> Admittedly, it is a statutory court, and not a court of inherent jurisdiction. But as with the Court of Queen's Bench, the Provincial Court and its judges are constitutionally guaranteed institutional and individual protections for independence and impartiality. Provincial Court judges have the power to cite for contempt. They have personal legal immunity for judicial actions. The Court is a court of record.

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<sup>32</sup>Seniuk and Lyon, *supra* note 20 at 19.

## The Provincial Court as a Criminal Court

[35] The Provincial Court now has jurisdiction over nearly all criminal offences. The Provincial Court has jurisdiction to hear

- (a) summary conviction offences, whether the offences are purely summary or are Crown election offences for which the Crown has elected to proceed summarily;
- (b) indictable offences in the “absolute jurisdiction” of the Provincial Court; and
- (c) indictable offences for which the accused has the election to be tried by Provincial Court judge, Court of Queen’s Bench judge alone, or Court of Queen’s Bench judge and jury, if the accused elects trial by Provincial Court judge.

The Provincial Court lacks jurisdiction over offences within the exclusive jurisdiction of the superior court – of which murder is the only commonly litigated offence. Provincial Court judges cannot preside over jury trials. Of course, a judge of the Provincial Court would not be entitled to try an indictable offence for which the accused has elected trial by Queen’s Bench judge alone or Queen’s Bench judge and jury.

[36] Furthermore, judges of the Provincial Court, when sitting as trial judges, have full jurisdiction to interpret and apply the Constitution. They hear and decide applications under ss. 24(1) and (2) of the *Charter*. They decide issues under ss. 7 - 14 of the *Charter*, and decide the limits of our fundamental freedoms under s. 2 of the *Charter*. They decide issues relating to the rights of aboriginal peoples under s. 35 of the *Constitution Act, 1982*. They are entitled to apply s. 52 of the *Constitution Act, 1982*, the “supremacy clause”. They may decide cases under ss. 91 and 92 of the *Constitution Act, 1867*.

### Practical Equivalence?

[37] One might argue that the foregoing observations, by themselves, would not provide sufficient support for the claims that our two-tiered system is in fact a single-tiered system and that this reality should be recognized by a single trial court structure. Provincial Court judges could have the indicated status, without their work being the equivalent of work of Queen’s Bench judges. The real question is whether, on the facts, judges of the Provincial Court perform the same or very nearly the same work as Queen’s Bench judges. In responding to this question, one might consider the following matters:

- Some researchers contend that almost all criminal cases are disposed of in the Provincial Court.<sup>33</sup> From 1998 - 2001, 96.9% of criminal cases in Alberta were decided

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<sup>33</sup>Law Reform Commission, *supra* note 14 at 7; Seniuk and Lyon, *supra* note 20 at 20; Friedland, “Magistrates’ Courts: Functioning and Facilities” *supra* note 13 at 72; C. M. Webster and A. N. Doob, “The Superior/Provincial Criminal Court Distinction: Historical Anachronism or Empirical Reality?” (December 14, 2002), (2003) *Criminal Law Quarterly* (forthcoming).

in the Provincial Court. Nationally, the average was that 98% of criminal cases were decided in the Provincial Courts.<sup>34</sup> It is true that serious offences (judged in terms of potential sentence) make up a higher proportion of the caseload of the superior courts than of the caseloads of the Provincial Courts. With the exception of murder offences, however, the Provincial Courts deal with more of these offences in absolute terms than the superior courts.<sup>35</sup> The Provincial Courts deal with more cases involving serious offences and more multiple charge cases than the superior Courts.<sup>36</sup>

· The use of the superior court as a criminal trial court is declining.<sup>37</sup> The causes of this trend have not been established. They likely include the increased hybridization of offences (with higher penalties being available on summary conviction), disposing Crowns to elect to proceed summarily.<sup>38</sup>

· While 98% of criminal cases may be disposed of in the Provincial Court, a very large number of these dispositions would be guilty pleas. If guilty plea dispositions were pulled out of disposition statistics and trials alone were compared, one might predict that the ratio between Provincial Court and Queen's Bench court activities would be more balanced.

· The numbers cannot tell the whole story. Is there is a difference between types of trials held in the Provincial Court as opposed to those held in the Queen's Bench? It may be, for example, that more multi-day trials are held in the Queen's Bench. Perhaps the sorts of issues litigated in the Queen's Bench differ from the sorts of issues litigated in Provincial Court (sorting out the "types of issues at stake" in trials would be difficult, both in terms of setting criteria and in determining from records whether those criteria were met).

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<sup>34</sup>Webster and Doob, *supra* note 33 at 4 - 5.

<sup>35</sup>*Ibid.* at 7 - 10.

<sup>36</sup>*Ibid.* at 10 - 11.

<sup>37</sup>*Ibid.* at 12.

<sup>38</sup>*Ibid.* at 17, 21, 24.

· Even if it were conceded that, in relation to serious (non-jury) criminal cases, Provincial Court judges and Queen’s Bench judges hear the same types of cases, this would not entail that there is a full overlap between the roles of the two courts. The Queen’s Bench deals with many types of cases that the Provincial Court does not (e.g., the whole non-“small claims” civil practice); and the Provincial Court deals with many types of cases that the Queen’s Bench does not (e.g., prosecutions under some Provincial statutes). Is the extent of any practical overlap sufficiently significant to warrant eliminating the formal distinctions between the two courts?

· Furthermore, one might suggest that the Provincial Court deals with some matters that the Queen’s Bench *should* not (e.g., summary conviction matters). We will return to this point below.

**Issue 5: Does the current system improperly distinguish between civil trial courts that are functionally equivalent?**

[38] The Civil Division of the Provincial Court has fairly broad jurisdiction. Recently the monetary value of its jurisdiction was raised to \$25,000. Its subject-matter jurisdiction is extensive, within the \$25,000 cap. In particular, it has jurisdiction over tort actions (e.g. motor vehicle accident claims), debt actions, and other breach of contract actions (e.g. wrongful dismissal).<sup>39</sup> The limitations on jurisdiction concern, *inter alia*, actions in which “the title to land is brought into question,” “in which the validity of any devise, bequest, or limitation is disputed,” and for “malicious prosecution, false imprisonment, [or] defamation.”<sup>40</sup>

[39] Is there a sufficient functional equivalence between the civil trials in the Provincial Court and the Court of Queen’s Bench to warrant eliminating the formal differences between the two courts?<sup>41</sup> In responding to this issue, one might consider the following matters:

· Monetary and subject-matter distinctions aside, are the types of actions brought in Provincial Court different than the types of actions brought in the Queen’s Bench?

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<sup>39</sup>*Provincial Court Act*, s. 9.6(1).

<sup>40</sup>*Ibid.*, s. 9.6(2).

<sup>41</sup>Even if no strong argument based on “functional equivalence” could be mounted in the civil context, it should be borne in mind that other reasons (e.g. relating to access to justice) might nonetheless support a single civil trial court. Moreover, if a single criminal trial court alone were implemented, the impact on the non-unified Civil Division would have to be considered. For example, judges could feel judged to be members of an inferior court. The public and lawyers could conclude that it is an inferior court. The consequence could be a drop-off in business, problems with judicial morale, and a diminution of the quantity or quality of applicants for judicial positions. These sorts of considerations (if they are accurate predictions) could bolster the case for full unification of the trial courts.

- If the two different civil courts are preserved, are there any arguments for further increasing the monetary jurisdiction of the Civil Division of the Provincial Court?
- Are new procedural developments for Queen’s Bench trials (e.g. expedited trials or summary trials) adequate for high-value but simple-issue cases? Do these sorts of procedural developments eliminate the need for civil trials in the Provincial Court?
- Is the amount of a claim a good indicator of whether it should be processed in one court, rather than another?
- Are the skills required to deal properly with “small claims” matters different than the skills required to deal with “non-small claims” matters? In what ways?

**Issue 6: Do the different legal statuses of judges of the Provincial Court and the Court of Queen’s Bench create the perception or reality of unequal justice?**

[40] Assume that the types of criminal trials (at least) heard in the Provincial Court are similar to the types of trials heard in the Court of Queen’s Bench. The legal statuses of Provincial Court and Court of Queen’s Bench judges are not identical. Do the differentiations support either the appearance or reality of unequal justice before the two courts? In responding to this issue, one might consider the following matters:

- The Court of Queen’s Bench is described as a “superior” court, whereas the Provincial Court is described as an “inferior” court. Does this technical distinction have any implications respecting the appearance or reality of justice in the Provincial Court?
  - · Is there any quantitative or qualitative evidence that members of the public perceive the Provincial Court to dispense “inferior” justice?
  - · Is there any quantitative or qualitative evidence that members of the legal community perceive the Provincial Court to dispense “inferior” justice?<sup>42</sup>

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<sup>42</sup>One would hope that it would be perfectly well understood that “inferior” and “superior” are simply technical terms, describing relationships relating to review jurisdiction, in which hierarchy counts. The terms, regrettably, do connote a sort of competence distinction, which is outmoded and, one might suggest, offensive. Perhaps a terminological change is required.

· · In contrast, is there evidence that the legal community understands Provincial Court judges to have distinct roles in the justice system, and these judges are respected for their performance in these roles?<sup>43</sup>

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<sup>43</sup>The Provincial Courts are busy, in part, because practitioners choose to put cases before these courts. Lawyers with excellent credentials seek appointments to the Provincial Court. At least one explanation of the plentiful number of applications for Provincial Court positions is that the profession views the Provincial Court as a coveted career goal – not as some sort of “inferior” prize.

- While the constitutional protections of the Provincial Court are approaching those for the Queen’s Bench, they are not the same. The two courts have relatively similar protections respecting financial security; both are protected by judicial compensation committee procedures. Their protections for security of tenure differ, however.<sup>44</sup> The guarantees of independence based on the judicature provisions of the *Constitution Act, 1867* (ss. 96 - 100) do not extend to Provincial Court judges. Furthermore, Provincial Court judges face practical burdens in excess of those of Queen’s Bench judges. The Provincial Court and its judges have fewer resources, higher caseloads, poorer facilities, and receive lower remuneration than their Queen’s Bench colleagues.<sup>45</sup>
- Do distinctions in constitutional status support the creation of a single trial court?

**Issue 7: Should the Provincial Court and the Court of Queen’s Bench deal with different types of cases?**

[41] The “functional overlap” arguments lead to arguments based on the functional differences between the two courts. To a greater or lesser degree, the two courts do deal with different types of cases. This observation leads to another question: Should Alberta have two trial courts to deal with different types of cases? In responding to this question, one might consider the following matters:

- Our court structure is based on an “English model” of court structure, which in turn is based on a particular approach to legal conflicts and judicial responses. Baar writes that

[The English model courts tend to] diminish the importance of an incredibly wide variety of disputes between individuals and between individuals and the state. Traditionally, the most valued cases have been the ones involving the largest sums of money . . . . In this process, criminal matters – even though they involve the liberty of the subject – are treated as routine matters, lacking sufficient interest for the skilled expert judgment of the superior court.<sup>46</sup>

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<sup>44</sup>*Re Therrien* (2001), 155 C.C.C. (3d) 1 (S.C.C.).

<sup>45</sup>Seniuk and Lyon, *supra* note 20 at 5, 33; see D. A. Schmeiser and W. H. McConnell, “The Independence of Provincial Court Judges: A Public Trust” (Toronto: Canadian Association of Provincial Court Judges, 1996), online: QL database “Law Net Historical” (LNH), document 57 at I.

<sup>46</sup>Baar, “The Zuber Reform,” *supra* note 7 at 125.

· In opposition to the English model is what might be called the “Minnesota model.” Minnesota has “transformed the single trial court concept from one rooted in doctrines of efficiency to one reflecting an emerging concept of judicial equality – a concept that moves beyond the equality of contending parties toward the equal importance of all types of court work.”<sup>47</sup> Minnesota trial court judges hear a very wide variety of cases.<sup>48</sup> Should the subject-matter divisions between the two trial courts be eliminated or reduced, to ensure the equality of litigants and litigation?

· It may be that the clientele of the Provincial Court is individuals of middle to lower class economic status; the Court of Queen’s Bench may be the court for those with greater resources (empirical analysis would be necessary to establish these claims). If there were a class distinction between the clients of the two different courts, would this be a reason supporting the creation of a single trial court?

### **Issue 8: Would a single trial court replicate the court structures that currently exist?**

[42] If a single trial court were created, would it ultimately end up replicating jurisdictional distinctions that currently exist between the Provincial Court and the Court of Queen’s Bench? If so, the expense and dislocation of creating a single trial court would be pointless. Hence, the Law Commission of New Zealand recently rejected a proposal to unify its trial courts: “the range, difficulty, importance and variety of work coming before a unified court would require gradations and divisions within [a unified court];” “the result would be a structure little different from the one already in place.”<sup>49</sup> In a little more detail, the argument would be along these lines:<sup>50</sup>

- (a) types of cases (whether civil or criminal) may be ranked (by some metric) in terms of “seriousness;”
- (b) types of cases may also be ranked in terms of volume;
- (c) low volume, high seriousness cases require a high investment of procedural and

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<sup>47</sup>C. Baar, “Trial Court Unification in Practice” (1993), 76 *Judicature* 179.

<sup>48</sup>*Ibid.* at 181; see also C. Baar, “Judicial Independence and Judicial Administration: The Case of Provincial Court Judges” (1998), 9:4 *Constitutional Forum* 114 at 116: “I watched one Minneapolis judge leave a bail hearing for her chambers in order to meet a roomful of lawyers for a motion in a complex civil suit that was part of her 300-case ‘civil block’; the previous month she did her semi-annual tour of duty in a suburban strip mall.”

<sup>49</sup>The Law Commission of New Zealand, *supra* note 11 at 162.

<sup>50</sup>I. R. Scott, “Court Reform Experience: Trial Court Integration” (Saskatoon: Trial Courts of the Future Conference, May 16 and 17, 2002) at 2, and the notion of the “case pyramid.”

judicial resources; high volume, low serious cases require a lesser investment of procedural and judicial resources (a lesser investment of system resources for these cases still provides a satisfactory result);

- (d) a “superior” level of trial court should be established to deal with low volume, high seriousness cases, and to develop and maintain the expertise required to deal with these cases;
- (e) an “inferior” level of trial court should be established to deal with high volume, low seriousness cases, and to develop and maintain the expertise required to deal with these cases.

Currently, the Queen’s Bench is the superior court and the Provincial Court is the inferior court. If a single trial court were created, would their jobs be replicated?

[43] In responding to the “replication” contentions, one might consider the following matters:

- Do the current jurisdictional distinctions between the Provincial Court and the Court of Queen’s Bench track the “volume” and “seriousness” factors indicated in the foregoing argument?
- The Minnesota system described above has exceptions. Certain issues are decided by (e.g.) family court referees and small claims judges. Some issues are, it appears, so high-volume or so routine that they should not be heard by trial level judges.
- Does the large overlap in criminal matters suggest that a single *criminal* trial court could be warranted?
- If any consolidation or unification of courts were to occur, would it be necessary to retain a reduced-jurisdiction version of the Provincial Court, to deal with (e.g.) provincial offences or “small claims” matters?
- Alternatively, if a single trial court were constituted but its judges did not take over the “inferior” jobs, would the legal or practical jurisdiction of justices of the peace be increased? Would other adjudicative officials be required? What impact would the transfer of authority to officials other than judges have on the rights of litigants and on the reputation of the administration of justice? Could there be a legitimate increased role for officials other than judges in relation to some types or stages of litigation?

## CHAPTER 4: PROSPECTIVE JUDICIAL ACTIVITIES AND A SINGLE TRIAL COURT

[44] A single trial court could be argued to support benefits that are not achievable within the current court structure – increased judicial specialization and more “comprehensive” processes and dispositions for types of cases (i.e., a single trial court would promote “therapeutic jurisprudence”).

### **Issue 9: Is increased judicial specialization desirable, and does the current system obstruct specialization?**

[45] Increased judicial specialization seems to be desirable as a matter of common sense. If a person were charged with a criminal offence, he or she would not seek the services of taxation expert. If a person contemplated setting up off-shore trusts and were interested in the Canadian income tax treatment of interest income, he or she would not consult an expert in breathalyzer law. Most areas of the law (whether family, civil, or criminal) are developing increasingly refined rules which are often subject to rapid evolution; to maintain currency and competence, many lawyers have become specialized. If lawyers should be specialized, one would think that judges should be specialized too.

[46] The Provincial Court is specialized now, with its Family, Civil, Youth, and Criminal Divisions. The Queen’s Bench, in contrast, is a generalist court, with no subject-matter “Divisions.” The generalist nature of the Queen’s Bench might be perceived to be an obstacle to specialization.

[47] Is specialization desirable, and, if so, is the generalist approach of the Queen’s Bench appropriate? In responding to these issues, one might consider the following matters:

- If specialization is appropriate for lawyers, does it follow that specialization is appropriate for judges? One might observe that lawyer specialization is counterbalanced, at least in some firms, through team approaches to problems. A specialist may obtain additional perspectives from a colleague. A trial judge, though, works alone.
- Practitioner specialization may encourage efficiencies and competencies in legal practice, but it may not support the development of innovation, critique, or legal progress, the broader views that more generalized perspectives can provide. One might argue that our justice system can support specialized lawyers, so long as we have generalist judges.
- Management research has indicated that work with greater depth and breadth increases job satisfaction and improves job performance. “Overspecialization” hinders professional development, narrows focus, and turns attention away from work’s larger

context.<sup>51</sup> Baar has cautioned that “[c]ourts in which judges are assigned a variety of work seem to operate most effectively.”<sup>52</sup> A critical issue in this context is the determination of what constitutes “overspecialization.” It may be that “specialization” in criminal law cases is an appropriate specialization, preserving competence and reducing “getting up to speed” time; whereas hearing exclusively drunk driving cases or drug trafficking prosecutions would be “overspecialization”. That is, what must be determined are the broad parameters within which specialization produces positive effects, and the limits within which excessive specialization induces negative effects.

- If specialization were desirable, could specialization be achieved within our current court organization? Other successful courts operate with specialized judges rather than with specialized courts.<sup>53</sup>
- How would specialization be managed within a single trial court?
  - · Assignment specialization may be controversial from the perspective of assignee judges; this type of specialization would increase pressures on administrative judges who would make assignments.
  - · What sort of “inter-specialization mobility” would be permitted? Would judges be permitted to “rotate” to new areas, after certain periods of service?
  - · How can the fairness of assignments be assured?
  - · Particular types of specialization may not be popular with judges. Difficulties may be experienced in assigning judges to these specializations or in retaining judges in these specializations.
- The Minnesota model, referred to above, rejects the notion of judicial specialization: “A key feature of the Minnesota trial courts is the complete absence of judicial specialization . . . every judge hears a mix of civil and criminal cases, plus an

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<sup>51</sup>Baar, *One Trial Court*, *supra* note 17 at 9.

<sup>52</sup>*Ibid.*

<sup>53</sup>Baar, “Trial Court Consolidation,” *supra* note 4 at 139.

equal share of the high-volume criminal intake, traffic, and municipal ordinance work.”<sup>54</sup> Perhaps an argument could be made that judicial specialization is inconsistent with the “equality of case” argument described in the preceding Chapter.

- Suppose that specialization within a single trial court were promoted by creating “Divisions” within the court, and assigning judges to particular Divisions. Cases would have to be assigned to one Division or another. That assignment may be controversial. Procedures would have to be developed for case assignment; assignment could produce its own litigation.

- Another difficulty with the Divisional structure is that it is not clear whether a distinction can or should be drawn between matters belonging to (e.g.) the Commercial Division or the General Division. When, for example, is a tort a “Commercial” tort, and when is it a “General” tort? The distinction cannot turn on the nature of the defendant (a corporation, therefore “Commercial”; an individual, therefore “General”).

- One response to the Divisional difficulties arguments would be to eliminate the Divisional aspect of the single trial court, or at least the distinction between the Commercial and General Divisions.

- Another response would be to point out that the Divisional assignment would only allocate a trial judge. This judge would have general jurisdiction, the same subject-matter and remedial jurisdiction as other single trial court judges. Assignment of a case to a particular judge in a particular Division would not entail any legal loss to a party. The virtue of the Divisional assignment would be that the judge would have some expertise relating to the main issues in the case. Assignment to a particular Division could be determined through (e.g.) the parties’ pleadings or addressed through pre-trial processes.

**Issue 10: Does the current system encourage the “fragmentation” of issues and would a single trial court repair fragmentation?**

[48] In relation to family law disputes, the jurisdictional splits between the two courts have precluded dealing with all relevant issues in a single forum and have resulted in a fragmented approach to family law problems. The Unified Family Court is to address this type of problem. Outside of family law cases, the fragmentation issue has two aspects: does the current system encourage “fragmentation”? and, if so, would a single trial court be the best or only means to address fragmentation?

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<sup>54</sup>Baar, “Trial Court Unification in Practice,” *supra* note 47 at 181.

## Encouraging “Fragmentation”

[49] Some “fragmentation” is inherent in our law. A particular set of factual circumstances may give rise to both civil and criminal consequences. The factual circumstances must be addressed through legal regimes that operate through different rules. No trial court unification could unify civil and criminal law. To that extent, fragmentation is inevitable.

[50] However, the applications of civil and criminal rules to a particular set of factual circumstances may be related – statutory, common law, and criminal law rules may apply respecting (e.g.) a particular act of domestic violence. To avoid a “fragmented” approach to the factual circumstances, it may be argued that single judges should possess full jurisdiction to deal with all of the issues that arise and are properly before the court.

[51] Various non-legal resources may be available to deal with particular factual situations. If judges are not familiar with these resources, they will not be in a position to craft remedies drawing on those resources. Specialized single trial court judges, with a good knowledge of extra-legal resources, can play important roles in developing solutions (therapeutic interventions) for the life-problems of litigants.

[52] In responding to these arguments, one might consider the following matters:

- Does the “single judge” approach create the risk of blurring important distinctions between criminal and civil rules?
- Should it be the job of judges to engage in therapeutic interventions?
- If judges should play a role in therapeutic interventions, should the main responsibility for crafting and advocating dispositions fall to counsel and not judges?
- Therapeutic interventions depend on inter-agency cooperation and on promoting judicial familiarity with agencies’ contributions. May these matters be addressed whether or not judges are members of a single trial court?
- We do have examples of domestic violence courts and drug courts that operate within our current structures.<sup>55</sup> Would a single trial court structure be a preferable platform for these sorts of initiatives?
- Therapeutic initiatives create a certain tension with the single trial court model. On the one hand, a single trial court is the result of centralizing, consolidating, unifying tendencies. On the other hand, the proliferation of specialized tribunals is the result of decentralizing, de-consolidating, dispersing tendencies. Perhaps the apparent

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<sup>55</sup>See, e.g., E. J. Ursel, “The Family Violence Court of Winnipeg” (1992), 21 Man. L. J. 100.

inconsistency may be addressed by pointing out that the different tendencies operate on different levels: at the foundation would be a single trial court; this unified organizational foundation would permit the flowering of diverse specialized courts.<sup>56</sup>

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<sup>56</sup>On the tension between unification and specialization, see D. B. Rottman, “Does Effective Therapeutic Jurisprudence Require Specialized Courts (and Do Specialized Courts Imply Specialized Judges)?” (2000), *Court Review* 22 at 24.

## CHAPTER 5: MANAGEMENT OF RESOURCES AND A SINGLE TRIAL COURT

[53] Trial courts are large-scale operations that require management or administration of judicial and non-judicial personnel, court services, and court resources. Proponents of a single trial court argue that court services and court resources could be managed better within a single trial court than within the current organization. They also argue that judges could be deployed more effectively within a single trial court than within the current organization.

### **Issue 11: Would unification improve the rational management of court-support/administrative resources?**

[54] The two trial courts are currently supported by two separate administrative systems. If there were a single administrative system, it is likely that cases – throughout their full procedural lives – could be managed better and costs of administration would be decreased. For example, a merged court administration could expedite the scheduling of matters, particularly those that move from the Provincial Court to the Queen’s Bench. Staffing shortfalls could be addressed by transfers or reassignments, whether temporary or permanent. Court facilities could be more fully utilized. Transmissions of documentation and information could be expedited. A merger of administration could also result in ancillary service provision expansion to all or at least more Provincial Court locations. The actual savings to be realized have not been estimated. Nonetheless, administrative merger may appeal as an intuitively good idea. In responding to this argument, one might consider the following issues:

- Administrative merger is not necessarily linked to unification. There seems to be no reason in principle why two trial courts could not share administrative support. There may be “integration without amalgamation.”<sup>57</sup>
- Court facilities could be shared by two types of court.
- Administrative merger and a single trial court, however, may be mutually reinforcing.

### **Issue 12: Would a single trial court improve the management of judicial resources?**

[55] The jurisdictional split between the two courts may be suggested to create two types of difficulties with the management of judicial resources – i.e., with the allocation of responsibilities to individual judges. First, subject-matter experts in one court are not available to deal with cases in the other court. Second, circumstances may arise in which judges of one court are over-booked and over-extended, while at the same time, judges of the other court are not. Judges from one court cannot “cross the divide” to take on overflow cases. In considering

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<sup>57</sup>I. R. Scott, *supra* note 50 at 5.

whether a single trial court would improve the management of judicial resources, one might consider the following matters:

- Institutional barriers to judicial “crossover” do exist. Do those barriers give rise to significant practical problems? What is the evidence?
- Do both courts have enough “experts” already? If they do not, is that a problem not of jurisdiction, but of the appointments process?
- One might respond to the overflow “crossover” problem by contending that this problem (to the extent that it occurs) could be addressed through the internal management of the two courts, by drawing on full resources (e.g. bringing in judges from neighboring areas), and through the appointment of more judges to either or both courts.
- If, however, the courts were unified, the jurisdictional split between judges would not exist, and greater latitude in the management of judicial assignments would be permitted. (Note that practical difficulties would still attend judicial assignments, as indicated in the previous Chapter.)

**Issue 13: Would a single trial court create an “administrative nightmare”?**

[56] Claims might be made that a single trial court would be an administrative nightmare. The number of judges to be supervised and the size of the court bureaucracy would be too large for any sensible or productive management.

[57] This fear is likely unfounded. In Alberta, at least, unification would bring together less than 200 judges. At issue is not an administrative re-organization of U.S. Homeland Security dimensions.

## CHAPTER 6: REVIEW, APPEALS AND A SINGLE TRIAL COURT

[58] The creation of a single trial court could have implications respecting the quantity of appeals from trial decisions, and would have implications for appeals of some trial decisions and for the possibilities of review of other decisions.

### Issue 14: Would a unified court structure tend to encourage appeals from trial decisions?

[59] Baar points to a potentially significant “unintended consequence” of unification for Alberta – the increase in the number of appeals:

When the superior court is no longer small, centralized, collegial and elitist, as was the traditional English central trial court emulated in Canada, Australia and India, its supervisory relationship with the lower trial courts, for example through interlocutory appeals, tends to atrophy, and the degree of homogeneity in its decisions declines. The responsibilities of appellate courts grow in volume and variety.<sup>58</sup>

The problem is that the larger the trial court, the more attenuated its collegial ties, and the higher the probability of conflicting decisions. With a greater number of conflicting decisions would come a higher number of appeals. One might consider the following:

- Would a single trial court actually impair collegiality? How significant is this risk?
  - · What is the current degree of collegiality? How might this be assessed?
  - · Would the actual increase in the number of judicial colleagues diminish collegiality?
- If the potential loss of collegiality is a significant concern, what measures might be adopted to sustain collegiality? (e.g. through conferences, establishing committees, the use of electronic communications)

Suppose that a single trial court were to be accompanied by an increase in the number of appeals. How might this increase be handled? Some options are as follows:

- The Court of Appeal could receive greater resources; new judges could be appointed to the Court of Appeal.

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<sup>58</sup>Baar, “Trial Court Unification in Practice,” *supra* note 47 at 183.

- An intermediate appellate court could be created. This has been a development in some U.S. jurisdictions that have unified their trial courts: “the structural cost of a large dispersed general jurisdiction trial court appears to be the growth of intermediate courts of appeal.”<sup>59</sup>

**Issue 15: How would current “Provincial Court to Court of Queen’s Bench” appeals be handled by a single trial court?**

[60] Currently, some Provincial Court decisions may be appealed to the Court of Queen’s Bench – e.g., summary conviction appeals or appeals from decisions of the Civil Division. If a “residual” Provincial Court were maintained upon establishment of a single trial court, decisions of this court could be appealed to the single trial court. If the single trial court absorbed former Provincial Court jurisdiction, how could appeals of decisions that formerly went to the Queen’s Bench be handled? Some options are as follows:

- All appeals could be heard by panels of the Court of Appeal. This option probably makes little sense in terms of the rational allocation of appellate resources.
- Appeals could be heard by a single judge of the Court of Appeal. A further appeal to the Court of Appeal could be available, on leave.
- Appeals could be made to an intermediate appellate body.
- Appeals could be made to a panel of single trial court judges (e.g. three judges). A disadvantage with this approach is that the reviewing body and the body reviewed would belong to the same level of court, which suggests a lack of impartiality or an institutional bias in favour of upholding trial decisions. The decision, however, would be made by a panel, not a single judge, and this corporate structure could provide a degree of decisional insulation from the trial judge.

**Issue 16: What mechanism would a single trial court use for bail reviews?**

[61] Judicial interim release decisions made by justices of the peace could be reviewable by a judge of the single trial court. A difficulty would arise, however, respecting judicial interim release decisions made by single trial court judges. Which body would review the decisions?

[62] Presumably, the solution would not be to assign all judicial interim release decisions for non-s. 469 offences to justices of the peace. Some options are as follows:

- Review applications could be heard by a single judge of the Court of Appeal.

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<sup>59</sup> *Ibid.* at 183; see also D. C. McDonald, “Comments on Proposals for a Single Trial Court in the Canadian Provinces” (1992), 15:1 *Provincial Judges Journal* 21 at 24; and “Excerpts from Joint Committee on Court Reform,” *supra* note 2 at 9.

- Review applications could be heard by an intermediate appellate body.
- Review applications could be heard by a panel of single trial court judges (e.g. three judges). This option has the “same level” disadvantage previously identified.

For the sake of consistency, it would be preferable for the same reviewing body to hear bail reviews, whether the adjudicator was a justice of the peace or a judge.

### **Issue 17: What implications would a single trial court have for preliminary inquiries?**

[63] The creation of a single trial court is not to affect the availability of preliminary inquiries. With the disappearance of judges of the Criminal Division of the Provincial Court, a variety of difficulties beset the preliminary inquiry within the single trial court context. Who would hear preliminary inquiries? How would the preliminary inquiry procedure affect the perception of fairness of trial following committal? How would preliminary inquiry decisions be reviewed?

#### **Hearing the Preliminary Inquiry**

[64] Some options for the hearing of preliminary inquiries are as follows:

- Preliminary inquiries could be heard by judges of a residual Provincial Court.
- Preliminary inquiries could be heard by a judge of the single trial court.

In the latter case, the judge hearing the preliminary inquiry would not be the judge assigned the trial. Would the status of the judge vitiate the preliminary inquiry itself? Would there be reasonable grounds for discerning bias or a particular interest in disposing of the case on the part of the preliminary inquiry judge, just because the case would go on to the same level of court following committal?

#### **Implications of Committal for Trial**

[65] Suppose that a preliminary inquiry judge did commit for trial. The trial would be heard by another judge of the same level of court. Would a reasonable person conclude that if one trial judge committed for trial, a fellow trial judge would be disposed to convict? The judges would be colleagues, and one judge might have a personal or job-related inclination to validate the decision made by his or her brother or sister judge.

[66] In responding to these concerns, one might consider the following matters:

- The issues at stake in a preliminary inquiry and at trial are different. The preliminary inquiry decision relates only to whether the Crown has adduced evidence

upon which a reasonable jury, properly instructed, could convict.<sup>60</sup> The issue is not the trial issue of whether the accused is guilty, beyond a reasonable doubt.

- The evidence at trial will differ from the evidence at the preliminary inquiry (in the absence of highly exceptional circumstances, preliminary inquiry evidence is not simply entered at trial). The case must be run afresh at trial. Furthermore, *Charter* remedies should not be granted by the preliminary inquiry judge.

- If the accused is tried by jury, the prospect of the trier of fact being influenced by an institutional relationship with the preliminary inquiry judge is eliminated. (Could we expect an increase in the number of jury trials to accompany a single trial court?)

### **Review of the Preliminary Inquiry Judge's Decision**

[67] What of judicial review of the decision of a preliminary inquiry judge who is a single trial court judge? Judicial review through the prerogative writs would be impossible, because the judge would not be an “inferior court” judge.

[68] A statutory review mechanism might be established, specifying the grounds of review (which could mirror those for judicial review) and the available remedies.<sup>61</sup> If an accused has the same types of grounds for review and remedies on review after unification as before, then have the accused's rights been improperly limited?

[69] Again, the issue of the identity of the reviewing court arises. And again, some options are as follows:

- a single member of the Court of Appeal,
- an intermediate appellate body,
- a panel of single trial court judges.

### **Issue 18: Would unification entail the loss of other rights of judicial review?**

[70] Accuseds are currently entitled to an array of judicial review remedies respecting decisions of inferior courts – i.e., decisions of both justices of the peace and Provincial Court judges. As indicated in relation to the previous issue, if Provincial Court judges become single trial court judges, review through the prerogative writs will be lost. To ensure that rights are not lost, statutory rights of review must be established, dealing with the circumstances in which review rights are engaged, the grounds for review, the remedies available, and the nature of the

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<sup>60</sup>*R. v. Hynes*, [2001] 3 S.C.R. 623, McLachlin C.J. at para. 30.

<sup>61</sup>See (e.g.) *Criminal Code*, s. 573, respecting applications for review of certain decisions or orders of judges of the Nunavut Court of Justice.

reviewing body. If such statutory rights of review were established, would accuseds suffer any net loss in their rights and remedies?

## CHAPTER 7: EVIDENCE OF OTHER JURISDICTIONS

[71] As indicated in Chapter 1, trial court consolidation and unification have occurred in the United States and Canada. There does not appear to have been any example of “de-merger” or the division of previously consolidated or unified courts. This should give some comfort that trial court unification is not (at least) inherently flawed or doomed to failure.

[72] The experiences of other jurisdictions should be approached cautiously. Of course, American developments have taken place within a different constitutional environment. Furthermore, we cannot ignore the realities of the “geography of justice.”<sup>62</sup> Justice institutions – as opposed to universal human norms – are highly dependent on geographic, social, cultural, linguistic, demographic and historical circumstances.

### Issue 19: Is Nunavut a good comparator jurisdiction for Alberta?

[73] Nunavut is sometimes described as a successful made-in-Canada model for a single trial court. Nunavut, however, has a population of only about 29,000 – stretched across 2 million square kilometres.<sup>63</sup> None of Nunavut’s 26 communities are accessible by road or railway. Transportation is by airplane or sealift. Prior to the creation of its unified court, two separate levels of court (judges and court staff) had to fly to communities at different times to provide judicial services. When considering the relevance of justice developments in Nunavut to prospective reforms in Alberta, one might consider the following matters:

- Does Alberta possess any geographical or demographic analogies to Nunavut, particularly respecting our less populated Northern areas?
- Does Nunavut present any “access to justice” issues parallel to those arising in Alberta?
- If rough geographical or demographic analogies could be drawn between certain areas of Alberta and Nunavut, do these analogies support the application of the Nunavut

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<sup>62</sup>I. R. Scott, *supra* note 50 at 22.

<sup>63</sup>This and the following information are from the Government of Nunavut, “Our Land,” online: <http://www.gov.nu.ca/Nunavut/English/about/ourland.pdf>.

Court of Justice model for the whole of Alberta?

- Are the costs of bringing justice to remote Alberta communities less than, the same as, or greater than the costs of bringing justice to Nunavut communities?
- What types of civil and criminal litigation occupy the court in Nunavut? Are the types of cases heard in Nunavut similar in type or complexity to the type of cases heard in Alberta?
- The Nunavut Court of Justice does not have a Divisional structure. As will be seen below, the Province has proposed a Divisional structure for Alberta's single trial court. Of what significance, if any, is this distinction?

### **Issue 20: Is California a good comparator jurisdiction for Alberta?**

[74] California is also sometimes described as a good successful American model for a single trial court. California is almost the demographic opposite of Nunavut: The California court system itself employs almost as many people as live in Nunavut (2,000 judicial officers and 18,000 court employees).<sup>64</sup> The court system serves over 34 million people, and hears nearly 9 million cases per year.

[75] The California court system is relatively complex. It does have unified trial courts, one in each county. Each of California's 58 counties has unified its superior and municipal courts into superior courts. Judges serve 6 year terms and are elected. The superior courts have an appellate division to hear matters formerly within the appellate jurisdiction of the (pre-unification) superior courts. California has Courts of Appeal in six appellate districts. The Courts of Appeal are intermediate courts of review. The Supreme Court of California is the highest state court. It has original jurisdiction for certain forms of extraordinary relief, and (*inter alia*) has the authority to hear appeals from the Courts of Appeal.

[76] The following has been reported respecting California's Trial Court unification:<sup>65</sup>

In November 2000, the Administrative Office of the Courts released the results of a study on the initial impact of trial court unification. The analysis, based on 53 trial courts unified as of April 1999 when the study was commissioned, focused on the initial changes and successes and its remaining challenges. The results indicated that:

- Many courts had improved services to the public through reallocation of judicial and staff resources.
- Court operations were generally becoming more efficient as courts reorganized administrative operations along functional rather than jurisdictional lines and eliminated the duplication of the former two-tier system.

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<sup>64</sup>“Fact Sheet: California Judicial System”, at [www.courtinfo.ca.gov](http://www.courtinfo.ca.gov).

<sup>65</sup>“Fact Sheet: Trial Court Unification”, at [www.courtinfo.ca.gov](http://www.courtinfo.ca.gov).

- Some courts had expanded programs, such as drug courts, domestic violence courts, and services to juveniles and had expanded hours of service and improved filing and payment procedures.
- Improved court calendars and case management practices had reduced backlogs and improved case disposition time in some courts.
- Judges were hearing a wider range of cases than before unification.
- Local rules, policies, and procedures were being standardized to support the countywide structure of court operations.
- Limitations of court technology and facilities were increasingly apparent as courts, now larger and more complex organizations, strove to deliver services on a countywide basis.

[77] When considering the relevance of justice developments in California to prospective reforms in Alberta, one might reflect on the following matters (aside from the obvious demographic and constitutional differences between the two jurisdictions):

- California does not have a single trial court, but 58 unified county-based trial courts (with elected judges).
- The superior courts have appellate divisions.
- The court system provides for intermediate appellate courts – the Courts of Appeal.
- What features of the California experience make it a good analogy for Alberta court reorganization?

## CHAPTER 8: A SINGLE TRIAL COURT AS A CATALYST FOR REFORM

[78] Often when legal or policy issues must be determined, no one consideration or subset of considerations has a dispositive role. Instead, the full constellation of considerations “pro” and “con” must be balanced. There may be no single knock-down argument for or against a single trial court. Whether a single trial court reform is justifiable must be assessed “holistically,” in light of all of the relevant factors.

### **Issue 21: Would a unified court serve as a catalyst for needed reform?**

[79] One way of approaching the issue of whether a single trial court should be established is to consider whether a single trial court would be a catalyst for reform, or would serve as a better platform for reform than the current two-tier system. One might consider the following matters:

- If there are real concerns around geographical and temporal accessibility, delay, distinctions without difference, the need for specialization, the need for innovative programs for litigants, the management of court services and facilities, and the deployment of judges, would a single trial court be the best means (best first step) for effective solutions?
- Alternatively, would the management difficulties inherent in a single trial court, the recasting of the preliminary inquiry, or the changes to appeal and judicial review processes outweigh the potential benefits of single trial court reform?

## CHAPTER 9: CONSTITUTIONAL ISSUES

[80] A single trial court could not be the product of only Provincial or federal efforts. The *Constitution Act, 1867* would require both levels of government to cooperate in the development of a single trial court.

### 1. No Unilateral Provincial Action

[81] The Provinces are not entitled to appoint judges to perform the tasks of s. 96 judges. Neither is Parliament entitled to delegate all s. 96 functions to Provincial appointees. Hence, Alberta could not unilaterally create a single trial court and populate it with judges with jurisdiction to hear all s. 96 matters, even if Parliament were inclined to permit the Province to do this.<sup>66</sup>

### 2. Enhancing the Jurisdiction of s. 96 Judges

[82] It appears that granting new authority to s. 96 judges does not violate s. 96:

I am of the view that s. 96's role is not to protect in any way a "core" of jurisdiction for inferior courts. Rather, it operates to protect the core jurisdiction of superior courts. Section 96 does not preclude any level of government from giving superior court judges jurisdiction which did not exist in 1867. Superior courts have long been recognized as courts of general competence and it is only if jurisdiction is validly granted to another body that they will be prevented from exercising the power in question.<sup>67</sup>

The allocation of the authority of Provincial Court judges to s. 96 single trial court judges would not, by itself, violate the *Constitution Act, 1867*. (To this point, it appears, the allocation of such authority to judges of the Nunavut Court of Justice has not been challenged.)

### Issue 22: Would the elimination of the Provincial Court violate accuseds' constitutional rights?

[83] But while the *Constitution Act, 1867* may not impede the establishment of a single trial court, the loss of the Criminal Division of the Provincial Court would entail that an accused would have one less election (or re-election) in cases of non-exclusive and non-absolute jurisdiction indictable offences. Would that loss impair an accused's constitutional rights?

### 3. Legislative Change

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<sup>66</sup>*McEvoy, supra* note 20.

<sup>67</sup>*Reference re Young Offenders Act (P.E.I.)*, [1991] 1 S.C.R. 252, Lamer C.J.C. at 274.

[84] Both Provincial and federal legislation would be required to establish a single trial court. The *Criminal Code*, for example, would require significant amendment.

#### **4. Appointments**

[85] As indicated, judges of the single trial court would be appointed federally. The Province, then, would lose the right to appoint judges.

#### **Issue 23: How, if at all, should the judicial appointments process be amended for a single trial court?**

[86] In responding to this issue, one might consider the following matters:

- Should the federal government have an obligation to “consult” the Province?
- What should be the nature of the “consultation”?
- Should a Provincially-constituted committee – or Federal/Provincial committee – be entitled to create a “short list” of potential appointees, with ultimate selection to be made by the “Governor General”?
- Would any formal involvement of a committee along these lines improperly fetter the discretion of the federal appointing power, and thereby violate s. 96 of the *Constitution Act, 1867*?
- If this sort of “committee” involvement were constitutionally permissible, how should the membership of the committee be constituted?
- What sort of procedures might be instituted to make the judicial appointments process more transparent and accountable? And what degrees of transparency and accountability would be appropriate?

#### **5. Responsibility for Compensation**

[87] As the appointing authority under s. 96, the Government of Canada would assume responsibility for the compensation for judges of the single trial court. Presumably, all judges would be on the same compensation scale. The cost of judicial compensation for a single trial court would therefore be higher than the sum of current compensation totals for the Court of Queen’s Bench and the Provincial Court.

[88] The transfer of appointing authority and responsibility for compensation could not entail simply the transfer of financial liabilities to the federal government. The Province, in some fashion, would have to “offset” the increased federal contribution through its own new spending

(alternatively, the Province could forego some federal transfer amounts, or could pay amounts to the federal government).

**Issue 24: If the federal government were to absorb responsibility for judicial compensation, how should the Province maintain its financial contributions to the administration of justice?**

[89] Some options for the redirection of resources (the “single trial court dividend”) by the Province could include the following:

- the financing of innovative projects (e.g. drug courts, domestic violence courts)
- increasing Legal Aid rates
- the financing of increased numbers of sitting points or of expanded hours of operation for the courts.

## CHAPTER 10: STRUCTURE OF THE SINGLE TRIAL COURT OF ALBERTA

[90] A single trial court could take a variety of forms. For example, the Provincial Court could be merged into the Queen's Bench; alternatively, the Queen's Bench could be organized into "Divisions" and Provincial Court judges could be appointed to those Divisions. The unification contemplated by the Province involves the constitution of a new Court.

### **Issue 25: Should a residual Provincial Court be retained?**

[91] One outstanding structural issue is whether the new court would completely replace the current Provincial Court and the Court of Queen's Bench, or whether a "residual" Provincial Court should be preserved, to deal with "high volume"/ "low complexity" issues; this Court would have a jurisdiction much reduced from the current Provincial Court jurisdiction.

### **Issue 26: Should a single trial court have a "Divisional" structure?**

[92] Another issue is whether a single trial court should have a "Divisional" structure (along the lines of the current Provincial Court), or whether it should maintain a generalist orientation (along the lines of the current Court of Queen's Bench).

[93] The Government has proposed a Divisional model. The single trial court would have four Divisions – Criminal, Family and Youth, Commercial, and General. Judges would retain full jurisdiction to hear all matters, but would be appointed to a Division and would primarily hear matters assigned to that Division.

[94] A Divisional model would entail some transitional issues. Judges would choose their Divisional assignments. As a matter of judicial independence, current Queen's Bench judges would doubtless be entitled to resist appointment to Divisions. Does this entail that, without their consent, current Queen's Bench judges would be entitled to "float" as generalist judges? Would anyone (e.g. an administrative judge?) be entitled to assign current Queen's Bench judges to the General Division (as has been suggested by the Government)?

[95] If the Province's Divisional model were adopted, the Divisional responsibilities would be as follows:

- The Criminal Division would handle all criminal trial matters, including provincial offence trials excluded from the jurisdiction of sitting justices of the peace. The jurisdiction of justices of the peace and commissioners would be preserved but not expanded. Justices of the peace would continue to handle such matters as the swearing of informations, the issuing of subpoenas and warrants, and judicial interim release hearings.
- The Family and Youth Division would deal with issues such as youth prosecutions, child protection, divorce, custody, access and support, division of

matrimonial property, restraining and protection orders, and adoption.

- The Commercial Division would handle commercial and corporate litigation, including litigation related to bankruptcy and insolvency, builders' liens, property disputes, and municipal law.

- The General Division would handle matters not assigned to other Divisions, such as surrogate matters and personal injury cases.

- The present jurisdiction and roles of Masters would be maintained.

[96] If a Divisional model were adopted, another issue is whether the proposed Divisions would be appropriate: Should there be, for example, separate "Commercial" and "General" Divisions?

[97] Yet another set of issues concerns the assignments of judges to Divisions: see Chapter 4 above.

**Issue 27: Should a single trial court be accompanied by the establishment of a new intermediate appellate court or should provision be made for panels of single trial court judges to hear certain appeals or review matters?**

[98] In Chapter 6, issues respecting appeals and reviews were set out. It would be necessary to create procedures that would substitute for current appeal and review procedures lost through the establishment of a single trial court.

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