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Editorial

The Criminal Trial Court

All those concerned with criminal justice should take an intense interest in our trial courts. It is in these courts that the majority of citizens who have encounters with the law will experience or fail to experience justice. Failures, overcrowding, inadequate resources, disrespect and delay at the trial court level can bring the administration of justice into disrepute in a very real sense. It is not only the sensational, newsworthy or appeal cases that determine the repute of the justice system, but also the routine cases that people learn about from family, friends and neighbours.

The prospect that some — corporations and the well-off who can afford to litigate their private and family law matters — might receive Cadillac justice in the robed splendor of the superior courts, while others — the poor and disadvantaged minorities — might receive second class justice in the crowded confines of the so-called inferior courts should be deeply disconcerting in a democracy committed to equal respect for all and the independence of the judiciary. Fortunately, the status and the vigour of our lower courts has never been higher. That does not, however, mean that there is not more work that needs to be done.

In this special issue, we are fortunate to include five essays on criminal trial courts, most of which were originally prepared for a conference on Trial Courts of the Future in Saskatoon in 2002. We are grateful to the organizers of that conference and to the contributors for allowing their papers to be published in this special issue.

In order to speculate about the future with any degree of intelligence or insight, you must be aware of the past. In the first essay, Martin Friedland revisits his 1968 study published in this journal on the status of Canada's lower criminal courts. He finds much has improved in terms of both personnel and facilities from the "depressing picture" that he painted in 1968 of magistrate courts staffed by non-lawyers in settings that were not only undignified but undermined the principle of judicial independence. Friedland argues that

despite some obstacles, his 1968 proposal for the unification of all trial courts will eventually be realized.

In an important and provocative paper, Patrick Healy argues that the constitutional obstacles to trial court unification are much less than conventional wisdom suggests. Healy takes a close historical look at the ability of district and county courts — not superior courts — to sit with a jury in order to re-evaluate the Supreme Court's controversial decision in *McEvoy v. New Brunswick*, [1983] 1 S.C.R. 704. Healy supports his conclusions not only with observations about the past, but with a re-evaluation of William Lederman's important work in light of the recent recognition of judicial independence as a principle that applies as much to the provincial courts as to the superior courts. Although he is careful to limit his detailed constitutional analysis to whether criminal trial court unification is possible, as opposed to desirable, his conclusions lend support to Friedland's bold predictions that criminal trial court unification will be achieved.

The future is determined not only by the past but the present. Cheryl Marie Webster and Anthony Doob publish findings from their important empirical study of almost one million criminal cases decided in both provincial and superior courts. Their research confirms that less than 2% of criminal cases are resolved in the superior court and that this figure has declined from 1998 to 2001. Equally as striking is their finding that the provincial court handles more homicide, aggravated forms of sexual assault, robbery and multiple charge cases than the superior court. Although the superior court may hear more complex cases, the Webster and Doob study suggests that the provincial court is becoming the *de facto* criminal court. One important explanation is that both Crown and defence counsel are frequently electing to have their cases heard in provincial as opposed to superior court. Like Healy, Webster and Doob do not explicitly address the desirability of trial court unification, but their work suggests that unification would in practice not be nearly as radical a change as some might think.

Carl Baar, Canada's leading student of court administration, provides an important bridge from the past through the present to the future in his essay. He summarizes the extensive "waves" of court reform that have already occurred in Canada while outlining the main options for the future. Baar also addresses the issue of trial court reform in a comparative context, noting that other jurisdictions, not to mention Nunavut and some Canadian family courts, have successfully achieved unification. Baar's essay is also valuable because it indicates that a wide range of trial court reforms can be achieved short of formal unification. Such reforms include administrative co-ordination and integration of provincial and superior courts. He also points out the unification of the provincial and superior court will only be partial if there is increased downloading of minor matters to justices of the peace and municipal courts.

Finally, the special issue concludes with a forward-looking essay on what a unified "house of justice" might look like in the future. Chief Justice Gerald Seniuk of the Saskatchewan Provincial Court and John Borrows, Canada's leading aboriginal law scholar, combine to paint an inspiring picture of a single trial court that not only decides all criminal cases, but also provides an accessible forum for community justice and healing. Such a structure would also in their view provide a welcoming shelter for the specialization and partnerships with communities that are occurring in many provinces. Indeed, it is a sign of the quality and vigour of our provincial court bench that many reforms and innovations are occurring from coast to coast even in the absence of the political will to achieve unification. The reforms range from Cree and peacemakers court on the Prairies to specialized drug, domestic violence and *Gladue* courts in urban centres. Seniuk and Borrows argue that unification will not necessarily mean uniformity.

Taken together, the five essays in this special issue provide a valuable survey of where trial courts have been in Canada, their current operation and the range of constitutional and policy options for the trial court of the future. Some of the findings and arguments in these papers are provocative. For example, the Webster and Doob study demonstrates that the provincial court already hears more serious criminal cases than the superior court and the Healy article suggests that Parliament could give the provincial court the power to sit with a jury and hear even murder cases. Taken together, the essays in this special issue should help to provoke policy makers to take a serious second look at trial court unification. Even in the absence of such political will, the essays provide a testament to the impressive evolution of Canada's criminal trial courts and some of the challenges that will be faced in the future.

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is a place of transparency, accountability and public record, the court should be involved from the start to the finish to ensure justice is done, in process and substance. The court is not only the accessible and coordinated entry to services and resources, it is also the window through which the general community can observe the results achieved by these services and resources. It is here that the justice system is transparent and accountable. This should be the place of record for pre-charge diversion and post-sentence treatment where the community can see what was expected of the offender and what was achieved in the end. This place, the *House of Justice*, is where the parties in conflict, the community, the court and the resource providers are held accountable to each other and to the public.

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Editorial

Calling Out the Troops

Calling out the troops is not necessarily a bad thing. The Canadian Forces provide valuable and popular public service in times of natural disasters such as floods, forest fires and hurricanes. Calling out the troops to keep order and enforce the law is, however, much more problematic. From the use of troops to crush strikes and protests in the first half of the twentieth century through the October Crisis of 1970 to the stand-off between the Canadian Forces and the Mohawk at Oka during the tense summer of 1990, the use of troops in Canada has often been unpopular. Moreover, it has often signaled a crisis for civil liberties.

Use of the military and military-like shows of force by the police should be a last resort in any free and democratic society. There are, however, some signs that they are becoming more frequent in Canada. Some recent laws make it easier, perhaps too easy, for the military to be used in aid of law enforcement.

Canada has a traditional mechanism for the use of the military in aid of the civil power. Part VI of the *National Defence Act*, R.S.C. 1985, c. N-5, allows the provincial Attorney General to call out the troops to deal with riots or disturbances of the peace that cannot otherwise be suppressed. Troops called out under such circumstances are given "constable" or peace officer status by virtue of s. 282 of the Act. There is a mandatory requirement in s. 281 for an inquiry into the extreme circumstances that led to calling out of the troops.

Although there are no guarantees, the cumbersome structure of this power provides some safeguards against overuse of the military in law enforcement. This would especially be true if the military was used in conjunction with the special safeguards of the oft-ignored *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.). Those safeguards include compensation provisions, bans on detention or imprisonment on discriminatory grounds and Parliamentary review.

In 1998, Parliament made it much easier for the military to be used for law enforcement purposes. With no real debate in the House of Commons or