

SUBMISSION of the
SASKATOON CRIMINAL DEFENCE LAWYERS ASSOCIATION
TO THE
2011 PROVINCIAL COURT COMMISSION
for SASKATCHEWAN

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SUBMISSION TO THE 2011 PROVINCIAL COURT COMMISSION
of the Saskatoon Criminal Defence Lawyers Association

I. BACKGROUND OF OUR ORGANIZATION

The Saskatoon Criminal Defence Lawyers Association Inc. (hereinafter referred to as S.C.D.L.A.) was established in 1979 as a Non-Profit Corporation and is made up primarily of criminal defence practitioners in the Saskatoon area although we have members who attend from as far away as Meadow Lake Saskatchewan. We are an association of both private defence counsel and Legal Aid lawyers that represent a majority of the accused in Saskatoon and surrounding district at all levels of courts.

Our organization serves as a forum for its members to discuss developments in criminal law and to share experiences and knowledge and ideas of defence counsel in relation to criminal law matters.

The goals of the S.C.D.L.A. are to develop and maintain a strong criminal defence bar, to defend individuals' rights *vis-à-vis* the state and to ensure that the Governments do not infringe those rights. The S.C.D.L.A. is committed to advancing reasoned positions with the Government, the Law Society, the Judiciary and other organizations in respect of reform and improvements in the criminal law, particularly with regard to protecting the rights of accused persons.

II. MANDATE OF THE COMMISSION

The S.C.D.L.A. recognizes the importance of this Commission and the determinations and recommendations that it will make. The members of the S.C.D.L.A. have a special

perspective on the functioning of the justice system in general and, in particular, of our Provincial Court. We offer our submissions out of a sense of professional duty to provide the Commission with our perspective on these issues.

Section 38 of the *The Provincial Court Act* sets forth the mandate of this Commission. The existence of this Commission¹ follows naturally from the need to maintain an independent judiciary, which is essential in a free and democratic society. Provincial Court Judges are employed by the State but they also sit in judgment on matters to which the State is a party. So it is appropriate that the determination of Judges' salaries, benefits and working conditions be made by an independent body – this Commission.²

In July 2005, the Supreme Court of Canada examined the role of independent judges' commissions such as this Commission. In *The Provincial Court Judges Association of New Brunswick v. New Brunswick (Minister of Justice)*; *Ontario Judges Association v. Ontario (Management Boards)*; *Bodner v. Alberta*; *Conference Des Juges Du Quebec v. Quebec (AG)*, *2005 Supreme Court of Canada 44*, [2005] 2 S.C.R.286. In referring to the 1997 reference case (footnote 3), the Court stated at paragraph 14:

¹ Section 38 of the *The Provincial Court Act* establishes the mandate of this Commission to make recommendations with respect to remuneration, and benefits of Provincial Court judges.

² This principle was recognized by the Supreme Court of Canada in *Reference Re: Remuneration of Judges of the Provincial Court of Prince Edward Island re Independence and Impartiality of the Judges of the Provincial Court of Prince Edward Island* [1997] 3 S.C.R. 3, (para. 187).

187 Second, negotiations are deeply problematic because the Crown is almost always a party to criminal prosecutions in provincial courts. Negotiations by the judges who try those cases put them in a conflict of interest, because they would be negotiating with a litigant. The appearance of independence would be lost, because salary negotiations bring with them a whole set of expectations about the behaviour of the parties to those negotiations which are inimical to judicial independence. The major expectation is of give and take between the parties. By analogy with *Généreux*, the reasonable person might conclude that judges would alter the manner in which they adjudicate cases in order to curry favour with the executive.

14 The Reference laid the groundwork to ensure that provincial court judges are independent from governments by precluding salary negotiations between them and avoiding any arbitrary interference with judges' remuneration. The commission process is an "institutional sieve" (Reference, at paras. 170, 185 and 189) - a structural separation between the government and the judiciary. The process is neither adjudicative interest arbitration nor judicial decision making. Its focus is on identifying the appropriate level of remuneration for the judicial office in question. **All relevant issues may be addressed. The process is flexible and its purpose is not simply to "update" the previous commission's report.** However, in the absence of reasons to the contrary, the starting point should be the date of the previous commission's report.

and at paragraph 17:

"The **commission must objectively consider the submissions of all parties** and any relevant factors identified in the enabling statute and regulations. Its recommendations must result from a fair and objective hearing. Its report must explain and justify its position."

III. SUBMISSION ON THE REVIEW OF JUDICIAL SALARIES

In *R. v. Valente* (1985) 2 S.C.R. 673, the Supreme Court held that judicial independence had three aspects: financial security, security of tenure and administrative independence. Every citizen has the right to be judged by an impartial tribunal - that is a tribunal that is, in reality and in appearance, not biased toward or against any of the interested parties. Judicial independence is essential to judicial impartiality. Maintaining both the reality and the appearance of judicial independence is, therefore, essential if the public is to have confidence in the administration of justice.

1. Historical Comparisons

In 1978, *The Provincial Court Act* replaced the Magistrate's Court with the Provincial Court for Saskatchewan. In 1978, a Provincial Court judge's salary was \$44,400.00 per year

compared to \$45,000.00 per year for a federally-appointed District Court judge and \$52,000.00 per year for a federally-appointed Superior Court judge.

By 1985 a Queen's Bench judge was being paid \$105,000.00 per year while a Saskatchewan Provincial Court judge was being paid only \$71,000.00. Since 1985 salaries for Queen's Bench versus Provincial Court judges have risen as follows:

Year	Saskatchewan Queen's Bench	Saskatchewan Provincial Court	Difference
1985	\$105,000	\$71,000	\$34,000
1986	\$115,000	\$73,130	\$41,870
1987	\$121,300	\$80,052	\$41,248
1988	\$127,700	\$90,000	\$37,700
1989	\$133,800	\$90,000	\$43,800
1990	\$140,400	\$90,000	\$50,400
1991	\$147,800	\$90,000	\$57,800
1992	\$155,800	\$90,000	\$65,800
1993	\$155,800	\$92,250	\$63,550
1994	\$155,800	\$94,556	\$61,244
1995	\$155,800	\$94,556	\$61,244
1996	\$155,800	\$94,556	\$61,244
1997	\$165,600	\$112,961	\$52,639
1998	\$175,800	\$112,961	\$62,839
1999	\$178,100	\$112,961	\$65,139
2000	\$198,000	\$143,000	\$55,000
2001	\$204,400	\$143,000	\$61,400
2002	\$210,941	\$143,000	\$67,941
2003	\$216,000	\$158,000	\$58,000
2004	\$240,000	\$161,634	\$78,366
2005	\$244,200	\$165,190	\$79,010
2006	\$244,700	\$195,000	\$49,700
2007	\$252,000	\$198,900	\$53,100
2008	\$260,000	\$204,552	\$55,448
2009	\$267,200	\$220,916	\$46,284
2010	\$271,400	\$229,753	\$41,647
2011	\$281,100	\$238,943	\$42,157

It is seen from the above that the difference between salaries of Saskatchewan's federally appointed judges' and the salaries of the judges of Provincial Court has gone from \$600.00 in 1978, up to a high of \$79,010 in 2005, and down to \$42,157 at the present time.

2. Qualifications and Workloads do not justify different treatment

Over the past 30 years, the increase in the work load for the Provincial Court appears to have greatly exceeded the increase in work of the court of Queen's Bench. Provincial Court is the Court of first instance for all people charged with a criminal offence. Most of these criminal cases stay within the jurisdiction of the Provincial Court. Some will require an election that they be tried in Provincial Court or that they be tried in the Court of Queen's Bench. This latter election will result in a preliminary inquiry at Provincial Court to determine if there is sufficient evidence to send the matter on to a trial at Queen's Bench.

The Provincial Court is the court of choice for the vast majority of criminal matters in Saskatchewan. The fact that the workload of the Provincial Court in criminal matters greatly exceeds that of the Court of Queen's Bench is a very real indication of the high regard that members of the defence and prosecution bars hold for the Judges of the Provincial Court in criminal law matters. The wealth of experience and knowledge of Saskatchewan Provincial Court Judges in all aspects of sentencing is widely appreciated by members of both the defence bar and the prosecution bar (with whom members of the defence bar are in frequent contact).

Amendments to the *Criminal Code* have resulted in fewer offences within the exclusive jurisdiction of the Court of Queen's Bench and more offences within the jurisdiction of the Provincial Court.

In order to deal effectively and efficiently with substantive and evidentiary **Charter** issues, new sentencing alternatives, new kinds of internet related offences and sex related offences, an increase in the number and kind of minimum sentences for a broader range of offences, special sentencing considerations for Aboriginal peoples and young people, the Provincial Court must have judges who have a strong working knowledge of wide range of substantive and procedural law.

In recent years, the Provincial Court has implemented the Cree Courts in order to provide a justice setting that relates to the language and culture of the accused person. Provincial Court now conducts three Domestic Violence Courts and two Drug Treatment Courts. These courts generally mandate more participation of the court in reaching resolution of the matters, and require judges with special skills and knowledge.

In addition to its responsibilities in criminal law matters, the Provincial Court also deals with offences pursuant to provincial legislation, small claims civil litigation, appeals, family law issues, income tax prosecutions, drug prosecutions, traffic court prosecutions, and many other quasi-criminal matters.

Forty-eight Saskatchewan Provincial Court judges preside at 13 Judicial Centres and a 73 other Provincial Court sitting locations through the province. These venues allow the court to be brought to the people. The Court of Queen's Bench has 12 judicial districts and 13 sitting locations. At Queen's Bench, the people must come to the court. For many, especially in the north, the travel can be long, expensive and difficult. For this reason, people are generally more familiar with Provincial Court and the Provincial Court judge in their area.

3. There cannot be “Two-tiers” of Justice in Saskatchewan.

The Court of Queen’s Bench may be a court of superior jurisdiction but this certainly does not mean that the importance and societal value of the work done by the Provincial Court is somehow inferior to that of the Queen’s Bench. We submit that support of different salaries and different levels of support for judges of the two courts based on the legal hierarchy of the courts, rather than economic differences between Saskatchewan and Canada as a whole, would be harmful to the interests of justice and is not in the public interest..

In 1974, the Honourable Emmett Hall of the Supreme Court of Canada reviewed the Court system in Saskatchewan and made several recommendations that led to the complete restructuring of the court system in this province. In his report entitled “Report of the Survey of the Court Structure in Saskatchewan” he stated (at p. 21):

“The status of the Provincial Court has to be raised in the public estimation. Its true worth must, of course, come from the quality of its work; from a Bench staffed with competent, knowledgeable judges of high personal integrity, with Court experience and a knowledge of the law and the ability to apply it fairly and humanely. The judge must have an adequate salary and security of tenure – in other words, judicial independence to the same degree as federally appointed judges of the District Court.

I can see no reason why they (magistrates) should be treated differently. They are judges doing judicial work of equal importance to the public and in many areas having concurrent jurisdiction, particularly in criminal law, with the judges of the District Court and Queen’s Bench Courts.”

We submit that these words of one of Saskatchewan’s most eminent jurists are as valid in 2011 as they were in 1974.

All litigants have the right to have their cases heard by judges possessed with the same general level of skills, legal knowledge and expertise, whether the judge is with the Provincial

Court or the Court of Queen's Bench. It should not be made to appear to members of the public that we have a two-tiered level of justice because there is a two-tier pay scale between federally and provincially appointed judges.

In an article in the Canadian Bar Review, the Honourable T.G. Seniuk, now retired as Chief Judge of the Saskatchewan Provincial Court, addressed this issue of public perception of the two trial courts (G.T. Seniuk, N. Lyon, The Supreme Court of Canada and the Provincial Court of Canada, [2000] 77 Can. Bar. Rev. at 81):

“ It also results in two trial courts in Canada with similarly qualified judges exercising increasingly similar criminal law jurisdiction, but with increasingly dissimilar institutional status. The federal government has continuously increased the criminal jurisdiction of the Provincial Court, thereby elevating its constitutional status. At the same time, the provinces fund the Provincial Court, and, as compared to the superior courts, it continues to be second best in terms of resources, case load, remuneration, facilities and other such indicators of institutional status. Many provinces were originally committed to virtual parity for both institutions. Although many important institutional improvements were made to the Provincial Court, the gulf between the two trial courts has increased in recent years, as is evident, for example, in salaries and case loads. Furthermore, different provinces provide different levels of support to the Provincial Court. While the superior courts across Canada in general have the same institutional resources, the standards in the Provincial Court can vary widely between provinces.

These institutional indicators determine how a court looks and responds to litigants and how citizens in turn feel about the institution. **Are we developing first and second class court systems with similar jurisdiction but with easier access to the first class court for those who can afford it?”** [*Emphasis added*]

For the reasons set forth by the late Justice Emmett Hall and former Chief Judge Gerald Seniuk, we submit that perpetuation of a “two-tier” system for remuneration and institutional support for Saskatchewan's two trial courts is not in the interests of justice and, therefore, not in the public interest.

4. Attracting qualified members of the bar to the Provincial Court Bench

It is in the interests of justice that we attract the ablest members of the private and public bar of the province to become judges. Provincial Court judges must be guaranteed a sufficient salary level necessary to attract highly qualified members of the bar. This includes candidates from both the private and public bars.

The British Columbia Commission Report of 2010³ recognized this principle:

The Commission recognizes the need to set compensation for Provincial Court Judges at a level sufficient to attract outstanding candidates from both the private bar and the public service. It is essential to the maintenance of a strong and vibrant Court that its bench be filled by applicants who bring with them expertise in broad areas of the law, a superb legal reputation, the respect of their communities, and a willingness to take on the significant challenges inherent in the role of a Provincial Court Judge.

Society, and its courts, is much more complex today than even a generation ago. Governments and laws are more complex. Courts of first instance produce important decisions that guide and shape the community. We require qualified, respected, respectful, and dedicated judges who are able to draw on knowledge of the law, broad life experience and a depth of understanding of human behaviour to make sound, timely, and well-reasoned decisions. The Provincial Court must be able to attract such persons to the bench.

There are many sacrifices lawyers must make in moving from private practice to the Bench. A lawyer must sever ties with his or her clients, withdraw from political life and exercise care and discretion in community, charitable and personal affairs. Accepting a judicial appointment may entail financial sacrifices as well. Judges must dissolve any business and financial connections they had before their appointment and cannot make any new ones or follow many business opportunities while on the Bench. Accordingly, judges do not have the same

flexibility of investment and the same ability to seek financial opportunities as lawyers in practice. The compensation and benefits accorded a Provincial Court judge should recognize this reality.

5. Tying judicial compensation to a province's fiscal capacity and cost of living

A discussion of wage and benefit parity would not be complete without commenting on the argument that economic capacity and cost of living in Saskatchewan relative to the rest of Canada should affect the salaries paid to a Saskatchewan Provincial Court judge.

The S.C.D.L.A. recognizes that differences in salaries for Provincial Court Judges and those of federally appointed Queen's Bench judges may be justified for reasons relating to differences in fiscal capacity or differences in the cost of living between Saskatchewan and other parts of Canada. In fact, we submit that this is the only basis on which a material difference in overall compensation may be justified. There should be no disparity based on qualifications or workload of our judges nor the importance/value of the work done by the Provincial Court relative to that of the Court of Queen's Bench or the Superior Courts in other provinces.

The S.C.D.L.A. submits that the current relative economic factors, including the fiscal capacity of the province and the relative cost of living here compared to the rest of Canada, do not justify a lower compensation scale for Saskatchewan Provincial Court judges, let alone one that is lower by \$42,157 per year. We note that Saskatchewan is experiencing strong economic growth and has a very strong fiscal capacity compared to many other parts of Canada. We submit that the closing of this salary gap is very much in the interests of justice in Saskatchewan.

³ Final Report of the 2010 British Columbia Judges Compensation Commission, September 20th 2010, at p. 30

CONCLUSIONS

The S.C.D.L.A. submits that there is no reason based on judicial qualifications or workload that can justify significant disparity between levels of compensation and benefits for judges of the Court of Queen's Bench and the Provincial Court.

Provincial Court judges and judges of the Court of Queen's Bench have an equally important a role in the administration of justice in this province. Perpetuation of a "two-tier" system for remuneration and institutional support for judges of the Provincial Court based on considerations relating to court hierarchy is not justified.

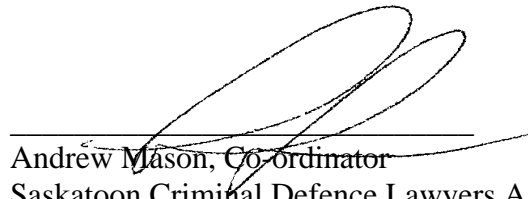
The Provincial Court must attract the most qualified members of the bar to become judges. A lower level of compensation for Provincial Court judges works against this goal.

The fiscal capacity of Saskatchewan relative to other provinces should not be a factor in justifying lower compensation levels for Provincial Court judges relative to the compensation provided by Canada to federally appointed judges.

All of which is respectfully submitted this 15th day of November, 2011.



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