

# The Fifth Manitoba Law Annual: Introduction

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THE USE OF THE TERM "ANNUAL" has become a bit of a misnomer to describe this effort by the Legal Research Institute in cooperation with the *Manitoba Law Journal* to sustain a regular commentary on legal developments in Manitoba. However sporadic, the law annual project continues, and this is the fifth in the series. We welcome submissions as well as feedback from readers. Particular thanks must go to the Manitoba Law Foundation which provides a regular grant to the Legal Research Institute. Without the support of the Foundation this annual volume of commentary would not be possible.

It is appropriate that in this issue dedicated to the late Roy Stubbs, we start with a major piece of historical scholarship by Russell Smandych and Karina Sacca. Their paper traces the transition from a private justice system controlled by the Hudson's Bay Company to a more formalized system of English common-law style criminal courts in the Canadian west to 1870. Particular attention is given to tracing the development of the legal system of the Red River Settlement and District of Assiniboia as it evolved in the period from 1812 to the 1860s. The paper also includes an analysis of criminal cases that were heard before the General Quarterly Court of Assiniboia from 1844 to 1872. The findings of this study contribute significantly to both historical knowledge about the legal history of early Manitoba, and theoretical knowledge about the relationship between "state" and "non-state" forms of legal ordering and social control.

As part of this section on Manitoba legal history, we include the last piece of writing by Roy Stubbs, the pioneer legal historian of Manitoba. At our request, Roy Stubbs submitted a review of Richard Willie's *"These Legal Gentlemen": Lawyers in Manitoba: 1839-1900*.

In late 1994, the Manitoba Law Reform Commission issued a report entitled *Regulating Professions and Occupations*. The report is revolutionary and deserves a much wider audience than might ordinarily be attracted to reports of our Commission. To this end, we have created a symposium on this report by first inviting Harold Dick of the Commission to describe some of the major recommendations of the report and also give his own opinions on various implications of the recom-

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mendations. Various scholars then comment on the report. These include Wes Pue, Nemetz Professor of Legal History at the University of British Columbia; Joan Brockman, School of Criminology, Simon Fraser University; Rene Laperriere from the University of Quebec in Montreal; and W.D.B. Pope, from the College of Physicians and Surgeons. I am most grateful to all the commentators for taking part in this symposium.

Turning to commentary related to aspects of the legal process, Peter McCormick and Tammy Praskach study the changing citation patterns of the Supreme Court of Canada for roughly the last five decades. Then, focusing mostly on the last decade, their research examines in a comparative way the frequency and type of citations of Manitoba decisions by the Supreme Court of Canada, excluding, of course, citations to the decisions of the lower Manitoba courts that are directly on appeal to the Supreme Court.

Barney Sneiderman deals with a very interesting, and emotionally painful, recent case in Manitoba where a man died of ALS shortly after his respirator was disconnected at his request. The Chief Medical Examiner at a later date reclassified the death as a suicide, and an inquest was held which, among other things, raised questions about the ethical and legal behaviour of the doctor that had disconnected the respirator and administered morphine to make the death more comfortable. Sneiderman gives an overview of the medical history of this case and the inquest that followed and in so doing clarifies the various issues involving the law of assisted suicide and the law of murder.

Freda Steel comments on the Unified Family Court in Manitoba on the tenth anniversary of its establishment. Based on a survey of family lawyers, she reviews the positive changes brought about by the implementation of the court: comprehensive jurisdiction, specialized judges, and various auxiliary support services. Steel also notes various matters that could be improved in terms of the process. It is noteworthy that subsequent to the writing of this article, Professor Steel was appointed to the General Division of the Manitoba Queen's Bench.

Turning to commentary more focussed on particular substantive areas of the law, in his review of tort decisions in Manitoba over the last several years, Professor Osborne begins with a recent Supreme Court of Canada decision reversing the Manitoba Court of Appeal on the issue of liability for latent and dangerous defects in buildings. He also notes the recent Australian High Court extension of liability to defects that are not necessarily dangerous. Osborne then reviews a series of Manitoba decisions on negligent misrepresentation and the Manitoba position of confining liability to statements of fact as opposed to statements of opinion or forecast. Professor Osborne makes a good case that this distinction should be abolished. Another issue dealing with negligent misstatement involves the extent of liability, and Osborne reviews a recent Manitoba Court of Appeal case on this point and then moves to another recent case involving the relationship between

misrepresentations and fiduciary duties. After reviewing a recent Court of Appeal case on limitation periods and sexual abuse, Osborne moves on to seven Court of Appeal cases dealing with occupiers' liability. In regard to trial court decisions, Osborne reviews cases involving informed consent to medical care; physician negligence, and negligence claims against the owners of stolen vehicles.

Cameron Harvey comments on a number of wills and succession cases. Included is a discussion of cases dealing with the Manitoba "substantial compliance" section, subsequently amended to what is now called the "dispensation power" section; the issue of whether provisions for lapsed bequests applies to residual clauses themselves, and other cases dealing with aspects of mutual wills, surviving children of a beneficiary, testamentary capacity and particularly the doctrine of suspicion; several construction difficulties and the admissibility of extrinsic evidence; and the relationship between beneficiary forms in various investment schemes and wills requirements.

Cliff Edwards comments on two recent trusts cases in Manitoba, one dealing with the variation of a trust and the other dealing with resulting trusts and the presumption of advancement.

David Deutscher is critical of the Manitoba Court of Appeal's decision in *R. v. B. (D.C.)*,<sup>1</sup> a case involving the much debated issue of admissibility of out of court statements in child sexual assault matters. He claims that the Court introduced a new category of admissibility without the proper foundation of scientific or other evidence that would justify the need for the new category. He also is critical of the new provision laid down by the Court.

The *B. (D.C.)* case is also examined by Lee Steusser, who reviews the case by giving a helpful overview of the law related to hearsay and to the prohibition against admission of prior consistent statements and the exceptions to that prohibition. Like Deutscher, Steusser is also critical of the court's decision in *B. (D.C.)*.

The penultimate paper in this volume is an expanded version of a lively talk given by Professor Sneiderman in Winnipeg in late 1995. Sneiderman examines the incoherent and costly "War on Drugs" and makes a trenchant plea for decriminalisation.

Finally, Bryan Schwartz voices his opinion on the state of the nation in his piece on "Visible Federalism." In this article, Dr. Schwartz outlines a Proposal for Change that the federal government should make in the aftermath of the recent referendum in Quebec.

I wish to thank all the authors for their contributions to this volume and also the editor of the *Manitoba Law Journal*, Mr. John-Paul Bogden, for his fine work in assisting me with this project.

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<sup>1</sup> (1994) 91 C.C.C. (3d) 357.

