

## INTRODUCTION

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THE CLICHÉ IS THAT THE COMMON LAW SYSTEM IS BASED on judge-made law, whereas civil law systems are based on a code. In fact, in Canada, both systems are primarily the product of statutes, and most judging is about the interpretation of statutes. Yet in spite of this reality, legal academics in Canada devote most of their attention to judge-made law, or to a lesser extent, how judges interpret statutes.

A reader of law journals in this country would not be notified of the existence of hundreds of statutes enacted each year by federal, provincial and territorial legislatures. In similar fashion, legal philosophy is largely concerned with how judges allegedly think or write. On the whole, the legal academic community has not displayed much interest in how legislators make policy choices and embed them in the statutes they enact.

In real legal life, the most useful thing a lawyer can do at times is help a client influence the officials who make statutes or regulations. Clearly, influencing the political process involves understanding political advocacy. To this end, there are teachable skills associated with researching, marshalling and presenting a case to elected officials. Unfortunately, these skills are not generally taught. Law students spend most of their first year reading case law. Little, if any time, is spent in first year investigating how elected officials make statutes—or how delegated officials made regulations.

It is time to acknowledge this and move to bridge the skill “gap”. It is time to ignite academic commentary and debate on the procedures used by law making bodies in Manitoba, and the legislation those bodies create. Manitoba faces many of the same social and economic problems as jurisdictions elsewhere in Canada and in the world. Students and practitioners of legislation have much to learn from each other. For those seeking to explore grand ideas and theories, Manitoba can be a worthy testing ground. A valuable piece of jurisprudence or political theory can emerge from a study of Manitoba’s legislative operations.

Although the public has increasing access to, and interest in, the journalistic coverage of national and international events, the ranks of local legislative reporters have radically diminished over the years. This compounds the problem by decreasing access to what debate does exist.

Law schools can help rectify the overall commentary deficit, and do so in a way that brings into play the special knowledge and experience of those with legal training. This special edition of the Manitoba Law Journal represents



the first in a series of issues devoted to providing the legal community with commentary on Manitoba's legislative process.

The operating procedure for this project was as follows. Legal Research Institute assistants and students enrolled in the faculty of law's legislative process course selected recently enacted statutes for examination. All researchers worked with the same foundational set of questions. This systemized approach was designed to let existing patterns emerge across the scope of the statutes that were reviewed.

Researchers were encouraged to explore these questions in particular:

**WHAT WAS THE INTELLECTUAL ORIGIN OF THE STATUTE?**

Did it emerge from the civil service, the law reform commission, from an elected official, or some other source? Was it largely copied from legislation of another jurisdiction, or was it an original Manitoba creation?

**HOW DID THE STATUTE PROCEED THROUGH THE LEGISLATURE?**

Was there adequate opportunity for public comment? Did the opposition have the time or interest to study the draft bill in detail, and make thoughtful suggestions or criticisms? How much did the debate cause or influence changes in the final version of the bill?

**WAS THERE ANY JOURNALISTIC COVERAGE?**

Was editorial commentary published, showing dissenting or supporting views?

**DID THE STATUTE THAT EMERGED PROVIDE DETAILED POLICY DIRECTIONS?**

Did it leave policy decisions to be determined by officials with delegated authority?

**WHAT IS THE LITERARY STYLE OF THE STATUTE?**

Is it easy for an ordinary person to follow? Is it drafted in legalese?

**ARE THERE ARE SIGNIFICANT DIFFERENCES BETWEEN THE FRENCH AND ENGLISH VERSIONS OF THE STATUTE?**

Did the officials who translated the draft into French identify and clarify ambiguities in the English version? Did they produce an outcome that is semantically different in some important ways?

The reviews attempt to examine the process of law making and the outcomes. The aim was to provide insight into particular episodes of law making, and also to gain some understanding of larger patterns that might exist. Ideally, a fuller set of questions could be developed, applied to all

statutes, and through the years, a much deeper appreciation of the actual patterns of law making in this province would emerge.

For this particular review, six statutes of various origins were analyzed. The overarching commonality was that in each of the six cases the government was reacting to pressures from outside itself to “fix” a problem. Every year, however, a significant amount of “housekeeping” legislation results from internal pressures. A thorough review of internally motivated legislation must be left to future researchers.

A number of the bills reviewed were the result of incidents that exposed a lack of appropriate legal tools. Public outcry was swift after a series of women died at the hands of violent partners. A public inquiry was launched and ultimately new protection order tools, under *The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, were enacted. Multiple deaths at Holiday Haven care facility moved the home care industry into the spotlight. These tragic deaths motivated a minister, then in opposition, to legislate enhanced protection for the most vulnerable elders in Manitoba with *The Protection for Persons in Care Act*.

*The Court Security Act* was passed in reaction to a court ruling that called into question the legitimacy and foundation of the security measures in place at the courthouse. The bill was passed in a scramble to make sure visitors to the courthouse were required to pass a security check. It was estimated that 1,000 courthouse visitors were immune from any security check, after the decision of the Court of Appeal was handed down.

The government reacted to intense lobbying by special interest groups by drafting *The Wildlife Amendment Act*, and pressure from individuals involved in the midwifery profession eventually led to the enactment of *The Midwifery Act*, in spite of strong opposition from the established medical community.

Although the sample size of statutes reviewed is too small to draw firm conclusions, some tentative observations can be made on a few points.

Deferral of real decision-making to delegated officials was a contentious issue across a number of statutes examined. For example, *The Wildlife Amendment Act* makes no firm decision on what is to be done about “penned hunting,” even though the legislation was in response to those who wanted to prohibit “penned hunting.” Whether it should be banned or regulated is left for a smaller group of officials and another day.

What passes for law making in our province is increasingly the deferral of real decision making to un-elected administrative officials. Recent statutes confer vast discretionary powers to delegated administrators, without imposing clear policy guidance. Governments increasingly use regulations to pass into law the “guts” of statute details. This shift has the potential to erode the quality of debate on the legislative process in Manitoba, as regulations are not debated in the House—in public view.



It does appear that improvements could be made in the process of notifying citizens of Manitoba that public hearings are going to take place. The quantity and quality of public input sometimes suffered from a lack of sufficient publicity about the progress of a bill.

It also appears that substantial pieces of legislation can emerge from the Manitoba legislature with practically no journalistic coverage or commentary. Much of what is covered by the media is not reflective of the full debates—especially those conducted in standing committees.

As a companion to the pieces of legislation reviewed, two “insiders” were interviewed. Rick Mantey and Norm Larsen help to shed light on the invisible portion of statute development. Rick Mantey spent over a decade helping to marshal legislation through the House. He offers comparisons with the federal system and his take on the lack of media coverage. Norm Larsen, a legislative drafter for thirteen years, explains the intricacies of the drafting process and his perspective on public involvement. The importance of advocacy that is timely and targets the correct government officials is clear from Norm’s interview, and should not be underestimated by interest groups.

Finally, advocacy for legislative reform often begins at the ballot box. Currently, we use a system of electing officials that enables parties with less than forty percent of the popular vote to wield near-absolute power for up to five years. To provide insight into our current first-past-the-post electoral model, an article on proportional representation is included. This article, in an earlier form, was presented at The Law Commission of Canada consultation on electoral reform, in Ottawa this past October.

The right to effective representation is a fundamental right for all Canadians. Our current electoral system is based on a model that is becoming antiquated. Few democracies continue to rely exclusively on first-past-the-post systems to create fair representation for their citizenry. This article offers some suggestions on how an element of proportional representation can be integrated into our system of electing legislatures. The need for reform in this regard is, I believe, profound.

With this brief introduction, the stage is set to take a closer look at the legislative process through the interviews, articles, and reviews we have collected and edited for clarity. Your comments and suggestions for future editions are welcome.

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