Introduction and Issue Overview

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Since we took over the Manitoba Law Journal in 2010 and revamped its mission to focus primary attention on legal developments that are of particular relevance to a Manitoba legal audience, we have asked authors to bring us high-quality commentary on developments of relevance to our own provincial community.[1] We invited others to a variety of subject matters, philosophical, and policy perspectives and methods of analysis, including not only the analysis of doctrine, but insight based on social sciences. Once again a group of authors has responded to the

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1 Bryan Schwartz, "New Vision for the Manitoba Law Journal" (2011) 35:1 Man LJ i.

challenge. This issue is particularly replete with analysis based on historical and statistical modes of investigation.

We begin with the unusual situation of having two keynote addresses contained in the same issue. Both were part of the annual DeLloyd J. Guth Visiting Lecture in Legal History series. It has been our custom to have the latest Guth Lecture speaker have their paper presented in the MLJ. But, due to the timing of the lectures and our production schedule, this year, we ended up with two papers arising out of Guth Lectures. Both Lectures focus on Métis issues. In the paper of Thomas Berger, Q.C., there is an "in the trenches" view of *Manitoba Métis Federation Inc. v. Canada (A.G.)*,[2] as the author was one of the successful counsel in the case.[3]

While Berger focusses on the evidence, argument and decision in the *MMF* case, Professor Bell's Guth Lecture – and the subsequent paper produced by her and her co-author, Paul Seaman – takes a more panoramic perspective of Métis rights. It considers not only where we are in terms of the jurisprudence (with *MMF* and other cases), but also barriers and opportunities moving forward.

Professor O'Toole's analysis of s. 31 of the *Manitoba Act, 1870*[4] as a land claim agreement is another set of ideas as to how the Canadian legal system might choose to legally protect Métis interests, based on existing case law precedents in place prior to the *MMF* decision.[5] Professor O'Toole also contends that, the findings of fact of the trial judge (MacInnes J., as he then was) were at odds with the historical evidence. In Richard Devlin's "Bend or Break: Enhancing the Responsibilities of Law Societies to Promote Access to Justice", Professor Devlin covers three major reports on access-to-justice issues.[6] After summarizing all of them,

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2 2013 SCC 14, [2013] 1 SCR 623.

3 The Manitoba Law Journal has already published a case comment on the case. See Sacha R Paul, "A Comment on *Manitoba Metis Federation Inc v Canada*" (2014) 37:1 Man LJ 323.

4 33 Vict, c 3.

5 *Supra* note 2.

6 Action Committee on Access to Justice in Civil and Family Matters, Report, "Access to Civil and Family Justice: A Roadmap for Change" (October 2013), online: <http://www.cfcj-fcjc.org/action-committee>; Canadian Bar Association Access to Justice Committee, Report, "Equal Justice: Balancing the Scales" (November 2013), online: <http://www.cba.org/CBA/equaljustice/main/>; Canadian Bar Association Legal Futures Initiative, "Futures: Transforming the Delivery of Legal Services in

with comments on both the strengths and weaknesses of each, he goes on to discuss public-interest vocationalism. According to Professor Devlin, part of the ethical make-up of every Canadian lawyer's professionalism should include a commitment to contributing to access to justice for clients of limited means. Moreover, the Federation of Law Societies of Canada, a collective of the provincial Law Societies, the regulators of lawyers in the public interest, according to Professor Devlin, has an important role to play in enforcing this type of approach.

Decades ago editor-in-chief of the Manitoba Law Journal Alvin Esau instituted an annual survey of legal developments in Manitoba as regular feature. He enlisted the contributions of Professor Peter McCormick, who provided highly innovative work based on finding statistical trends in the body of case law produced in Manitoba rather than focusing on the doctrinal nuances of individual cases. It is a welcome return to our pages to have articles provided by these two pioneers.

The contribution of Professor Peter McCormick and Mark Zanoni attempts to trace the historical development of "By the Court" judgments. In the view of the authors, early in the history of the Supreme Court of Canada this technique was used in matters considered routine, and was only later adopted as a tool to have the Court speak with a single, unattributed voice in politically charged decisions.

In "Some Reflections on the Empirical Studies of Peter McCormick on the Occasion of His Retirement", Professor Esau details how the Legal Research Institute of the University of Manitoba was able to commission work from Peter McCormick to assess the decisions of the Manitoba Court of Appeal in two different periods, and using a variety of different indicators and drawing a plethora of conclusions (firm or otherwise). The work in Manitoba led some to believe that personal ideological views of the judges might play a greater role in Manitoba than elsewhere, but the later work, according to Professor Esau, tended to show that many of the indicators of performance that put Manitoba as an outlier earlier on had largely evaporated during later studies. As Professor Esau points out, many of the conclusions drawn about judicial performance (particularly those based on rates of reversal of a provincial Court of Appeal by the Supreme Court of Canada) were challenged by members of the legal community.

Canada" (August 2014), online: <http://www.cbafutures.org/The-Reports/Futures-Transforming-the-Delivery-of-Legal-Service>.

Nonetheless, Professor Esau shows that the studies were used by some (including, of course, Professor Esau himself) in legal education, to show that the process of judicial decision-making is not as clean, objective or impersonal as the reading of the results reasons for decision might otherwise suggest.

Professor Esau respectfully disagrees with his subject in terms of the *Canadian Charter of Rights and Freedoms*.[7] According to Professor Esau, Professor McCormick believes that the *Charter* has entered a relatively dormant phase, with only minor changes around the edges of constitutional analysis. Professor Esau, on the other hand, believes that the *Charter* is entering an "echo" phase, essentially reconsidering its prior decisions, such as the *Prostitution Reference*[8] (with *Canada v Bedford*)[9] and *Rodriguez* v *British Columbia*[10] (with *Carter v Canada*).[11]

In the piece authored by Professor Michelle Gallant, "An Empirical Glimpse of Manitoba Civil Forfeiture Regulation", the author both reviews the Manitoba civil forfeiture legislation, and explains most of the major arguments militating against the current civil forfeiture regime. She then empirically reviews 100 civil forfeiture cases in Manitoba in light of four criteria, and draws some general conclusions, such as its predominant use in cases involving drug offences.

In Professor Joan Brockman's contribution, "The Use of Undercover Operators by Professional Organizations When Gathering Evidence to Enforce Their Monopolies: 'Reprehensible' Tactics and 'Outright Deception'?", the author argues that the doctrine of entrapment and privacy concerns should be dealt with in the investigations of professional self-regulatory organizations (for example, law societies). These organizations are generally given a statutory monopoly over the practice of the profession, and that monopoly gives them the power to prevent non-members from carrying on the profession. What little case law there is on these issues of professional investigation, she contends, seems quite

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7 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

8 *Reference re ss 193 & 195.1(1)(c) of Criminal Code (Canada)*, [1990] 1 SCR 1123 [*The Prostitution Reference*].

9 2013 SCC 72, [2013] 3 SCR 1101, [2013] SCJ No 72.

10 [1993] 3 SCR 519.

11 2015 SCC 5, [2015] 1 SCR 331.

contradictory. David Ireland provides a searching survey of the practical realities of plea bargaining the criminal justice system in Manitoba. He shows that Manitoba may have created a situation where plea bargains (and joint recommendations in particular) are used not because they necessarily achieve good policy results from the perspective of the criminal law, but rather because they are efficient. He takes issue with the efficiency argument at the normative level (he suggests that while efficiency is important, other values may trump it in many cases) and even the efficiency argument at the practical level (he points to work that suggests that widespread plea bargaining and joint recommendations may not be as efficient, and as critical to the functioning of the criminal-justice system as their proponents would suggest). Ireland suggests a need for further empirical study on a larger scale to confirm the findings of his work.

The final contribution, by Joshua David Michael Shaw, "The Queer Child Deserves Protection: Bill 18 and the Justifiable Infringement of Denominational Schools' Freedom of Religion", comments for a third time in the Manitoba Law Journal[12] on Bill 18.[13] This legislation is designed to ensure that schools are made safe. The particular matter of interest is the need to allow the creation of gay straight alliance groups in all schools in Manitoba, including those denominational schools that are religious in orientation. The author recognized the conflicting rights of both religious groups, on the one hand, and the rights of lesbian, gay and bisexual (LGB) youth, on the other. The collective nature of both of these types of rights as group identity rights is clear. The author argues that given the particular vulnerabilities of LGB youth (as compared even to LGB adults) requires special consideration in the analysis of the potential application of s. 1 of the *Charter*. According to Shaw, as a result of this vulnerability, earlier cases that found in found of religious rights might not be as likely to apply in the context of a *Charter* challenge to the GSA provisions of Bill 18.

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12 For the two earlier articles, see Donn Short, "Bound for Glory: Bill 18, The Public Schools Amendment Act (Safe and Inclusive Schools)" (2013) 36:2 Man LJ 115; Zachary Kinahan, Stacy Senkbeil, & Matthew Carvell, "Wedge Issue Politics in Manitoba: Bill 18 — The Public Schools Amendment Act (Safe and Inclusive Schools)" (2014) 37:2 Man LJ 177.

13 Bill 18, The Public Schools Amendment Act (Safe and Inclusive Schools), 2nd Sess, 40th Leg, Manitoba, 2012 [Bill 18].