

Preface and Issue Overview

D A R C Y L . M A C P H E R S O N *

In a year dominated by a global pandemic, an associated worldwide economic downturn, and fundamental changes to the way that legal education is delivered in Canada, it would be very easy to be quite emotionally spent. Oddly enough, though, in reading through this issue of *Underneath the Golden Boy*, I am struck by a feeling of gratitude. As difficult as this year has been for everyone associated with the University of Manitoba's Faculty of Law (faculty members, staff members, sessional lecturers, students, and others), the legal profession in Manitoba and elsewhere (and everyone else, for that matter), we are still delivering on the stated goals of our institution. This issue of *Underneath the Golden Boy* is evidence of that. Despite everything that has happened, through the hard work of our authors, peer reviewers, student editors, administrative support, and others, the Manitoba Law Journal continues to deliver high-quality commentary on legal developments in Manitoba and elsewhere. We, as Editors-in-Chief, are pleased to provide the venue through which the hard work of all of these people can be recognized and disseminated.

One of the themes that unites a number of the articles in this volume is a concern and appreciation for different conception of the public interest and how different actors in the justice system may or may not be seen to be protecting the public interest.

In fact, one of the articles is specifically focused on the private-sector response to COVID-19. For Lord and Saad ("Tackling the COVID-19 Pandemic: The Unsettling Role of Non-State Actors in Addressing Global Pandemics"), not only do private-sector actors (like employers) have a significant role to play, but, despite the best of intentions, government responses to the crisis may actually discourage those private-sector actors from taking the actions that will limit the negative impacts of the crisis.

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The authors also offer a starting-point for potential solution to the issues that they raise.

To me, what is most interesting about the contribution of Allan C. Hutchinson (“How Civil Procedure Fails (And Why Administrative Justice is Better)”) is not that he acknowledges many of the challenges that confront our civil-justice system (delay and cost among them). Rather, he looks to the administrative-law system as a means to resolve some of these challenges. He believes that administrative justice, with its more flexible approach to the resolution of procedural concerns, may offer solutions that typical civil-justice reform efforts may not have considered.

The piece by Silas Koulack (“Defunding and Refunding: A Harm Reduction Approach to the Police Budget”) takes a number of rather controversial positions about the police and policing. His argument is that a reduction in spending on police could and should be redirected to social-program spending that would alleviate poverty and other causes of criminal behavior. In Koulack’s view, this spending would reduce both the cost of criminal justice and could increase workplace participation, economic success, and overall population health, among other impacts. Like other articles in this volume, we suspect that some of the assertion made in this contribution are likely to generate significant debate and disagreement.

In the piece by Jonathan Andrews (“The cost of compromising on procedure: A case study of Manitoba’s *The Vulnerable Persons Living with a Mental Disability Act*”), the author takes a critical view of the procedural protections (or, more accurately, the perceived relative dearth of such protections) offered to persons with a mental disability when assisted or substitute decision-making is sought with respect to their personal care or property. Andrews argues that removing a person’s decision-making capacity (even if the person is vulnerable and suffering from a mental disability) is a serious one, and that therefore, protections additional to those currently in place are both advisable and necessary.

In “Lawyers serving the state: ethical issues when administrative directions conflict with the client-state’s interests”, Edgar Schmidt explains why he decided to seek court help when he believed that the government was not following through on its statutory duties. More particularly, the legal conclusions of the Federal Court of Canada and the Federal Court of Appeal were not at the center of his analysis. Rather, the analysis was on the legal reasoning that, for Schmidt at least, compelled him to believe

that his course of action was consistent with the action taken were consistent with his ethical duties, as he saw them.

Unquestionably, it is somewhat unusual to have a person who was involved in litigation discuss issues around that litigation. But the ethics of the choices of individual lawyers and the public discussion of the ethical choices that public servant lawyers confront raised may questions beyond the resolution of *Schmidt v. Canada*. Is a lawyer in a government department simply there to implement the policy priorities of the government of the day? Does this lawyer serve a higher goal, like ensuring compliance with law, even when political masters may find this inconvenient? Should disagreement about the application of the Constitution to a law be reported to someone beyond the relevant government Minister? If so, to whom? Is a lack of adherence and fidelity to the political choices of the government of the day a lack of loyalty to one's client, leading to potential professional discipline for a lawyer?

It is these broader questions that lead to a series of back-and-forth articles between Edgar Schmidt and Andrew Flavelle Martin in this issue. Each of the authors lays out views on some aspect of these broader questions in each of the articles they present here. What is interesting to us is that, while we could find something in each article with which we can disagree, this is, for us, the sign of a good debate to have in a law journal. By presenting all of these article in a single issue of *Underneath the Golden Boy*, we hope that this will expose our readers to the best form of many arguments in the same topic area in a short period. However, there was one warning: despite the number of issues addressed in these articles, we doubt that the arguments offered here represent every possible viewpoint or argument on the issues raised. Again, this is another sign of a good and nuanced debate. Hopefully, the sides of the debate that are explored here will stimulate others to join the debate, bringing different viewpoints, and still more nuance in the discussion of these issues.

In "Folk Hero or Legal Pariah? A Comment on the Legal Ethics of Edgar Schmidt and *Schmidt v Canada (Attorney General)*" (one of Andrew Flavelle Martin contributions), the author assesses the conduct of Edgar Schmidt as a lawyer, as a delegate of the Attorney-General, and as public servant and whistleblower. He argues none of the approaches to the obligations of the lawyer/public servant referred to in the existing literature are sufficient, and offers a different approach, which suggests people like Schmidt may be protected as a delegate of the duties of the

Attorney-General. He also explores whether the lawyer/public servant has to be correct in his or her assertion of unconstitutionality in order to be vindicated.

In ordinary circumstances, it is rare that a law journal would publish the views of a case where those views are expressly those of a party in that case. But, many commentators (including Andrew Flavelle Martin in this issue and others in different venues) have challenged both the right of Mr. Schmidt to bring the case forward and defended the reasoning of the Federal Court of Appeal to at least some extent. Both Mr. Schmidt's ethics and appropriateness as a party have been challenged. Thus, we thought that allowing him a chance to explain his view of the law to the case that he brought before the Federal Court of Appeal would provide a fuller picture for the reader.

In another of Andrew Flavelle Martin's contributions in this volume ("Does the Attorney General have a duty to defend her legislature's statutes? A comment on the *Reference Re Genetic Non-Discrimination Act*"), he considers, as the title suggests, the *Genetic Non-Discrimination Act*,¹ in particular, the constitutional challenge to it under the *Canadian Charter of Rights and Freedoms*.² But, this is not to consider the merits of constitutional challenge. Instead, Martin interrogates a different question: Where the Attorney-General does not believe in the constitutionality of the legislation, what should the Attorney-General do where the legislation is challenged on constitutional grounds? Martin looks at various streams of thought on the issue, as well as considering issues that flow from various approaches, including whether the Attorney-General should consider resignation where the legislative branch has passed a statute where the Attorney-General has advised that the law is unconstitutional.

In "From Attorney General to backbencher or opposition legislator: The lawyer's continuing duty of confidentiality to the former client" (another contribution by Andrew Flavelle Martin in this volume), the author takes the rather unique approach that any Attorney-General who is a lawyer may be in violation of their duty of confidentiality if they discuss anything to do with the advice received by them or their from staff at the Department of Justice when they later speaks as a backbencher or

¹ SC 2017, c 3.

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

opposition politician. He claims that the need for a lawyer/politician to maintain confidentiality promotes public confidence in lawyers, and promotes candour from other government lawyers to the Attorney-General.

