

THE ASPER REVIEW OF INTERNATIONAL BUSINESS AND TRADE LAW JOINS THE MANITOBA LAW JOURNAL FAMILY

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

I n 1999, a gift to the University of Manitoba created the Asper Chair in International Business and Trade Law in the Faculty of Law. From the beginning, there was a commitment to have the Chair provide an outlet for research within its mandate. From the year 2000 forward, the Asper Chair has done this through the vehicle of the Asper Review of International Business and Trade Law. For the first 22 years of its existence, the Asper Review functioned independently of any other publication, both in the Faculty of Law and elsewhere, under the editorship of Dr. Bryan Schwartz.¹ While, in later years, others would share the title of Co-Editor-in-Chief, Dr. Schwartz, as the Asper Chair throughout, has been the driving force behind the Asper Review since its inception, and remains so today.

The time as an independent publication was, by any metric, highly successful for the Asper Review. It was highly ranked in a number of annual surveys and studies, of both law journals generally, and specialized law journals, both when compared to its Canadian peers, and those around the globe. In the Washington and Lee University annual rankings of law journals in 2017, for example, the Asper Review was ranked among the top ten

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among all law journals in Canada, third out of almost fifty specialized law journals in Canada, and seventh in the world among peer-review international trade law journals. These accolades showed that the Asper Review could (and did) stand very well on its own.

When Dr. Schwartz and I took over the Manitoba Law Journal as Co-Editors-in Chief in 2010, we wanted to create a law journal that would produce materials that were highly relevant to the Manitoba legal community.² In the beginning, we were simply trying to get the Manitoba Law Journal off the ground, and we were successful in this labour-intensive endeavour. We discussed the interaction of the Manitoba and the Asper Review at that time, but we decided that one project at a time was enough at that point.

As the operation of the Manitoba Law Journal began to grow, we added new dimensions. One of the first of these was to integrate the previously independent publication called “Underneath the Golden Boy”, so that the Manitoba Law Journal would have an outlet for contributions that were focused on statutory provisions and their interpretation. Soon after, colleagues of ours wanted to produce a law journal focused on criminal law. We encouraged them to use the Manitoba Law Journal as a vehicle for publication. While we were there to help, our colleagues maintained editorial control throughout. Dean Richard Jochelson and Professor David Ireland have produced multiple issues under the Robson Crim banner of the Manitoba Law Journal every year since. Other dimensions have included oral histories of the judiciary, the legal profession and the law school, and oral histories with respect to Indigenous jurists and policy-makers.

With this issue of the Manitoba Law Journal, we add the Asper Review’s focus on issues of international business and trade law into the family of volumes produced as part of one of the University of Manitoba Faculty of Law’s flagship publications.

In this edition of the Asper Review of International Business and Trade Law, we publish articles on a diverse array of cross-border subjects, including whistleblowers incentives as a part of securities regulation, issues around the international regulation of duty-free tobacco, and recent case law that acknowledges the liability of Canadian corporations in our domestic courts for serious wrongs committed by their subsidiary corporations outside of

² See Bryan P. Schwartz, “A New Vision for the Manitoba Law Journal” (2011), 35(1) Manitoba Law Journal.

Canadian territory, regardless of whether the subsidiary is formed under the laws of Canada, its provinces or territories, or laws outside of our borders.

In the contribution by Dr. Janet Austin (“What Effect Has the SEC’s Whistleblower Award Program had on Ponzi Schemes and their Victims?”), the author reviews the whistleblower program that the U.S. Securities and Exchange Commission developed to encourage the reporting of, among other things, major financial frauds on the public markets. The particular interest here was on financial awards given to whistleblowers to incentivize this behaviour. While there is passing reference to Canadian initiatives in this area, the article focuses on Ponzi schemes in the US in particular, and comments on the effects of financial incentives to encourage contact insiders who become aware of serious wrongdoing to inform regulators of this information.

In the contribution of Pei-Kan Yan (“Legal Assessment of Duty-Free Tobacco Regulations under International Trade Laws”), the author sets out a case for banning the current practice of allowing international travellers to purchase tobacco products on a duty-free basis. The article provides a sweeping discussion of a large number of international instruments relevant to duty-free tobacco, produced by several international bodies, including both the World Health Organization and the General Agreement on Tariffs and Trade. Despite a number of international agreements on the matter, the author suggests that these agreements do not do enough to protect health. The argument is that countries can do more for the health of their citizens by not providing a duty-free option with respect to tobacco products.

In this issue, we introduce a concept we call “connector articles”. Contributions about international business often refer to legal systems outside of Canada. Where (i) the article itself is interesting in its own right; (ii) the issue it discusses arises is also dealt with differently in Canada, we will sometimes ask one of the student editorial staff to write a short contribution explaining the Canadian law on the subject. This contribution is referred to as a “connector article”, because the contribution connects the original article (that often looks at a problem in international business from the point of view of a country that is important in Canadian commerce, such as the U.S.) to Canada and Manitoba. By using these connector articles, we hope to ensure that Canada and Manitoba will always remain at the center of the analysis, regardless of the jurisdiction of the original author. Each of the two publications referred to above (by Austin and Yan, respectively) received this approach. Vicki Liu and Ryan Hall (two Robson Hall students on the

editorial staff of the Manitoba Law Journal) completed short contributions to provide a Canadian viewpoint on both the regulation of Ponzi schemes and duty-free transactions with respect to tobacco products, respectively.

The final contribution is by Evaristus Oshionebo (“Investors Beware!: The Liability of Canadian (Parent) Corporations for the Wrongful Actions of Subsidiaries in Developing Countries”). This contribution continues an exceptionally important conversation about the liability of non-state (usually corporate) actors for breaches of norms of international law occurring through subsidiary corporations operating outside of Canada. This becomes particularly important when the parent corporations are based in Canada. Though much of the conversation in this area of law justifiably revolves around the groundbreaking decision of the Supreme Court of Canada in *Nevsun Resources Ltd v Araya*,³ the contribution makes clear that there was a significant jurisprudential history of false starts, and even court defeats before a recent spate of case law that led up to the Supreme Court’s decision. Where this area of law may go next is a serious issue that we will have to watch with interest.

³ 2020 SCC 5.