Underneath the Golden Boy

CONTENTS

1 Preface
DARCY L. MACPHERSON

LEGISLATIVE REVIEWS

1 Manitoba's changes to Workers Compensation Legislation regarding Post-Traumatic Stress Disorder: Analysis and Legislative Process
NORA FIEN

29 Bill 34: The Safer Roads Act (Drivers and Vehicles Act and Highway Traffic Act Amended)
COLLIN INTRATER

55 Reflections on Bill 11: The Domestic Violence and Stalking Amendment Act
ERIKA DAY

87 Bill 5: The Police Services Amendment Act (First Nation Safety Officers)
DANIELLE MAGNIFICIO

POLICY REVIEWS

123 The Prevention Strategy: Eliminating FASD in Indigenous Communities
BRYAN P. SCHWARTZ, TERRENCE LAUKKANEN, JUSTINE SMITH
Wiretapping Smart Phones with Rotary-Dial Phones’ Law: How Canada’s Wiretap Law is in Desperate Need of Updating

ANNE TURNER

TO VAPE, OR NOT TO VAPE Electronic Cigarettes and the Ambiguous State of Their Legality in Canada

RANISH RAVEENDRABOSE
When Dr. Bryan Schwartz and I took over the editorship of the Manitoba Law Journal (MLJ) in 2010, one of the first tasks was to determine the path that the publication would follow going forward. As we re-envisioned the goal of the MLJ, our overriding aim was to produce high-caliber and lively commentary on issues of importance to our own legal community. As part of that mandate, we decided to re-integrate “Underneath the Golden Boy” (UTGB) into the annual issues of the MLJ. Inaugurated in 2000 by Dr. Schwartz, UTGB focuses on legislation and public policy, with an emphasis on issues affecting Manitobans. While many academic law journals tend to concentrate on judicial developments, statutory changes and policy debates are topics often under-analyzed by legal academy.

As usual, this year’s UTGB issue includes profiles of bills enacted by the Legislative Assembly of Manitoba. Since these bills were introduced, there has been a change in government. The references to representatives of the Crown (such as ministers) are made as of the time of introduction of the relevant bill.

Nora Fien discusses Bill 35, an amendment to the worker’s compensation scheme in Manitoba. She does a remarkable task in discussing the often-misunderstood concept of post-traumatic stress disorder (PTSD), and the value of adding a presumption that post-traumatic stress occurred at work. Two of the most interesting elements of this paper are the comparison to other Canadian jurisdictions and the analysis of various stakeholder positions with regard to Bill 35.

In his contribution, Collin Intrater tackles the important issue of bad driving, whether caused by intoxicants, distractions (such as texting and

* Professor, Faculty of Law, University of Manitoba; Co-Editor-in-Chief, Manitoba Law Journal.
social media), or other factors. Bill 34 introduced harsher penalties for provincial offences around driving, despite some indication from academic literature that there is only a minor deterrent effect in increased punishments. The amended act does not wait for a criminal conviction to apply these harsher outcomes; a charge around driving is sufficient to impose penalties. The system administered by the Manitoba Public Insurance to deal with problematic drivers is also scrutinized, and its “buyback” provisions are criticized in light of the amendments.

Erika Day’s contribution, focused on Bill 11, examines recent amendments designed to protect the victims of stalking and domestic violence. The author makes a convincing case that domestic violence and stalking are continuing and gendered problems in Manitoba, often resulting in the serious injury or death of victims. Bill 11 makes it easier, among other things, for victims to seek protective orders and monitor the use of firearms by those subject to these orders. Valid concerns about the efficacy of such measures are raised.

Danielle Magnifico explores Bill 5, an amendment to the Police Services Act designed to confront issues surrounding policing in First Nations communities. Manitoba has one of the largest Indigenous populations in the country. One of the most interesting parts of the paper is Ms. Magnifico’s discussion of the jurisdictional dispute surrounding policing in First Nations communities, as it appears neither level of government is willing to take responsibility over the issue.

This volume of UTGB also has a public policy portion. Bryan Schwartz, Terrence Laukkenen, and Justine Smith address one of the most important issues to Manitoba society as a whole and its criminal justice system, which is reducing the incidence of fetal alcohol syndrome disorder. The authors focus, in particular, on the challenges faced by Indigenous communities. They propose the need to develop strategies that include specific and measurable results, that draw on the successes achieved in other jurisdictions based on a thorough canvassing of the literature, and that consider interventions on many scales, from the cellular level to community employment and education.

Anne Turner has produced a thorough study of the history, modern development, and effectiveness of judicial supervision over the issuance of search warrants in wiretap situations. She points out that the law in this area still tends to be dominated by precedents that were developed in the era of rotary phones. Her ability to use history to explain a complex area of
law and its constitutional dimensions, and at the same time make it accessible to a non-expert, is a strength of the article.

Finally, the legality of purchase, sale and personal use of e-cigarettes lies in the background of the contribution authored by Ranish Raveendrabose. Raveendrabose wrote the article before any federal legislation was introduced, and he emphasized that more scientific research would help the legislature in formulating legislation that protects and serves those who are on either side of the issue of e-cigarettes. Interestingly, he concludes that the most effective method by which the federal government could regulate e-cigarettes is by amending the Food and Drugs Act, or drafting new regulations under this act (as opposed to the Tobacco Act).

One of the more distinctive aspects of this UTGB volume is that there is, in each of the contributions, a connection to police work, despite the fact that in some cases, this can create a jurisdictional issue with respect to the government. Ms. Fien’s contribution has a policing dimension, as the presumption that PTSD is caused by employment was considered in certain jurisdictions for first responders, such as police, who are exposed to trauma as part of their work. The presumption is extended by the Manitoba legislation to all workers, which makes Manitoba a leader in the country on broadening this type of legislation and increasing supports for workers with post-traumatic stress disorder.

Distracted and impaired driving, discussed in Mr. Intrater’s contribution, can lead to serious criminal offences that are sought to be curbed by a provincial amendment. Ms. Day’s contribution describes how the amendments proposed by Bill 11 were developed through consultation with police, and addresses the enforcement aspect of protection orders. With respect to Ms. Magnifico’s contribution, the connection to policing is, to say the least, obvious.

The public policy section addresses similar issues. In some cases (such as the Turner contribution), the link to the criminal law and policing is quite direct, while in others (such as the contributions by Schwartz, Laukkanen, and Smith, and that of Raveendrabose) the link is still clearly present, but not quite so obvious.

In the end, I believe that the various contributions in this volume fulfill the commitment that Dr. Schwartz and I have made with respect to the MLJ. The articles touch on various topics of great importance to Manitobans and the legal community. Many of the issues discussed are
connected to the criminal justice system. This is particularly timely as the MLJ will shortly release its first of many planned issues on criminal law jurisprudence.¹ Manitoba challenges, experiences, and policy initiatives in the area of criminal justice, including its impact on members of Indigenous communities, is potentially of national and international importance; we believe that in this area and in many other public policy areas over the years, the MLJ has released analysis and reflection that can contribute significantly to understanding and reform.

¹ (2017) 40:3 Man LJ [forthcoming].
Underneath the Golden Boy

CONTENTS

i Preface
BRYAN P. SCHWARTZ

LEGISLATIVE REVIEWS

1 The Restorative Justice Act: An Enhancement to Justice in Manitoba?
ZACHARY T. COURTEMANCHE

17 Will the Reform Act, 2014, Alter the Canadian Phenomenon of Party Discipline?
PAUL GEISLER

44 “All talk with very little action”: Bill 26, The Accessibility for Manitobans Act
SHARYNE HAMM

65 Bill 2: The Highway Traffic Amendment Act (Safety of Workers in Highway Construction Zones)
ANDREW HNATIUK

83 The New West: Bill 202 and Manitoba’s Future in the New West Partnership
JOSHUA MORRY
POLICY REVIEWS

102  On we go to Manitoba’s next provincial election: Whither the NDP?  
     KARINE LEVASSEUR

123  Municipalities Amalgamate in Manitoba: Moving towards Rural Regions  
     WILLIAM ASHTON, WAYNE KELLY & RAY BOLLMAN

155  Climate Change Policy in Manitoba: A Small Province Looking to  
     “Punch above its Weight”  
     BRENDAN BOYD

184  Policy Design in Rural Manitoba: Alternatives and Opportunities in the  
     Midst of Change  
     LARS K. HALLSTROM, WILLIAM ASHTON, RAY BOLLMAN, RYAN GIBSON & THOMAS JOHNSON

220  Flooding of First Nations and Environmental Justice in Manitoba: Case Studies of the Impacts of the 2011 Flood and Hydro Development in Manitoba  
     SHIRLEY THOMPSON

260  Beyond Instrument Choice: Micro-Level Policy Design in Manitoba’s Child Care System  
     SARAH WHITEFORD

APPENDICES

284  Appendix A: Manitoba Policy Facts and Trends

294  Appendix B: Facts and Figures
Preface

BRYAN P. SCHWARTZ

This issue of Underneath the Golden Boy marks the first in which the Manitoba Law Journal (MLJ) has had the support of a grant from the Social Sciences and Humanities Research Council. Since 2011, the MLJ has attempted to refocus on events in our own jurisdiction, Manitoba. For a time, the MLJ was a more eclectic journal, publishing only about an article or two a year in its regular issues about events within our own legal community. Now the MLJ, including Underneath the Golden Boy, provides a forum for thirty to forty scholarly and peer-reviewed articles that relate specifically to events in our province. The editorial vision is not, at least in intent, parochial; rather, we believe that the study of law and its impact within this community should bring to bear perspectives from many parts of the world and many academic disciplines, and that insights gained from critically reflecting on our own community can in turn contribute to many wider explorations.¹

Underneath the Golden Boy remains an annual special issue of the Manitoba Law Journal, with a distinctive editorial structure. Underneath the Golden Boy was inaugurated fifteen years ago with a long-term research agenda. In contributions from various authors regarding bills processed at the Legislative Assembly of Manitoba, the plan has been to examine a series of questions. These include: the intellectual origins of statutes; the effect, if any, of these bills' processing through the legislature; the degree to which the outside world, including the press, considers the legislative process; and the extent to which legislation provides policy directions or instead leaves those to be determined by subsequent processes.² These case studies continue in this edition. Underneath the Golden Boy has also dedicated itself to the study of legislation and the law concerning political processes, including parliamentary and voting system reform.

¹ Bryan Schwartz, "Introduction" (2011) 35:1 Man LJ i.
In the 2013 edition, Underneath the Golden Boy added a special public policy section that draws on contributions from experts outside of the legal discipline, including scholars from areas such as political science, policy studies, economics and social work. We, the editorial staff, are grateful again this year for these contributions. We wish to particularly note the efforts of Karine Levasseur—who has both edited the public policy section, and contributed her own content to this issue—as well as Robert Ermel and Gillian Hanson at the Manitoba Institute for Policy Research (MIPR). While the MIPR was, regrettably, not continued into the 2015-16 academic year, it made a crucial contribution to the development of this journal, particularly by enabling the inclusion of experts from outside the law school.

These prefatory comments will focus on linking some of this year’s contributions, particularly from policy studies, with perspectives we have included over the years, particularly from legal scholars.

In “Municipalities Amalgamate in Manitoba: Moving towards Rural Regions,” William Ashton, Wayne Kelly and Ray Bollman propose using the “self-contained labour area” methodology to define regional boundaries in Manitoba. They compare this method with the results of the provincial government’s recent initiative to promote regional amalgamations. Their thorough, empirical approach may provide a solid foundation for assessing the consequences of the initiative and determining future policies. Another contribution to this issue by Lars Hallstrom, William Ashton, Ray Bollman, Ryan Gibson and Thomas Johnson, entitled “Policy Design in Rural Manitoba: Alternatives and Opportunities in the Midst of Change,” reviews conceptual and terminological developments in thinking about rural development from many jurisdictions. The authors assemble and analyze data on developments in Manitoba, and provide research and conceptual analysis that may assist policy makers in developing the next steps in reinventing local government in Manitoba.

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6 Ibid.
In last year’s issue of Underneath the Golden Boy, our law students Jessica Davenport and Gerrit Thule criticized the lack of consultation with local communities in pursuing provincial initiatives, and doubted whether the proposed benefits would justify the costs, including those to local identity. They also questioned the extent to which there was adequate data to support the goals and metrics of the related provincial legislation. It has been argued in these pages that more thorough, transparent data collection and cost-benefit analyses should be a general objective of democratic process reform in this province. It has also been a theme of my own reflections on Manitoba law-making and public policy that Manitoba needs diversity, rather having society be dominated by the provincial government. This could be achieved by vesting more authority and resources at the level of local government, further segmenting authority within the provincial government, including providing more autonomy for crown corporations and watchdog agencies; and creating more balance between government and the private sectors, including both business and non-profit enterprises.

In “Climate Change Policy in Manitoba: A small province looking to “punch above its weight,” Brendan Boyd discusses the political studies literature on “policy transfer.” Academic lawyers refer to this issue as “the comparative approach to law reform.” As many previous editions of Underneath the Golden Boy would suggest, legislation from other jurisdictions is a highly recurrent source of ideas for law reform. There are many advantages to this approach: The lawmaker can draw on the input, research, conceptualizing of issues, development of terminology, and reconciliation of competing interests reflected in other jurisdictions. The lawmaker can also see how law reform actually operates in a “field

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9 See for example, “An Interview with Rana Bokhari, Liberal Party Leader” (2014) 37:2 Man LJ 41 at 58
10 See generally Bryan Schwartz, “Revitalizing Manitoba: from supplicant society to diversity and dynamism” Frontier Centre for Public Policy (2011), online: <archive.fcpp.org/>.
experiment” when it is implemented in another society, and lessons can be learned about how various actors and regulators adapt to new norms. The limitations of the comparative method include inadequate understanding by potential emulators in one jurisdiction of the social and legal subtleties of another jurisdiction. There is a risk of not appreciating that what a legal code or a law reform commission is officially about may be very different from how the law operates in practice. Emulating lawmakers can also be insufficiently attentive to the particularities of their own society that might lead to unexpected difficulties in applying lessons from abroad.

The issue of hydro policy in Manitoba also invites reflection on how governments adapt when large-scale and long-term visions encounter unexpected realities. There has been a lively debate in Manitoba about whether Manitoba Hydro’s plans to build new hydro dams are premised on thinking that is out-dated in light of new realities, such as the emergence of new technologies, like fracking, that have lowered the cost of competing energy sources.

There is a debate every election, be it municipal, provincial or federal, about whether it is “time for a change.” From one perspective, the call is simplistic. Other things being equal, why is a change in government or policy presumptively a good thing? Perhaps the presumption could be reversed in favour of experience, of having elected officials who have had time to learn in their jobs; that a longer period of office enables a government more time to implement its ideas and see how they actually work out in practice; and that the continued incumbency of a particular party provides a more stable platform in which citizens can make their plans, rather than seeing their adaptations to existing policy upset by a change in the course of public policy.

The countervailing view, in favour of periodic change, is that people in office grow in experience, but may also be increasingly rigid in their thinking and resistance to acknowledging the validity of external criticism or the contradictions of experience with expectations. The existence of a “natural governing party” can also narrow the diversity of opinion from which governments and society draw; those seeking patronage are more likely to funnel themselves into only one party apparatus, rather than having people choose sides based predominantly on idealism, and expect to have a turn in office once in a while. With respect to hydro development in Manitoba, there are different views on whether the incumbent government has been reasonably open to adapting its thinking
or has instead been stubborn, perhaps due to confirmation bias or concern about a potential loss of prestige due to a change in course. In the years leading to the next election, the provincial government has pressed ahead with some controversial initiatives, such as the Bi-Pole III transmission line project and the Keeyask generating station, but—in accordance with a 2004 report from the Public Utilities Board—slowed down on others, like the Conawapa hydro dam.

Do the legislated rules of the political game everywhere tend to favour one side in the recurring “experience” versus “change” debate? It can be argued that rules about spending on advocacy during and between election campaigns and other matters tend to be defined by incumbent officials in their own interest. For example, there may be very low limits on spending by parties (and even stricter restrictions on advocacy groups) during an election, but an incumbent government during its term of office can still use vast public resources for government communications of a largely partisan nature.

Shirley Thompson, in “Flooding of First Nations and Environmental Justice in Manitoba: Case Studies of the Impacts of the 2011 Flood and of Hydro Development in Manitoba,” argues that policy-making with respect to flood control issues is biased against First Nations and disrespectful of their rights under the laws of Canada and international norms. It can be argued that, at least in some other respects, public policy in Manitoba is attempting to learn from past errors concerning river management. For example, new hydro projects in Manitoba, such as at

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Wuskwatim¹⁷ and Keeyask, often involve Manitoba Hydro partnering with one or more First Nations such that the First Nation acquires partial ownership in the project and appears at environmental hearings as a co-proponent. I hope that future issues of the Manitoba Law Journal will include many more explorations from a wide diversity of perspectives about issues involving natural resource development, including water use, and the dynamic developments of the law and public policy concerning the rights of indigenous peoples.

In “Beyond Instrument Choice: Micro-level policy design in Manitoba’s child care system,” Sarah Whiteford explores and applies the policy studies literature regarding the different levels at which public policy can be defined.¹⁸ Legal scholars writing in this area have long considered whether public policy is defined at the legislative level in Manitoba, or in supplementary and later documents, such as regulations. The answer that authors have given is that often legislation is cast in terms that authorize policy to be made by various actors in different contexts, but leaves much or all of the substantive content to later decision-making. While bills in Manitoba are passed through an unusually democratic process, in which there must be public hearings and opposition parties can debate the matter in the Assembly, there can be a dearth of public input and scrutiny when decisions are in fact deferred and delegated to officials who are not subject to these rigorous standards of deliberation and public participation. Among the remedies that might be adopted are:

- a practice of government to have regulations or other supplementary material available at the time legislation is enacted, so that the public has a much fuller understanding of the real purpose or impact of the bill;
- a much more rational and open process of making regulations or other supplementary policy decisions, involving notice to the public, impact-assessment statements and opportunities for public input;
- the inclusion in legislation of measures that require monitoring, including quantitative measuring of the impact of policies, and standards by which success or failure can be judged.¹⁹

¹⁷ Keeyask, supra note 15.
¹⁹ See Schwartz, Armstrong, Hildebrand & Mozeson, supra note 8.
In this issue, as in so many, authors from the legal side criticize various government bills for their lack of detail and for leaving too much policy-making at the discretion of executive officials; see the contributions by Zachary Courtemanche,20 Sharyne Hamm,21 and Andrew Hnatiuk.22

As this issue goes to press, a new federal government has been elected whose party platform includes creating a more open process for legislating, including eliminating party discipline—the subject matter of Paul Geisler’s contribution to this issue23—on matters not contained in the Liberal Party’s election platform.24 The scope of what is outside of the platform might turn out to be the subject of some uncertainty and dispute; it also remains to be seen whether the informal pressures to conform to the policies of the cabinet may prevail even where there is an official policy of free exercise of judgment. Joshua Morry explores how the introduction of private members bills can be used to draw attention to a public policy issue.25 With the number of seats in the House of Commons expanding yet again, it might be asked whether backbenchers at the federal level will attempt to make increasing use of this route to expressing their individual aspirations for public policy.

21 Sharyne Hamm, “‘All talk with very little action’: Bill 26, The Accessibility for Manitobans Act” (2015) 38:2 Man LJ 44.
Underneath the Golden Boy

CONTENTS

i  Preface
   Bryan P. Schwartz

INTERVIEWS

1  Honourable Andrew Swan
17  Kelvin Goertzen
41  Rana Bokhari
61  James Beddome

LEGISLATIVE REVIEWS

83  The Future of Education in Manitoba: Bill 12 – The Community Schools Act
    Kyle Emond

109  Bill 28: The Health Services Insurance Amendment and Hospitals Amendment Act (Admitting Privileges)
     Sherry Brown

135  Bill 9 - An Act to Amend the Teachers’ Society Act: A Lacklustre Legislative Process
     Jessica Isaak
POLICY REVIEWS

207  CONTINUED INSTABILITY IN MANITOBA: DEFICITS, TAXES, ELECTIONS, AND RESETING GOVERNMENT
     KARINE LEVASSEUR

229  BALANCED BUDGET LEGISLATION FOR MANITOBA: PRINCIPLES AND PROSPECTS
     WAYNE SIMPSON

259  REVITALIZING POVERTY REDUCTION AND SOCIAL INCLUSION
     S.B. STROBEL & E.L. FORGET

277  MAKING THE CASE FOR AN ABORIGINAL LABOUR MARKET INTERMEDIARY: A COMMUNITY BASED SOLUTION TO IMPROVE LABOUR MARKET OUTCOMES FOR ABORIGINAL PEOPLE IN MANITOBA
     SHAUNA MACKINNON

303  TAGGED AND TURFLESS: NEOLIBERAL JUSTICE AND YOUTH CRIME IN WINNIPEG
     KATHLEEN BUDDLE

339  IS JUSTICE DELAYED, JUSTICE DENIED? CHANGING THE ADMINISTRATION OF THE WINNIPEG FAMILY VIOLENCE COURT
     JANE URSEL

365  REVISITING REPRESENTATIVENESS IN THE MANITOBA CRIMINAL JURY
     RICHARD JOCHELSON, MICHELLE BERTRAND, RCL LINDSAY, ANDREW M SMITH, MICHAEL VENTOLA & NATALIE KALMET

399  BUILDING FROM THE GROUND UP: FUNDING THE INFRASTRUCTURE DEFICIT IN MANITOBA
     JOAN GRACE
APPENDICES

465  APPENDIX A: FIGURES AND TABLES

475  APPENDIX B: MANITOBA POLICY FACTS AND TRENDS

485  APPENDIX C: BILLS PASSED IN THE 2ND SESSION OF THE 40TH LEGISLATIVE ASSEMBLY

507  APPENDIX D: BILLS PASSED IN THE 3RD SESSION OF THE 40TH LEGISLATIVE ASSEMBLY
Preface

BRYAN P. SCHWARTZ

Does the “inside game” matter anymore? Does what happens in legislative assemblies significantly affect the content of legislation, or is that essentially pre-determined by a majority government? Can an opposition party use parliamentary procedure to slow down a measure it strongly opposes and use its speeches and manoeuvres in the assembly to rally public opposition? Does the debate in a legislative assembly inform the public, change opinion, and affect the outcome or elections, or is a sideshow in the world where public attention is fragmented into a multichannel world of television, internet and social media?

We pose these questions, among others, in a set interviews included in this issue that we conducted with a set of senior party officials in Manitoba — the then-leader house leader for the government, Andrew Swan, the house leader for the opposition, Kelvin Goertzen, the leader of the Manitoba Liberal Party Rana Bokhari, and then former, now returning leader of the Green Party, James Beddome. Readers are invited to explore their answers, and to view in the context of the remarkable recent events in Manitoba politics. All of these leaders are alumni the University of Manitoba Law School – including the Legislative Process Course that has been at the heart of the Underneath the Golden Boy from the outset. We explored with a number of them the possible links and disconnects between their legal educations in general and their political careers.

The long-governing party of Manitoba, the New Democrats, came to power with assurances of the Premier that there would not be an increase in sales tax. The opposition leader, Hugh McFayden, went down to defeat while insisting that Mr. Selinger’s numbers were not credible, that a Progressive Conservative Government would need several years to balance the books, and that the NDP would have to increase taxes to maintain its own agenda.\(^1\) After increasing its

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majority in the Legislature, the government suddenly announced an increase of one cent in the provincial sales tax while repealing the requirement that such increases must first be submitted to a plebiscite.

The political and legislative consequences of that decision continue to unfold. The official opposition party chose to focus its efforts on resisting the measure in the Legislative Assembly. Its successful effort to protract debate on government bills, including the tax increase, delayed its implementation. Whether affected or not by opposition tactics in the Legislature, support for the Premier in opinion polls dropped and that of the opposition party increased. Events reached the point where five cabinet ministers resigned. At the time that this preface is being written, at the end of December 2014, the new Democratic Party has agreed that a convention in March will include a leadership race. One of the rebel five has entered the race, and a cabinet Minister who was not among the original rebel five has resigned his cabinet seat to compete.

The legality of the government’s decision to proceed without a referendum was contested in the courts; an analysis of the decision upholding the constitutionality of the legislation, is provide in these pages by the editors in chief of this publication. A public policy examination of the erosion and possible reform of balanced budget legislation in Manitoba is provided by Professor Wayne Simpson.

Another high controversial measure – leading as well to protracted debate in the legislative assembly – was the government’s bill to address bullying of students in schools. An account of the politics and policy of that debate is provided by a group of three students from the 2014 Legislative Process class. Each originally wrote their own account, and notwithstanding their varying political persuasions, they were able to collaborate on a balanced and informative analysis.

An overall review of the events of the past year, elaborating on her hypothesis that Manitoba politics is moving from a long period of stability to one of uncertainty is provided by Karine Levasseur.

In a typical session, over thirty bills are passed in Manitoba Legislative Assembly, as always, Underneath the Golden Boy has sought to provide critical portraits of some specific pieces of legislation, both as objects of study in their own right and as part of an exploration

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3 *The Public Schools Amendment Act (Safe and Inclusive Schools)*, SM 2013, c 6.
of the nature and value of the legislative process. Studies in this issue, in addition to those already mentioned include the following efforts:

- Kyle Emond studies the educational and social philosophy behind of a bill to promote “community schools” reviewing the comparable initiatives in other jurisdictions, and finds that the bill was a meritorious effort that has the potential to assist students from less advantaged backgrounds.

- Sherry Brown reviews legislation to provide for admitting privileges at hospitals for nurse practitioners and midwives; she expresses concern that the practical implications of the bill were not sufficiently identified and addressed, partly due to a lack of prior consultation with health care providers.

- Jessica Isaak reviews legislation to expand the power of teachers' professional society to establish a code of conduct for members and discipline them for breach. She concludes that that legislation does not provide sufficient direction to guide teachers and their regulators, and that the legislative process was not sufficiently deliberate in this respect.

- Jessica Davenport and Geritt Theule write on a bill to require the amalgamation of small municipalities in Manitoba. They find that there is insufficient evidence to support the view that good government is required or served by amalgamation.

  We initiated last year the integration into Underneath the Golden Boy of essays by experts in many other disciplines besides law, focusing on the reform of public policy as well as specific legislative initiatives or outcomes. This partnership with the Manitoba Institute for Policy Research has grown this year to include:

- Katherine Buddle proposes that public policy on addressing issues of youth crime should move away from an approach that focuses on supressing a threat and more on initiatives to identify the potential in young people and assist in their positive development.

- Joan Graces calls for a stronger framework for intergovernmental cooperation in addressing the infrastructure debt.

- Richard Jochelson and his coauthors propose that measures be taken to increase the participation of aboriginal citizens in criminal trial juries.
Shauna MacKinnon proposes the creation of a new organization, a labour market intermediary, to promote the preparation and placement of aboriginal citizens with respect to employment.

Jane Ursel reports on a study of the effectiveness of the Family Violence Court.

With respect to these essays, I would briefly point to some alternative perspectives.

"Neo liberalism" as Katherine Buddle acknowledges in her essay, might have a variety of meanings. As with my comments in prefatory comments last year, I would caution against a stark division of thought and political parties in Manitoba in the Manitoba context in terms as sweeping as "neoliberal" versus "progressive". A reasonable neo-liberal approach would indeed be concerned about the freedom and opportunity of all members of society, and so would at the same time seek to reduce the burden on the victims of crime, who disproportionately come from disadvantaged parts of society. At the same time, neo-liberals would be wary of the abuse of state authority, concerned about the special interests that might profit from over-incarceration, and eager to find ways to facilitate the ability of individuals to achieve meaningful lives in the context of their own values and choices. If "neo liberalism" includes seeking a balance and pluralistic society, in which a central government is not overwhelmingly pre-eminent, then promoting the contribution of non-governmental organizations to promote individual development and reduce crime would be consistent with that philosophy. Over the years, various contributors to Underneath the Golden Boy have expressed concern about the extent to which "crime suppression" initiatives, including those involving gangs, have insufficently addressed the issues of their practical effectiveness and compatibility with civil liberties.

Joan Grace in her contribution views more intergovernmental cooperation as necessary element of addressing the infrastructure debt. Another perspective – adopted by Rana Bokhari in her interview and in my own writings on the subject - might be that cooperation has its merits, but that a fundamental part of the problem is the imbalance in

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resources and authority with which varying levels of government approach issues. Local governments do not have the powers, including access to growth taxes that are commensurate with their responsibilities. Rather than expanding the arena in which the provincial government can dictate to municipalities or exercise overriding and direct control over infrastructure choices, it is time to strengthen the capacity of municipalities to make their own decisions.

Just before going to press, we learned that the Manitoba Law Journal has received a grant from the Aid to Scholarly Journals program of the Social Sciences and Humanities Research Council that will facilitate our next three years of operation, including continuing Underneath the Golden Boy. We are looking in forward to further expanding the cooperation with our colleagues in Political Studies, public administration and other disciplines on producing the public policy part of our journal. We are hoping to enlist contribution from even more disciplines and grounded in a variety of fresh perspectives. If, as Karine Levasseur argues, we are entering a dynamic new period in Manitoba politics and public policy, we believe that Underneath the Golden Boy is better placed than ever to be a forum for critical and independent analysis of what has been and visioning of what could be.
Underneath the Golden Boy

CONTENTS

1 Preface
Bryan P. Schwartz

ARTICLES

1 The Shareholder Proposals Mechanism under the Manitoba Corporation Act: A Proposal Reform
Evaristus Oshionebo

41 Subsections 43(7) and 43(8) of the PPSA: Argument in Favour of Technical Amendments
Darcy L. MacPherson

63 “Parliament, We Don’t Need No Stinking Parliament” - A Comment on Sheldon Intewenash and Lynn Factor Charitable Foundation v The Queen
Sunita D. Doobay & Darcy L. MacPherson

77 “If it ain’t broke don’t fix it”: Bill-6 The Regional Health Authorities Amendment Act (Improved Fiscal Responsibility and Community Involvement)
Timothy Brown

115 Bound for Glory: Bill-18 The Public Schools Amendment Act (Safe and Inclusive Schools)
Donn Short
WHY ELECTORAL REFORM FAILED IN ONTARIO?
WILLIAM KUCHAPSKI

THE PRIVATE MEMBER BATTLEGROUND: THE FUTURE OF PRIVATE MEMBER’S BILLS AT THE MANITOBA LEGISLATIVE ASSEMBLY
JASON STITT

POLICY REVIEWS

THE GROWING INSTABILITY IN MANITOBA: THE SELINGER MAJORITY.
BUDGETARY REDUCTIONS AND INCREASING TAXES
KARINE LEVASSEUR

ENHANCING ACCESS TO JUSTICE: SOME RECENT PROGRESS IN MANITOBA
DONNA J. MILLER

INVESTING IN MANITOBA’S FUTURE: POST-SECONDARY EDUCATION BETWEEN 1999-2013
ANDREA ROUNCE

POVERTY REDUCTION IN MANITOBA UNDER NEOLIBERALISM: IS THE THIRD WAY AN EFFECTIVE WAY?
SID FRANKEL

RESEARCH STUDY

ESTABLISHING A LEGAL FRAMEWORK FOR E-VOTING IN CANADA
BRYAN P. SCHWARTZ & DAN GRICE

APPENDICES

APPENDIX A: MANITOBA POLICY FACTS AND TRENDS

APPENDIX B: FIGURES AND TABLES

APPENDIX C: BILLS PASSED IN THE 1ST SESSION OF THE 40TH LEGISLATIVE ASSEMBLY

APPENDIX D: BILLS PASSED IN THE 2ND SESSION OF THE 40TH LEGISLATIVE ASSEMBLY
Preface

BRYAN P. SCHWARTZ

In this issue, we have added a new feature. Assistant Professor Karine Levasseur of the Political Studies Department, as guest editor, has commissioned and edited a series of articles on public policy in Manitoba. Our aim is to expand the extent to which this publication can serve as a forum for ideas about law and regulation in our province. Ideas about public policy, even if not focussed on specific pieces of existing law, may promote our understanding and evaluation of the laws and the books and inspire specific proposals for reform. We at Underneath the Golden Boy hope this pilot project will lead to an even wider debate, enlivened by the views of an even wider range of authors, in the years ahead.

All of the editors at this publication wish to thank Karine and all the authors for their effort and ideas in this pilot year.

We do not propose to critique any of the public policy papers in depth, but would draw to the attention of readers a different perspective that is embodied in several of them. In “Revitalizing Manitoba”, first published as a series in the Winnipeg Free Press, and later in two annotated editions by the Frontier Centre for Public Policy, I has attempted to set out this alternative perspective and apply it to specific areas of policy.

Professor Sid Frankel of the Faculty of Social Work offers a strongly worded critique on the current government’s approach to addressing economic disadvantage and social exclusion. He characterizes the government as a “neo-liberal” or “third way” in its orientation. I would suggest that “neo-liberal” is a very broad term. In many variants, it could certainly include the view that government has a necessary role in identifying economic and social marginalization and finding mechanisms to ameliorate it. However, the mechanisms of doing so, where reasonable and practical, can enhance the ability of beneficiaries to make their own

1 Bryan P. Schwartz, Revitalizing Manitoba: From Suppliant Society to Diversity & Dynamism, (Winnipeg: Frontier Centre for Public Policy, 2011).
choices rather than leaving them to the discretion of government policy makers and bureaucrats.

In my view, the current government is not “middle way”, but tends to adopt an approach that highly favours centralized, and with it, politicized control rather than leaving space for, or promoting, the capacity of individuals, families, non-profit institutions, businesses and local governments to choose and innovate in light of their own knowledge, values and abilities.

In his essay on Bill 6 in this issue, Timothy Brown suggests the ways in which Bill 6 provoked controversy by further enhancing the control of Regional Health Authority bureaucracies over the non-profit sector, to determine their ability to provide their own ideas, resources and commitment in the service of choice and quality for patients, residents and clients.

Assistant Professor Andrea Rounce provides a useful summary of the development of public policy in the post-secondary educational arena. I would point readers, for additional background, to the report of the Commission of Commission on Tuition Fees and Accessibility to Post-Secondary Education in Manitoba.\(^2\) Professor Rounce suggests the current system overall is working rather well. While there are no doubt some strength in the status quo, including high participation rates in post-secondary education, I would offer by contrast some concerns for the consideration of readers.

The current system is largely delivered by a small number of large institutions whose boards are predominantly appointees of the provincial government. Council on Post-Secondary Education officially influences allocations among institutions, but the provincial government appoints that body, it provides little or no transparency in how and why it reaches its conclusion. Within the universities, there is an increasing trend to more centralized bureaucratic control, rather than allowing individuals and units with the University to make their own choices in light of their immediate contact with students and particular communities, and their own expertise and experience.

Access to education in my view should include access to high quality services, not only entrance. The Maclean’s annual survey of post-secondary

\(^2\) Commission on Tuition Fees and Accessibility to Post-Secondary Education Manitoba, Final Report (Winnipeg: Minister of Manitoba Advanced Education and Literacy, 2009) (Chair: Dr Ben Levin).
education in Manitoba reports that student tend to be less satisfied with the quality of their education than in many other places.\(^3\) A system that to a greater extent funded students, rather than institutions, and allowed them to make their own choices among universities, colleges and other education and training venues, might make the system more responsive to actual student needs and choices. If the government relaxed its control over financing, some units might find ways to both increase program quality and enhance accessibility; portions of a general tuition increase might, for example, be used to expand support for students most in need of financial assistance.

This publication has always taken a strong interest in parliamentary and democratic reform. About a decade ago, at the height of the search in support for voting system reform, this publication carried a piece of mine on “proportional representation” for Manitoba.\(^4\) That led to an invitation to produce a research study for the Law Commission of Canadian, “Valuing Canadians”, which in turn helped to inform the Law Commission’s own proposals.\(^5\) Since those days, a number of Canadian jurisdictions have considered a move to modify our current first-past-the-post system. Commissions were formed, plebiscites were held and no change emerged. Things that do not happen tend to attract less study than those that do; recall Sherlock Holmes’ *Dogs that Didn’t Bark*. But in this case, the story of how all that enthusiasm produced no results seems worthy of study, both out of historical interest, and to derive larger lessons about democratic reform.

I invited students in my latest legislative process class to do some cases studies of “how nothing happened” in various jurisdictions William Kuchapski took up the challenge, and has produced a highly informative case study concerning Ontario, included in this volume. My hypotheses so far are these:

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\(^3\) Across multiple satisfaction indicators Manitoba universities averaged between 15\(^{th}\) and 25\(^{th}\) of 37 institutions, see Macleans, “Canadian University Consortium 2012 Results”, (7 February 2013), online: Macleans.ca on Campus <http://oncampus.macleans.ca/education/2013/02/07/canadian-university-survey-consortium-cusc-2012-results/>.


Enthusiasm for voting system reform in the public mind tends to reflect recent experience, rather than reflection on the long course of the past and future. Enthusiasm for voting system reform peaked when there were perceived to be serious anomalies in various jurisdictions, such as elections in which opposition parties received no representation whatever in a legislature, or there appeared to be protracted one party majority rule in various jurisdictions by parties who rarely, if ever, obtained a majority (rather than plurality) of public support. But many of these anomalies were resolved, at least in the short term, in the past decade.

In jurisdictions like Ontario, the first-past-the-post system was producing regular alternations among parties, and there was not a perception over the last decade that it was working unfairly. The anomalies tended to disappear partly because there is room for adaptation in the first-past-the-post system. In some provinces, opposition parties united and were then able to oust long-entrenched governments. In Ontario, the first Liberal government in decades had been brought to power by a formal agreement between the second and third place parties right after the election.

Both governing and opposition members owe their jobs to whatever system brought them into office, and so will tend to be dubious about major reform. In Ontario, the government and parties did not tend to publicize, let alone support, proposals for reform. As a result, as William Kuchapski demonstrates in his study of the Ontario situation, it is not a surprise there was little enthusiasm or support for change at the polls.

Systems that incorporate some element of proportional representation tend to produce more minority governments. But Canadians in the last decade experienced a long period of minority government at the federal level. Many seem to have decided they would prefer more stability and less pluralism at the law-making level, and pumped for a majority government.

In British Columbia, there was an impressive attempt to break out of the self-perpetuating nature of the current first-past-the-post system. A Citizens’ Assembly met periodically for about a year and proposed the single transferrable ballot system. The assembly was chosen by lottery from among those expressed interested. But a paradox might have emerged. The members of the assembly were not truly representative in some sense. First, they were interested enough in politics to work hard, for a long time, at no compensation, to study up and make recommendations. Second, they became quite expert on the theories and alternative “single
transferrable ballot” has much theoretical appeal, but is hard to explain to
the general public and may not be well-suited, with its need for multi-
member constituencies, to a geographically sprawling jurisdiction like
British Columbia. It may also be that such a complex system is less suited
for a federalized state like Canada, where voters already are represented at
various levels, and it is hard to keep track of who your representative is at
the best of times.

Perhaps we will have some case studies, like the one by William
Kuchapski with respect to Ontario, to offer in future editions. I would
look forward to seeing my hypotheses confirmed, qualified, or disproved
by further case studies of the quality of William Kuchapski’s.

Included in this year’s issue is also a research study prepared by Bryan
Schwartz and Dan Grice on a framework for electronic voting in Canada.
The use of distance technologies might make voting more accessible and
convenient for many Canadians, but carries with it risks that must be
anticipated and addressed in a way that ensures not only the intrinsic
reliability of the process but public confidence. There are unique
challenges involved. The incentive to tamper, for political reasons or
amusement, is high and the consequences of doing could be society-wide
and long-lasting. The system must both avoid fraudulent voting and secure
the anonymity of the voter. In other contexts, by contrast, such as
financial transactions, the potential for fraud is minimized by going to
extensive steps to ensure that the user is identified. The Chief Electoral
Officer released this peer-reviewed study on its website in December 2013,
and it is included here to make it more widely and enduringly accessible to
scholars and the public.

It has been an eventful year in legislative process in Manitoba,
including an intense debate over the lawfulness of the government’s
increasing the provincial sales tax without either holding a referendum or
first amending earlier law to remove the referendum requirement. The
whole episode deserves to rank in the annals of “Famous Legislative
Crises” that were the subject of a special issue of this journal in 2003.⁶ We
hope in at least one future issue to provide some insights and perspectives
on the constitutional and legislative issues involved.

⁶ See (2003) 30:1 Man L.J.
Underneath the Golden Boy

CONTENTS

1  Preface
BRYAN P. SCHWARTZ & DANIEL HILDEBRAND

ARTICLES

1  Democratizing the Regulation Making Process in Manitoba: Drawing on National and International Best Practices
BRYAN P. SCHWARTZ, MATTHEW ARMSTRONG, DANIEL HILDEBRAND & JONAH MOZESON

49  Law Reform in Corporate / Commercial Law in Manitoba: Pre-Incorporation Transactions—Part I
DARCY L. MACPHERSON

85  Making the Transition from Lawyer to Lawyer-Politician in Canada: An Exploratory Study
RALPH A. CHATOOR

107  An All-Terrain Vehicle under the PPSA and its Regulations: A Comment on Houle v Meyers, Norris, Penny Ltd.
DARCY L. MACPHERSON & EDWARD D. BROWN
REVIEWS

4TH SESSION, 39TH LEGISLATURE

135  The Five Stones: Bill 15, The Franchises Act
     MARY-ELLEN WAYNE

163  Bill 14, The Body Armour and Fortified Vehicle Control Act
     BRETT KODAK

183  Bill 25, The Manitoba Evidence Amendment Act (Scheduling of Criminal Organizations)
     BRENDAN JOWETT

205  Bill 5, The Cottage Property Tax Increase Deferral Act: A Case Study in the Making of Useless Law
     KYLE LAMOTHE

5TH SESSION, 39TH LEGISLATURE

221  Unnecessary Delay? Bill 47, The Accessibility Advisory Council Act and Amendments to The Government Purchases Act
     KARINE LEVASSEUR

237  Bill 40, The Condominium Act and Amendments Respecting Condominium Conversions
     DANIEL HILDEBRAND

257  Legislation to Combat Impaired Driving: Bill 12, The Highway Traffic Amendment and Drivers and Vehicles Amendment Act
     PATRICIA DOYLE

283  Bill 7, The Polar Bear Protection Amendment Act (International Polar Bear Conservation Centre)
     JOSH DISENHOUSE

APPENDICES

295  Appendix A: Bills Passed in the 5th Session of the 39th Legislative Assembly

321  Appendix B: Bills Passed in the 1st Session of the 40th Legislative Assembly
Preface

BRYAN P. SCHWARTZ AND DANIEL HILDEBRAND

Democratic and parliamentary reform has been a major focus of *Underneath the Golden Boy* from its outset, and is a theme in this issue. Our lead article is an extensive and collaborative exploration of whether and how Manitoba should reform its regulatory system in light of best practices at the federal and international level.

The *Corporations Act* is a foundational piece of Manitoba legislation, and Professor Darcy MacPherson has produced a thoughtful proposal for reform to one aspect of it. Along with his co-author Ned Brown, he has also analyzed the Court of Queen’s Bench’s interpretation of the *Personal Property Security Act* in relation to all-terrain vehicles and farm equipment.

Ralph Chattoor’s interviews with lawyers who transitioned to the role of politician provides fresh and systematic insight into both occupations and the relationship between the two.

This publication regularly features profiles of particular pieces of legislation—the story of their intellectual origins, the way in which the parliamentary process did or did not affect their content, and their policy merits and demerits. These annual explorations are intended as part of a long term research program which attempts, by looking at various bills, to help identify and illuminate patterns in the way the democratic process in Manitoba—a representative Canadian legislature—is operating in practice and evolving through time. This issue continues this project. One of this year’s profiles is in effect a follow-up from volume 6 of *Underneath the Golden Boy* which included a series of papers from a conference sponsored by the Asper Chair of International Business and Trade Law on the potential enactment of Manitoba’s first franchising law. That conference sought to learn from the legislation and models in other jurisdictions, and it is interesting to see these issues subsequently reflected in practice.

Last issue marked the first time, in many years, that *Underneath the Golden Boy* was, while retaining its own editorial and creative identity, released as a special edition of the *Manitoba Law Journal*. This issue is
released as Issue 2 of Volume 35 of the Manitoba Law Journal. We thank
the editors and staff of the Manitoba Law Journal for the opportunity again
this year to find a wider audience, both through the print version and by
sharing with us in the creation and operation of the new Manitoba Law
Journal website.

To mark the renewed coordination of the Manitoba Law Journal and
Underneath the Golden Boy, we commissioned a new version of our cover
art, executed by the same artist, Brian Seed, who allowed his watercolour
of the Great Gray Owl to serve as cover art for the Manitoba Law Journal’s
rebranding in 2011.

Looking ahead, we are actively exploring whether we can add yet
another major dimension to Underneath the Golden Boy, which would be
the analyses, by scholars of political science and other disciplines, of public
policy issues facing our community. This issue includes a pioneering piece
by political science Professor Karine Levasseur. We hope next year’s issue
will be enriched by more of such creative collaborations.
Underneath the Golden Boy

CONTENTS

i  Preface
   BRYAN SCHWARTZ & MARY-ELLEN WAYNE

ARTICLES

1  Bill 28, The Strengthening Local Schools Act (Public Schools Act Amended)
   KEVIN ANTONYSHYN

35  Bill 219: An Insurmountable Goal
    COURTNEY POPE

55  The 2008 Manitoba Electoral Divisions Boundaries Commission:
    Efficacy and Equality
    LANDON MILLER

71  Bringing the Thin Blue Line into Line: Bill 16, The Police Services Act
    JASON E. ROBERTS

95  Stifling Innovation in Health Care: The Regional Health Authority
    System and Restriction of Private Actors
    BRYAN SCHWARTZ & KYLE B. LAMOTHE

107  Heart of the Continent? The CentrePort Canada Act and the Future of
     Manitoba
     MICHAEL SILICZ

135  The Misguided Moratorium: Bill 17, The Environment Amendment Act
     (Permanent Ban on Building or Expanding Hog Facilities)
     BRENDAN BURNS
159  Bill 14, The Consumer Protection Amendment Act (Payday Loans)
NATHAN IRVING

183  Devils Lake Outlet and the Need for Canada and the United States to
Pursue a New Bilateral Understanding in the Management of
Transboundary Waters
ANDREA SIGNORELLI

215  Legislating Jordan’s Principle: An Indirect Success
ADAM NATHANSON

233  Appendix A: Bills Passed in the 3rd Session of the 39th Legislative
Assembly

263  Appendix B: Bills Passed in the 4th Session of the 39th Legislative
Assembly
Preface

BRYAN SCHWARTZ AND MARY-ELLEN WAYNE

Underneath the Golden Boy, originally published in 2003 as a special edition of the Manitoba Law Journal, has served to highlight case law developments in Manitoba. Its mandate was to provide a forum to study both the content of current legislation and the strengths and weaknesses of the legislative process. Our mission has proven worthy in the eyes of those closely associated with the process, including the Honourable Andrew Swan, Hugh McFadyen, and Dr. Jon Gerrard.¹

We have addressed a number of issues of national importance, including a noteworthy series on voting system reform and proportional representation. In our primary focus on Manitoba developments, we consider study and evaluation important to this community, but also in wider national and international contexts. This includes ways and means for public contribution to the formation of legislation, for opposition parties to play an effective role even in majority government situations, and for the need for democratic reforms such as fixed election dates and the imposition of limits on the ability of governments to use public funds for partisan advertising.

The Manitoba Law Journal will henceforth return to its original focus on developments in Manitoba and, in particular, events in the courts and the administration of justice. This is an auspicious time, therefore, for Underneath the Golden Boy, while retaining a distinctive identity, to reappear as a special issue of the Manitoba Law Journal. This will inform readers about local developments and contribute to the much wider debate about understanding the history and future of our legal and democratic processes.

¹ The Honourable Andrew Swan, Minister of Justice and Attorney General for Manitoba, has praised Underneath the Golden Boy as “a valuable review of legislative developments in Manitoba” that also provides “insightful analysis” (Letter from Andrew Swan (5 July 2010)). Hugh McFadyen, Leader of the Official Opposition, has commented on the “thoughtful analysis, attention to detail, and informed commentary” offered by this publication. (Letter from Hugh McFadyen (18 February 2011)). Dr. Jon Gerrard, Manitoba Liberal Party Leader, has lauded Underneath the Golden Boy as “the best current assessment of laws being passed in Manitoba today” (Letter from Dr. Jon Gerrard (8 April 2010)).
Underneath the Golden Boy

Contents

Introduction
Bryan Schwartz & Erin Melrose ........................................... 1

Articles
Limiting Parliamentary Debate: The Inception of Closure and Time Allocation
Erin Melrose........................................................................ 5

Event Summaries
The French Language Debate............................................. 31
The Defeat of the Pawley Government................................. 35
The Meech Lake Accord.................................................... 39
The MTS Debate.............................................................. 43

Interviews
Gord Mackintosh........................................................... 49
Howard Pawley............................................................... 61
Andy Anstett..................................................................... 71
Roland Penner................................................................. 79
Steve Ashton..................................................................... 89
Rick Mantey................................................................. 99
Stuart Murray............................................................... 111
Jon Gerrard................................................................. 117
Darren Praznik............................................................. 125
We begin by expressing our thanks to those readers of last year's inaugural volume who have written to express their appreciation or suggestions on future direction. The response has provided us with much encouragement and insight in this second effort.

The essay calling for reform on Canada's voting system led to last year's editors, Bryan Schwartz and Darla Rettie, receiving an invitation from the Law Commission of Canada to produce a follow-up study. Interest in voting system reform seems to be building, and we hope that our efforts to highlight and study this issue will contribute to the debates in a variety of provinces as well as at the federal level of government.

The inaugural volume's interviews with Rick Mantey and Norm Larsen, on the legislative drafting process, also found an appreciative audience. We have used the interview format to explore another set of issues this year: the lessons to be learned from four crises in the Manitoba Legislative Assembly in modern times. Our aim was to bring to light fresh perspectives on these events from active participants in them. We also sought to determine whether any lessons could be learned from past events about whether the rules of the Assembly need change. We were particularly interested in exploring whether an opposition party has the procedural tools needed to mount an effective response to a majority government that is determined to proceed with an initiative. Can the opposition party slow down the matter long enough to arouse public debate and possibly opposition?

In each of the four crises we studied, the Legislative Assembly faced unique and challenging procedural situations, due in large part to the use of the procedural rules of the assembly to further a particular personal or political cause.

The first of these events was the 'bell-ringing episode' during the debate on constitutional amendments involving French-language services in 1983-84.

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Legislative 'bells' are rung to summon members to the Chamber when a vote has been called. During the French-language debate, the opposition Conservatives used bell-ringing to stall debate. During the final bell-ringing episode, the bells rang continuously for twelve days, ending only when Howard Pawley's government decided to end the session without a vote on the French-language services initiative.

The next notable legislative event occurred only a few years later, in 1988, when backbencher Jim Walding voted against his own party (the NDP government) and joined the Conservatives in withholding support for the provincial budget. Walding provided the crucial swing-vote in the Assembly and forced his own government to resign. The following day, in accordance with political convention, Premier Howard Pawley called an election. The Conservatives formed government less than two months later.

The defeat of the Meech Lake Accord in 1990 is the third legislative event we studied. With a strict deadline looming, and the 'eyes of the nation' focused on Manitoba, MLA Elijah Harper used the procedural rules to stall debate on the Accord and prevent its ratification by Manitoba's Legislative Assembly.

The final legislative crisis we reviewed was the 'procedural experiment' showcased by the passage of the bill privatizing the Manitoba Telephone System. A new rules structure was given a trial run during the 1996 legislative session. These temporary rules, and the contentious nature of the privatization bill, combined to create an eruption in the Legislative Assembly unlike anything in recent history.

We have provided, in the following pages, a brief summary of each of these events. Initial research unveiled a plethora of newspaper articles and commentaries recounting each event. Our hope, however, was to delve into how and why these events occurred, and how the rules of the assembly were changed to ensure that similar crises would not be repeated. In our efforts to understand these events and the functioning of the legislature in general, we were very fortunate to have the opportunity to sit down and conduct personal interviews with a number of political personalities—many of whom had first-hand involvement and vivid memories of these four legislative crises. We also asked each individual whether they believe procedural rules of the Assembly have been amended to the point that opposition parties can no longer use the rules to their advantage. Finally, in closing, we canvassed each interviewee's views on electoral voting reform.

We thank the many public figures who participated in the process for their insight and candour, and trust their contribution will be a lasting addition to the public record and to public understanding of these events.

This year's edition of Underneath the Golden Boy begins with an article that explores two procedural tools used to limit parliamentary debate—closure and time allocation. When closure is invoked, it stirs intense reaction from an opposition. However, Canadian governments of all stripes have found use for
the closure mechanism when it has appeared impossible to pass contentious legislation. The author looks at the use of closure since its inclusion in Canada's Parliamentary rules of procedure in 1913.

We look forward, as we did with our inaugural addition, to hearing comments from our readers on our second effort, and to any suggestions they may have on what we can do to bring attention and insight to the process of lawmaking by the legislative and executive branches of government.
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Underneath the Golden Boy:
a review of recent Manitoba laws
and how they came to be

Contents

Introduction
Bryan Schwartz ................................................................. 129

Articles
Proportional Representation for Canada?
Bryan Schwartz ................................................................. 133

Interviews
Rick Mantey: Exposing the Invisible .................................................. 187
Norm Larsen: "Draftstoevsky" ..................................................... 201

Reviews
The Electoral Divisions Amendment Act
Joe Ziemba ........................................................................ 213
The Wildlife Amendment Act
CHANTELLE J. BRYSON ................................................................. 227

The Protection for Persons in Care Act
DARLA RETTIE ........................................................................ 245

The Midwifery Act
CAROLYN FROST ................................................................. 261

The Domestic Violence and Stalking Prevention, Protection and Compensation Act
BONNIE MACDONALD ......................................................... 269

The Court Security Act
NANCY ZETTLER ................................................................. 287
INTRODUCTION

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, theses 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 review attempts 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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& Darla Rettie