

## Introduction

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*Le «Legal Research Institute» et la Revue de droit manitobain ont collaboré à l'élaboration d'un premier fascicule d'une série de commentaires annuels sur le droit manitobain. Bien des articles tracent les développements de la doctrine juridique pendant 1988, passant en revue l'ensemble des domaines du droit ou bien concentrant leur attention sur des questions controversées émanant de la jurisprudence manitobaine. D'autres apports à cette collection d'articles examinent le système juridique de la province.*

*The Legal Research Institute and the Manitoba Law Journal co-operated to produce this first of an expected series of annual commentaries upon Manitoban law. Many of the articles trace Manitoban developments in legal doctrine through 1988, surveying entire fields of law or concentrating upon the issues that arise from out of particular Manitoban decisions. Other contributions to this collection examine the Province's legal system.*

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THE LEGAL RESEARCH INSTITUTE in the University of Manitoba is engaged in a wide variety of legal research projects that are largely made possible by grants to the Institute from the Manitoba Law Foundation.<sup>1</sup> One of our new research initiatives is to organize an annual survey of legal developments in Manitoba in co-operation with the *Manitoba Law Journal*. This is the first modest volume of what is expected to be a regular and expanding series of annual commentaries upon legal developments in Manitoba.

One of the tasks of legal scholars is to analyze critically the decisions of the courts for consistency, clarity, and conformity with existing legal principles; the academic also aims to promote creativity through the reformulation of legal principles so that they may more adequately meet the needs of society. Judges do not get much feedback, positive or negative, from practising lawyers, who are reluctant to make normative evaluations of the decisions of the judges before whom they regularly appear. Legal scholars thus provide a real service when they con-

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<sup>1</sup> Legal Research Institute, University of Manitoba, *Annual Report 1988-89* (Winnipeg: The Institute, 1989), *passim*. Copies of the *Report* are available upon request from the Institute.

structively and critically comment upon the decisions of courts. While much analysis of this sort exists for the Supreme Court of Canada, there is a need for a more sustained and systematic review of judicial decisions in Manitoban courts.

It is also hoped this project will have some educational value for law students, lawyers, and legal scholars. Subsequent volumes will hopefully cover far more subject areas than the reader finds in this first effort. All the written decisions of Manitoban courts for the 1988 calendar year were collected and classified and assigned to commentators. However, some areas did not yield enough cases to merit consideration. Other areas of fundamental importance were not completed by the publication deadline; accordingly, the next "Annual Survey" issue will include comments that span several years of developments, rather than just the single calendar year. A review of legislative and administrative developments is also intended.

In terms of dealing with the Manitoban cases for the year in particular areas of the law, special mention should be made of the essay by Philip Osborne on torts law. This essay provides a model for the kind of commentary that perfectly accords with, if it does not in fact surpass, the goals of this project. Professor Osborne takes more than a dozen of the Manitoban torts cases from the 1988 year and clearly outlines the facts, dealing with the issues to which they give rise. He places each issue into its wider context through a discussion of related cases in other jurisdictions. He also critically evaluates the competing policy choices that are involved and the soundness of the particular decisions that have been made. Similarly, David Deutscher surveys the Manitoban Court of Appeal's application of s. 24(2) of the *Canadian Charter of Rights and Freedoms*.<sup>2</sup> He not only looks at the cases from 1988, but also examines all the Court's decisions that precede or follow upon the leading case of *Collins*<sup>3</sup> in the Supreme Court of Canada. Professor Deutscher argues that the Manitoban Court of Appeal is not employing the framework of analysis that the case sets forth.

Many of the essays in this first "Annual Survey" deal with a particular set of issues raised by a recent Manitoban decision, rather than their surveying a whole field of law. Alison Diduck raises important questions about the use of fixed-term maintenance orders in light of the mandate to promote the financial self-sufficiency of dependent spouses upon marital dissolution. In her discussion, she reviews not only the recent Manitoban cases, but also refers to cases in other jurisdictions. Lee Stuesser uses a current Manitoban case to launch a spir-

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

3 *R. v. Collins*, [1987] 1 S.C.R. 265.

ited comment upon the "battered women syndrome" defence in Canada. Similarly, Arthur Braid employs a recent Manitoban case on trade names and trade marks as a departure point for a rigorous and ultimately reorienting journey through the relevant federal and provincial legislation and through the applicable constitutional and torts principles.

In addition to commentary upon legal doctrine, including notes on wills and successions law by Cameron Harvey and on trusts by Cliff Edwards, this first "Annual Survey" includes scholarly work upon aspects of the legal system in Manitoba. Peter McCormick provides a statistical analysis of about one hundred reported decisions of the Manitoban Court of Appeal for the 1987 calendar year. His analysis compares the Manitoban Court with other courts of appeal in Canada in terms of, for example, patterns of dissent and concurrence, caseload and output, length of decisions, trends in citations. This sort of study is all too rare in Canada. While such statistical analysis does not attempt the controversial drawing of conclusions about the attitudes of particular judges on the Court, the McCormick work nonetheless illuminates in an interesting and suggestive way the relationship between the individual judges and the Court as a whole. Professor McCormick's article is a very valuable contribution to this collection, and such statistical work will hopefully be included in the next "Annual Survey."

Another work that utilizes surveys and statistical analysis is Lee Stuesser's paper on lawyers' attitudes towards the jury in criminal cases. In the spring of 1988, Stuesser surveyed defence counsel in British Columbia, Manitoba, New Brunswick, and Nova Scotia about their views on jury verdicts, the use of juries, and factors that influence the decision to elect trial by jury. Some of the results of this survey are usefully compared to the data from the Law Reform Commission of Canada's survey of public and judicial attitudes to the jury done in 1977.<sup>4</sup> Stuesser also places his findings within the context of the quite substantial existing literature on the jury. While it is not focused solely upon Manitoba, his study belongs in this "Annual Survey," not only because some of the canvassed opinions are drawn from Manitoba, but also because Manitoban responses stand out as being substantially different in many respects than those from other provinces: Manitoban lawyers hold the least favourable opinion of the jury. Another issue of importance in the legal system in Manitoba is the practice of law in French, and we are grateful for Daniel Mathieu's fine contribution.

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<sup>4</sup> *Background Studies on the Jury* (Study Paper) (Ottawa: Law Reform Commission of Canada, 1979).

The "Annual Survey" has a further goal to comment upon current legal issues in Manitoba that are particularly newsworthy and controversial; and so, the reader will find Bryan Schwartz's submission to the Manitoban Aboriginal Justice Inquiry, in which he addresses the issue of a separate aboriginal justice system.

This first "Annual Survey" issue lays a foundation upon which to build. I want to thank all of the authors who have contributed to the initial collection. As well, thanks to Mike Mahon and Karen Beattie, research students of the Legal Research Institute; and to Robert Dawson, Editor-in-Chief of the *Manitoba Law Journal*. Finally, we are very grateful to the Manitoba Law Foundation for its financial support of this project.