

# Preface

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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.<sup>1</sup>

*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.<sup>2</sup> 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.

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<sup>1</sup> Bryan Schwartz, "Introduction" (2011) 35:1 *Man LJ* i.

<sup>2</sup> Bryan Schwartz & Darla Rettie, "Introduction" (2001) 28: 1 *Man LJ* 130 at 131.

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<sup>3</sup>—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,"<sup>4</sup> 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,"<sup>5</sup> 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.<sup>6</sup>

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<sup>3</sup> Karine Levasseur, "On we go to Manitoba's next provincial election: Whither the NDP?" (2015) 38:2 Man LJ 102.

<sup>4</sup> William Ashton, Wayne Kelly & Ray Bollman, "Municipalities Amalgamate in Manitoba: Moving towards Rural Regions" (2015) 38:2 Man LJ 123.

<sup>5</sup> Lars Hallstrom et al., "Policy Design in Rural Manitoba: Alternatives and Opportunities in the Midst of Change" (2015) 38:2 Man LJ 184.

<sup>6</sup> *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.<sup>7</sup> 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.<sup>8</sup> 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;<sup>9</sup> 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.<sup>10</sup>

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."<sup>11</sup> 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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<sup>7</sup> Jessica Davenport & Gerrit Thule, "Bill 38: The Municipal Modernization Act (Municipal Amalgamations)" (2014) 37:2 *Man LJ* 153.

<sup>8</sup> Bryan P. Schwartz, Mathew Armstrong, Daniel Hildebrand & Jonah Mozeson, "Democratizing the Regulation Making Process in Manitoba: Drawing on National and International Best Practices" (2012) 35:2 *Man LJ* 1.

<sup>9</sup> See for example, "An Interview with Rana Bokhari, Liberal Party Leader" (2014) 37:2 *Man LJ* 41 at 58

<sup>10</sup> See generally Bryan Schwartz, "Revitalizing Manitoba: from supplicant society to diversity and dynamism" *Frontier Centre for Public Policy* (2011), online: <[archive.fcpp.org/](http://archive.fcpp.org/)>.

<sup>11</sup> Brendan Boyd, "Climate Change Policy in Manitoba: A Small Province Looking to 'punch above its weight'" (2015) 38:2 *Man LJ* 155.

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<sup>12</sup> and the Keeyask generating station,<sup>13</sup> but—in accordance with a 2004 report from the Public Utilities Board—slowed down on others, like the Conawapa hydro dam.<sup>14</sup>

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.<sup>15</sup>

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,”<sup>16</sup> 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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<sup>12</sup> See Manitoba Clean Environment Commission, “Bipole III – Manitoba Hydro” (2015), online: <[www.cecmanitoba.ca/hearings/index.cfm?hearingid=36](http://www.cecmanitoba.ca/hearings/index.cfm?hearingid=36)>.

<sup>13</sup> See Manitoba Clean Environment Commission, “Keeyask Generation Project: Report on Public Hearing” (April 2014), online: <[www.cecmanitoba.ca/resource/hearings/39/Keeyask%20WEB.pdf](http://www.cecmanitoba.ca/resource/hearings/39/Keeyask%20WEB.pdf)> [Keeyask].

<sup>14</sup> Public Utilities Board, “Report on the Needs For and Alternatives To (NFAT): Review of Manitoba Hydro’s Preferred Development Plan” (June 2014), online: <[www.pub.gov.mb.ca/nfat/pdf/finalreport\\_pdp.pdf](http://www.pub.gov.mb.ca/nfat/pdf/finalreport_pdp.pdf)>; see also: Graeme Lane, “Dam-Nation: Rolling the Dice on Manitoba’s Future” Frontier Centre for Public Policy (2013), online: <[archive.fcpp.org/](http://archive.fcpp.org/)>.

<sup>15</sup> Bryan Schwartz & Andrew Buck, “Bill 37: Battle Hymn of the Incumbent” (2009) 6 *Underneath the Golden Boy* 1.

<sup>16</sup> Shirley Thompson, “Flooding of First Nations and Environmental Justice in Manitoba: Case Studies of the Impacts of the 2011 Flood and of Hydro Development in Manitoba” (2015) 38:2 *Man LJ* 220.

Wuskwatim<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup>

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<sup>17</sup> Keeyask, *supra* note 15.

<sup>18</sup> Sarah Whiteford, “Beyond Instrument Choice: Micro-level policy design in Manitoba’s child care system” (2015) 38:2 Man LJ 260.

<sup>19</sup> 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,<sup>20</sup> Sharyne Hamm,<sup>21</sup> and Andrew Hnatiuk.<sup>22</sup>

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 issue<sup>23</sup>—on matters not contained in the Liberal Party’s election platform.<sup>24</sup> 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.<sup>25</sup> 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.

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<sup>20</sup> Zachary T. Courtemanche, “*The Restorative Justice Act: An Enhancement to Justice in Manitoba?*” (2015) 38:2 Man LJ 1.

<sup>21</sup> Sharyne Hamm, ““All talk with very little action”: Bill 26, *The Accessibility for Manitobans Act*”(2015) 38:2 Man LJ 44.

<sup>22</sup> Andrew Hnatiuk, “Bill 2: *The Highway Traffic Act Amendment (Safety of Workers in Highway Construction Zones)*” (2015) 38:2 Man LJ 65.

<sup>23</sup> Paul Geisler, “Will the *Reform Act, 2014*, alter the Canadian Phenomenon of Party Discipline?” (2015) 38:2 Man LJ 17.

<sup>24</sup> Liberal Party of Canada, “Real Change: A New Plan for a Strong Middle Class” (2015), online: <[www.liberal.ca/files/2015/10/New-plan-for-a-strong-middle-class.pdf](http://www.liberal.ca/files/2015/10/New-plan-for-a-strong-middle-class.pdf)>.

<sup>25</sup> Joshua Morry, “The New West: Bill 202 and Manitoba’s Future in the New West Partnership” (2015) 38:2 Man LJ 83.

