

Preface and Issue Overview

D A R C Y L . M A C P H E R S O N * A N D
B R Y A N P . S C H W A R T Z * *

When we assumed editorship of the Manitoba Law Journal (MLJ) in 2010, our mission was to produce informed, diverse and timely discussions that would focus on events involving or highly relevant to our own community.¹

There are close to a million people living in Manitoba. The statutes and court cases of this province can and do affect their lives, sometimes in fundamental ways. That alone should be sufficient to justify having a venue for informed and independent commentary. A society needs critical commentary on how it is being governed, why, and what the future might or should look like.

A law journal focused on our own province need not be provincial. It can bring to bear insights from many personal and philosophical perspectives; it can draw on learning from many disciplines, including history, philosophy, sociology, economics, and psychology. Developments in other jurisdictions can be a powerful source of understanding.

Conversely, the study of legal events in Manitoba can contribute to many disciplines and their study in many places throughout the world. Our society is diverse and complex. Immigrants from all over the world have come here. It remains the home for many Indigenous communities. It has anglophone and francophone communities, and the legal system offers services in both official languages. A large part of the population lives in a modern urban centre, but Manitoba continues to have dynamic

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¹ Bryan Schwartz, "A New Vision for the *Manitoba Law Journal*" (2011) 35:1 Man LJ.

agricultural and forestry sectors. There is an opportunity right here to study how the legal system impacts all kinds of individuals and groups involved in a vast range of endeavours. Our latest issue, we hope, illustrates our commitment to producing lively commentary from a group of authors with diverse perspectives, areas of expertise, and environments.

Our program has developed and evolved so that it now includes a commitment to producing each year the following four issues:

- (1) a general issue that encompasses review of developments that take place primarily in courts and tribunals;
- (2) “Underneath the Golden Boy” (UTGB) devoted to legislation and public policy; a project inaugurated by Bryan Schwartz in 2000;
- (3) an issue on criminal law, led by our team of specialists in the area, Richard Jochelson, David Milward, David Ireland, and Amar Khoday; volume 40(3) of the MLJ will be the first.²
- (4) A special issue on a topic involving the past, present or future of the legal profession, including law school education, professional practice, and the judiciary.

Volumes 39(1) and (2) were on the Great Transition in Legal Education.³ A companion volume, to be included in Volume 41, will focus on the history of Indigenous individuals at our law school and their subsequent careers.⁴ Previous special issues under our editorship concerned the judiciary: the memoirs of Chief Justice Sam Freedman,⁵ and Five Decades of Chief Justices of Manitoba.⁶ Our methodology with special issues often involves the use of oral history.⁷ We have found that

² (2017) 40:3 Man LJ [forthcoming].

³ See Jonathan Black-Branch, “Modern Legal Education: Towards Practice-Ready Attitudes, Attributes, and Professionalism” (2016) 39:1 Man LJ i; Darcy MacPherson, “Issue Introduction and Overview” (2016) 39:1 Man LJ xv; Bryan Schwartz, “The Next Great Transition in Canadian Legal Education” (2016) 39:1 Man LJ xxiii [Transition]; Bryan Schwartz, “Preface to the Document Supplement of the Special Issue on Legal Education” (2016) 39:2 Man LJ i.

⁴ (2018) 41:1 Man LJ [forthcoming].

⁵ (2014) 37: Special Issue Man LJ (*A Judge of Valour: Chief Justice Freedman – in His Own Words*).

⁶ (2013) 36: Special Issue Man LJ (*5 Decades of the Chief Justice of the MBCA*).

⁷ These include Volume 39(1) of the Manitoba Law Journal, *The Great Transition in Legal Education*, which included twelve interviews with teachers from the University of Manitoba Law School; Transition, *supra* note 3; Volume 36 of the MLJ, (2013) 36: Special Issue Man LJ (*5 Decades of the Chief Justice of the MBCA*), which includes interviews with former Chief Justices Freedman, Scott and Monnin; Volume 37 of the

spoken dialogues, while edited and peer reviewed, provide a powerful means by which personalities and perspectives can be expressed and preserved.

This is our latest general issue. We hope it illustrates our commitment to gathering and publishing commentary that is engaging, relevant to our community, independent in its thinking, and diverse in the expertise and experience of our authors. They include full-time academics, practising lawyers, and judges; some are based here in Manitoba, some live and work in other jurisdictions. The methodologies used includes close examination of legal doctrine from Canadian courts and comparing pronouncements of courts in other jurisdictions. They also include empirical studies of current practice and the exploration of the early history of the common law.

In the first contribution,⁸ made by the Honourable Thomas A. Cromwell (former Justice of the Supreme Court of Canada), the author discusses one of the most important legal issues that confronts us as a society: access to justice. Like all jurisdictions, Manitoba finds itself under great stress trying to give those who have potentially been wronged an opportunity to make their case for redress, whether that be through the courts or otherwise. As chair of the Action Committee on Access to Justice in Civil and Family Matters, no one has had a better view of one of the more intractable problems that confronts our profession, our people, and our law today than has Justice Cromwell. Justice Cromwell speaks eloquently of the need for transition from older style methods (with litigation thought of as the primary source of justice) to forms of dispensing justice that are more tailored to the stakes at issue in each individual dispute. The concept of dispensing justice actually goes beyond what is typically thought of as the “justice system”. Justice Cromwell points out that many government agencies make decisions that fundamentally

MLJ, (2014) 37: Special Issue Man LJ (*A Judge of Valour: Chief Justice Freedman – in His Own Words*), largely based on interviews with former Chief Justice Samuel Freedman; the “famous legislative crises” of *Underneath the Golden Boy* (2003) 30:1 Man LJ, which includes nine interviews with senior Manitoba politicians. A forthcoming issue of the Manitoba law Journal will included a series of interviews with Indigenous persons who studied law at the University of Manitoba and explores their professional careers after graduation.

⁸ Thomas A. Cromwell, “Questions and Answers About Access to Justice” (2017) 40:1 Man LJ 1.

affect the lives of citizens every single day, and that what he refers to as the “justice gap” extends to these decisions as well. He discusses ideas of serious reform in a number of areas. The ideas of the Action Committee may lead to change. Will Manitoba lead in one or more of these areas? What can we learn from other jurisdictions? Contributions like that of Justice Cromwell will hopefully lead us into meaningful discussions about what changes we need here in Manitoba to make access to justice an even greater reality.

In this issue, we also continue our tradition of publishing the DeLloyd J. Guth Lecture in Legal History. The paper reproduced in this volume⁹ represented the sixth such lecture. Professor Charles Donahue, Jr. of Harvard Law School was the guest. He confronts the views of English historians about the beginnings of what would now be considered the building blocks of the laws of contract and tort. One of the most remarkable aspects of his speech is that he made 14th century legal precedents interesting and relevant to his 21st century audience. The Manitoba legal system retains in large part its common law origins, and reminds us that these influences are not always recent, and yet remain both debatable and important.

The contribution¹⁰ of Judge Anne Krahn,¹¹ Sarah Inness, Stacey Cawley, and Bettina Schaible is evidence of Manitoba at its best. Each of the four authors represents a different sector of the criminal justice system. A judge, a criminal defence lawyer, prosecutor, and a police officer came together to assess whether, on a systemic basis,¹² there were issues on

⁹ Charles Donahue Jr, “The Modern Laws of Both Tort and Contract: Fourteenth Century Beginnings?” (2017) 40:1 Man LJ 9.

¹⁰ Anne Krahn et al, “Reaching for Excellence: Evaluating Manitoba’s Process for Issuing Judicial Authorizations” (2017) 40:1 Man LJ 41.

¹¹ Though it is generally our custom to use the honorific of “The Honourable” when referring to sitting and former judges, since the judge herself chose not to it in the text, we have decided to be consistent with that choice in this preface.

¹² This is not the first time that the Manitoba Law Journal has published a group of significant contributions by members of different sectors of the criminal-justice system on a single topic. Under the rubric of “The Anatomy of a Public Inquiry”, in Volume 37, we were pleased to publish a series of contributions around the involvement of lawyers, police officers and judges with respect to public inquiries of various sorts. The contributions of Bruce MacFarlane, Q.C. (a lawyer and a former Deputy Attorney General of the Province of Manitoba), The Honourable Justice Jeffrey J. Oliphant (the former Associate Chief Justice of the Court of Queen’s Bench of Manitoba), Richard

the way in which judicial authorizations for police searches were granted in this province. While, undoubtedly, each of the authors comes to this task with different (one might even say conflicting) perspectives on the appropriateness of the authorizations granted (or not granted), they were able to find significant consensus. It also includes comments from individual authors, presumably where consensus was not possible. This article was motivated by an earlier study made in Ontario.¹³ It emerges that there are significant differences in the percentage that this panel found to be problematic when compared with the Ontario study. The decision by Manitoba criminal-justice participants to engage in this study, and publish the results, may encourage other jurisdictions (both provinces within Canada, and perhaps, international jurisdictions as well) to assess their own judicial authorizations schemes to determine compliance with both statutory and constitutional mandates.

G. Greg Brodsky, a well-known defence lawyer, argues in his piece¹⁴ that the provisions of the *Criminal Code*¹⁵ designed to keep mentally-ill defendants out of prison (and, presumably, get these defendants the mental health programming that will assist them) may actually be worse for the defendant than prison itself. Perhaps the most evocative part of the article is to be found in several descriptions of the real-life differences between prison on the one hand, and involuntary psychiatric care, on the other.

In Thomas Harrison's case comment¹⁶ on *Green v. Law Society of Manitoba*,¹⁷ the author argues that that leave to appeal to the Supreme Court of Canada should never have been granted. He then turns his

Wolson Q.C. (a senior member of the criminal defence bar) and John Burchill (now a lawyer, but at the time of the events described, Mr. Burchill was an active-duty police officer) were yet another example of public service by those involved in the criminal-just system. See MacFarlane et al, "Anatomy of a Public Inquiry" (2003) 37:1 Man L J 103.

¹³ Casey Hill, Scott Hutchinson & Leslie Pringle, "Search Warrants: Protection or Illusion" (2000) 28 CR (5th) 89.

¹⁴ G. Greg Brodsky, "Proceed with Extreme Caution: The Not Criminally Responsible Defence" (2017) 40:1 Man LJ 89.

¹⁵ RSC 1985, c C-46.

¹⁶ Thomas Harrison, "A Sign of Things to Come? Legal and Public Policy Issues Raised by the Supreme Court of Canada Decision in *Green v. Law Society of Manitoba*" (2017) 40:1 Man LJ 117.

¹⁷ 2017 SCC 20, 407 DLR (4th) 573.

attention to the judgment itself. After discussing the reasoning of both the majority and the dissent, Mr. Harrison points to the importance of the case for its discussion of the impact of law societies on the professions that they are charged with regulating. Mr. Harrison points out that this case may have a significant impact on at least three upcoming Supreme Court of Canada cases (one concerning lawyer civility,¹⁸ and two more concerning the ability of law societies to deny admission to potential graduates of a planned law school due to perceived lack of tolerance¹⁹).

In “Gender-Exclusive Charitable Trusts: *Re The Esther G. Castanera Scholarship Fund* and Recent South African Judgments on Discriminatory Bursary Trusts”,²⁰ author François Du Toit draws some remarkable parallels (and some differences too) on the acceptability of gender-exclusive gifts between Manitoba and South Africa.

Finally, Darcy MacPherson has written a book review²¹ of the biography *Canadian Maverick: The Life and Times of Ivan C. Rand*,²² written by William Kaplan. This review continues a relatively recent tradition, here at the MLJ, of promoting judicial biography. For example, Volume 34, Issues 1 and 2, in collaboration with the UNB Law Journal in Rand’s native New Brunswick, contain a series of articles discussing the overall impact of the same Justice Rand who was the subject of Kaplan’s work.²³

In the end, therefore, this issue of the MLJ embodies the commitments defined when we developed a new vision for the Journal in 2010: of producing high-quality relevant material for a Manitoba

¹⁸ *Groia v Law Society of Upper Canada*, currently tentatively scheduled for November 6, 2017, Supreme Court of Canada, “Scheduled Hearings”, (accessed 26 July 2017), *Supreme Court of Canada* (website), online: <<http://www.scc-csc.ca/case-dossier/info/hear-aud-eng.aspx?ya=2017&ses=01&submit=Search>>.

¹⁹ *Trinity Western University et al v Law Society of Upper Canada* and *Law Society of British Columbia v Trinity Western University*, each currently tentatively scheduled for November 30, 2017, Supreme Court of Canada, “Scheduled Hearings”, (accessed 26 July 2017), *Supreme Court of Canada* (website), online: <<http://www.scc-csc.ca/case-dossier/info/hear-aud-eng.aspx?ya=2017&ses=01&submit=Search>>.

²⁰ François DuToit, “Gender-Exclusive Charitable Trusts: *Re The Esther G. Castanera Scholarship Fund* and Recent South African Judgments on Discriminatory Bursary Trusts” (2017) 40:1 *Man LJ* 141.

²¹ Darcy MacPherson, “A Walking Contradiction: A Review of *Canadian Maverick: The Life And Times Of Ivan C. Rand*” (2017) 40:1 *Man LJ* 173.

²² (Toronto, Buffalo and London: University of Toronto Press, 2009).

²³ (2010) 34:1 *Man LJ*; (2010) 34:2 *Man LJ*.

audience. We hope that it incorporates the insights from many other jurisdictions; that it can potentially contribute to legal understanding and reform far beyond our own borders; that is multidisciplinary; that it looks at law not only doctrinally, but empirically and philosophically; that it draws on authors from the academy, the practising profession and the judiciary; that places the current legal scene in the context ranging from the distant past to future possibilities.