

Preface and Issue Overview

BRYAN P. SCHWARTZ* & DARCY L.
MACPHERSON**

Underneath the Golden Boy is a series of special issues of the Manitoba Law Journal, initiated over two decades ago, focusing on legislation, public policy and democratic reform. The contributions in this issue cover a wide swath of legal problems, ranging from Manitoba legal and political history, to the ethics of the legal profession, to reviews and analyses of current legislation and case law dealing with issues that include family-law mediation, the readability of tax statutes, pre-incorporation transactions and the legalization of cannabis.

In the first contribution in this volume (“Triaging and Mediating to Meet the Needs of Families Under *The Family Dispute Resolution (Pilot Project) Act* of Manitoba”), Stefanie Goldberg addresses the effect of recent legislation¹ that attempts to encourage the resolution of issues in family law through mechanisms other than the courts. The article canvasses the literature on different approaches to mediation, and then draws on interviews with practicing mediators to assess proposal for legislated reform in this area. The article argues that mediators who provide the services contemplated by this new legislation should be required to have certain professional credentials but that these not necessarily include a law degree.

In the article, “Readability in the Canadian Tax System”, Colin Jackson uses empirical methods to test a hypothesis that many of us who teach tax law have always believed, that is, the *Income Tax Act*² can be an exceptionally

* Professor, Faculty of Law, University of Manitoba; Asper Chair in International Business and Trade Law; Co-Editor-in-Chief, Manitoba Law Journal.

** Professor, Faculty of Law, University of Manitoba; Co-Editor-in-Chief, Manitoba Law Journal; Research Associate, Desautels Centre for Private Enterprise and the Law.

¹ Bill 9, *The Family Law Modernization Act*, 4th Sess, 41st Leg, Manitoba, 2019, Explanatory Note (assented to 3 June 2019).

² RSC 1985, c 1 (5th Supp).

difficult statute to read and understand. The contribution reviews both the academic literature on the subject, and real-life legislative attempts to make tax laws more easily understandable. The author acknowledges that readability metrics have limitations, but can still be useful in identifying and remedy problems involving legislation that is unnecessarily difficult to understand.

In the first of two contributions to this volume (“The Duty of Legislative Counsel as Guardians of the Statute Book: *Sui Generis* or a Professional Duty of Lawyers?”), Andrew Flavelle Martin addresses a number of ethical issues around the role of legal counsel engaged in drafting legislation. The article explores whether duties may be different depending on the party for whom the counsel is acting (the government v. the legislative assembly). The contributor also analyzes some challenging real-world problems for legislative counsel including: legislation that is designed to be ineffective, in the sense that the law is not meant to be enforced; laws that leave exceptionally broad regulation-making power in the hands of the government of the day; and titles that are overly politicized or meaningless. The role of legislative counsel with respect to preambles and purpose clauses is also discussed, along with the appropriateness of drafting omnibus legislation.

Andrew Flavelle Martin’s second contribution is entitled “The Premier Should Not Also Be the Attorney General: *Roncarelli v Duplessis* Revisited as a Cautionary Tale in Legal Ethics and Professionalism”. It explores whether codes of professional responsibility or legislation should expressly preclude anyone from serving those two roles simultaneously. The contributor provides a number of ethical reasons why the dual role should be prohibited.

In “‘*Ultra Vires* and Void’: An Executive Inquiry Takes on Manitoba’s Legislative Building Crisis (And Wins)”, Tom Mitchell discusses a scandal from a century ago, involving allegations of fraudulent conduct on the part of a group that included the Premier of Manitoba, Rodmond Roblin. The article reviews and analyzes events that included an important precedent in addressing high-profile political and social issues in this country: the appointment by the executive of commissions of inquiry.

In Darcy L. MacPherson’s contribution in this volume (“A Deposit in a Pre-Incorporation Transaction is Still a Deposit: A Comment on *Benedetto v 2453912 Ontario Inc*”), the contributor assesses some recent case law from

the Ontario Court of Appeal,³ with respect to pre-incorporation transactions. Though the case arose under the Ontario legislation,⁴ the Manitoba legislation is comparable to its Ontario counterpart in this regard.⁵ While the article agrees with the result reached by the Court of Appeal, the contributor disagrees with the reasoning that the Court of Appeal used to reach that result. The article also pushes back against some commentary made by members of the profession indicating that the Court of Appeal's judgment had unnecessarily upset standard practices engaged in by the profession.

In Nick Noonan's contribution ("High Time for Change: Combatting the Black Market for Cannabis in Canada"), the contributor reviews the practical impacts of the legalization of cannabis under federal legislation.⁶ It reports that the legalization of cannabis has not, despite the intention of many of its supporters, had a large impact on the illicit cannabis trade in Canada. It argues that the causes of this failure include some provisions of the *Cannabis Act* itself. It also notes that there is a provision of the *Canada Post Corporation Act*⁷ that has been an important element of the distribution strategy for many sellers of illegal cannabis. The article concludes with some suggestions, including education and the lifting of some legislated restrictions on the legal market, that might better serve the objectives of law reform in this area.

The concluding contribution in this issue is by Honourable Mr. Justice Gerald Jewers, a retired member of the Manitoba Court of Queen's Bench. It draws favourable attention to the reflection of another retired judge, John Reilly, in his book *Bad Law: Rethinking Justice for a Postcolonial Canada*.⁸

³ *Benedetto v 2453912 Ontario Inc*, 2019 ONCA 149.

⁴ *Business Corporations Act*, RSO 1990, c B.16, s 14.

⁵ *Corporations Act*, CCSM, c C225, s 14.

⁶ SC 2018, c 16.

⁷ RSC 1985, c C-10, ss 40(3).

⁸ John Reilly, *Bad Law: Rethinking Justice for a Postcolonial Canada* (Calgary, Alberta, 2019).

