

Preface and Issue Overview

D A R C Y L . M A C P H E R S O N *

This issue of the Manitoba Law Journal is focused on online dispute resolution, or ODR. This issue is the second installment of a three-part series examining how the Canadian legal system adapted to the COVID-19 crisis. The first was 46.1 Canada's Emergencies Act: Beyond the Roulou Report. The third issue will explore decision-making during the crisis by our most senior elected leaders in Manitoba.

This issue which was designed by Bryan Schwartz, the second in the series, has two parts. The first section presents two academic articles, each of which is focused on this area, but from different perspectives. In the contribution of Bryan P. Schwartz, Mikal Sokolowski, and Laura Balagus, the authors begin by reviewing the history and development of the concept of ODR. This presents an overall framework in which the past and future of ODR can be viewed. The article goes on to make a series of specific recommendations on systemic reform in Manitoba to incorporate distance technologies.

The second contribution in this first part of the issue (by Richard Jochelson, David Ireland,¹ Brandon Trask, Michelle Bertrand, and Krishna Nair) discusses virtual juries in the context of criminal proceedings as a result of COVID-19. Canadian constitutional jurisprudence has put limits on the time between charging and trial.² Considering the lockdowns and social-distancing measures that were taken to prevent the spread of the pandemic, how was this achieved? Furthermore, what would the popular

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¹ The Honourable David Ireland was appointed as a Judge of the Provincial Court of Manitoba on June 8, 2023. However, to be clear, his contribution to the article found in this volume were completed before Judge Ireland was appointed to the Bench.

² See *R v Jordan*, 2016 SCC 27.

response to be to the legal system? To answer these and other questions, the authors looked at Canadian English-language popular-media articles.

The second section of the volume features a number of oral histories with members of the Manitoba legal profession about dispute resolution during the COVID period. One of the most remarkable things about this discussion of online dispute resolution resulting from the COVID-19 pandemic was that, despite the differences in practice between all of the participants, the oral histories held a great deal in common. All the lawyers that we interviewed as part of this project indicated that while COVID-19 certainly presented significant and ultimately long-lasting challenges over the period from 2020 well into 2022, there were also some developments that resulted from these challenges that they would want to hold on to going forward.

Covering the gamut from civil litigation to family law, to labour and employment law, to government service, these participants all found the transitions mandated by the pandemic to be difficult and challenging. But they also found things about practice that we would want to maintain. One of the most interesting discussions on which a number of these oral histories touched was the idea of the willingness of their fellow members of the profession, as well as members of the judiciary, and others, to step away from the sometimes-expected adversarial approach, to instead work to solve problems. The actions of these people and groups remind me of the honour of this profession, by the way they behaved through difficult circumstances. Many of our oral-history participants pointed out that other lawyers and judges would extend themselves further to accommodate the needs of the people on the other side either of a transaction or a piece of litigation. There seems to have been a recognition that there was a commonality between us all during COVID. Everyone needed other people to be more flexible to make the system work. We were all challenged to “step up” in difficult circumstances. Sometimes, incredibly difficult circumstances that befall us all and create situations beyond our control can remind us to try to be the best versions of ourselves. Yes, we are all there to serve the clients who need our help. But in situations like the pandemic, there is a need to be flexible so the justice itself is served.

Circumstances that strike at the heart of the system (like COVID-19) should remind us that without a functioning system, no one can succeed. Working proactively to make that system work (regardless of one’s putative role in it) fell to every lawyer, judge, and administrator who works in that

system. Some of the stories that were relayed in this volume should remind us all that when the world that we knew previously was on a significant pause due to COVID-19, our humanity and adaptability were on full display. Many of our oral-history participants describe what their fellow lawyers, judges and others did to accommodate others, so that the system could still function. One of my greatest lessons after reading all of these oral histories was that we sometimes talk about the justice system as if it is separate from us all. Instead, the justice system is not something separate and apart. It is instead something that is entirely dependent upon people making it work, largely through their interactions with each other. No one person can do this alone. We are all dependent on one another, as justice-system participants, to make the system work. One of the things that these oral histories demonstrated for me was how much people were willing to struggle, beyond their immediate interests, to make sure that the system would work for everyone.

Secondly, in many of these oral histories, one of the student editors of the Manitoba Law Journal was also directly involved. These were students who were going through the pandemic while in law school. Most of them had done their first two years of law school in an online-learning environment. As such, their experience of law school was significantly different than those who had preceded them. It was interesting to me that when these students contributed to these histories, it became clear that the students themselves were aware that they were having a very different experience of law school than they had originally anticipated, and were cognizant of how they felt that different experience was affecting them. In my view, there may very well be a strong reason to look back after these students, who did the majority of their legal training in an online environment, have been practicing professionals for five or ten years, and see perhaps how their experience of the profession is affected because of their different law-school training. But such a retrospective is years away. For the moment, it is interesting that even in the throes of their law-school experience, these students seem aware of how the requirements foisted upon their law school by the pandemic are affecting them and their learning.

In short, there is a great deal that can be taken from these oral histories, about legal practice prior to the pandemic, the shifts necessitated by the pandemic, and how legal practice may look different going forward. While each of our participants works in a different area and brings their own

separate views to all of these questions, certain commonalities remain. Each participant provided thoughtful, practical and incisive commentary on how they were affected by the pandemic, but also how they and the justice system were able to adapt to the challenges.