

Preface

Underneath the Golden Boy was initiated on the basis that most law in even the “common law” provinces is statutory, and that academic lawyers have devoted far too little attention to the study and teaching of how such law is created. We set out to invite authors to explore a series of questions about the manner in which legislation is conceived, drafted and processed through the legislature.

As a ‘legislation making machine’, there do appear to be some limitations in the way the process currently operates. Much legislation that is likely to have a substantial impact on law and society passes through legislatures without much explanation by its government sponsor or criticism from either the opposition parties or members of the public. Knowing that it has a majority, the governing party does not make a substantial effort to even account for the origins and intended meaning of the statute, and the public record is, as a result, often spare. Manitoba has a commendable process of inviting the public to participate at the committee stage of legislation, but there is sometimes little or no turn out. This may be partly attributable to the fact that potential commentators receive little advance notice of when they will have an opportunity to appear. Media coverage of events in the legislature is also sparse, except in relation to a small number of controversial bills each year. There are far fewer reporters assigned to the legislature than there were decades ago, and coverage competes for public attention with public news about events across Canada, in the United States and around the world; carried by dozens of television, radio and now Internet reporters and bloggers.

In our “famous legislative crises” issue, we explored whether opposition parties retain the tools to stall legislation in the face of a determined government, and thereby give the public an opportunity to become aware of alleged problems and mobilize to protest. In the past, our study suggested, the opposition parties were able to use parliamentary debate and manoeuvres to force a government to rethink or abandon measures that were opposed by a large part of the public. Whether sufficient tools still remain is a matter on which experienced politicians differ.

It may be that the principal way to make legislatures a real place for scrutiny and improvement of legislation would be through voting system reform. As long as governments know they have automatic majorities, they need not, in most cases, take seriously concerns raised by opposition parties, interest groups or ordinary citizens. Voting system reform could produce legislatures in which the governing party will more frequently have less than a majority in the assembly and therefore must anticipate and address legitimate technical and policy objections in an improved sense with respect to proposed bills. If opposition parties

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knew their efforts could actually make a real difference in the substance of legislation, they would be encouraged to put in the effort needed to become well-informed reviewers of bills.

It would be naive to suppose that minority parliaments will always produce better bills. The wheeling and dealing might, at times, produce 'compromises' that are based on better attending to the partisan interests or rigid ideology of another party, rather than law that is technically sounder, more efficient in its use of taxpayers resources, more informed about the prospects for legislation to actually achieve its purposes and more equitable in its distribution of benefit and burdens among competing interest groups and regions. There are grounds for hope, however, that with most legislation, the potential for opposition parties to actually make a difference would tend in practice to produce a more rigorous application of reason to legislation. The fact that passage of a bill is not a 'given' will lend some drama and increased attention to the operations of the legislature. Both the governing and opposition parties will strive to use evidence and rational argument to persuade other parties. Those who are interested in policy debate, not only in partisan political competition, might increasingly find the vocation legislators to be one that gives scope to their knowledge and intellect. There might be a rebalancing in the relative esteem with which courts and elected legislatures are seen in Canada by both the public and those making career choices. Courts would no longer be seen as the only rational and open-minded branch of government; the legislature, and the executive that must account to it, could become parts of government that are ennobled by the quality and impact of debate, and which might even be the superior of courts in some respects. A legislative assembly can be the home of a debate that contains far more intellects and voices than the one or few judges who rule in a particular legal case. Legislators might then be more in touch with public opinion and social realities, better able to think outside of the structures imposed by precedent and legal logic, more able to refine and revise their thinking in light of changing realities or the lessons of experience than precedent-bound judges.

Underneath the Golden Boy itself has focused in the past years on the creation of statutes.

In this respect, it has mirrored the tendency of modern assemblies to view the 'statute passing' function of assemblies as paramount, and to view other functions as ancillary to that.

Question Period typically only takes place while the Assembly is in session to process legislation. As the latter is often done in a relatively small number of days, the opportunity for the opposition parties to ask searching questions of the executive is severely limited. Bills enacted by the Assembly increasingly tend to set up the institutions that will make

policy decisions, and much policy formation actually takes place through regulations or the formulation of guidelines by administrators. The Manitoba Legislative Assembly tends to spend little or no time on oversight and criticism of how these follow up decisions are made. Inquiries into particular allegations of misconduct or the general administration of government departments and agencies tend to be parceled out to independent inquiries, rather than conducted by committees of the Legislature. Freewheeling policy discussions prior to the formulation of legislation are usually conducted within the executive, or sometimes in the form of consultations by the executive with the public, but rarely within the Assembly.

In each area of current inactivity, there is the potential for the Assembly and its committees to rise up and become relevant. Committees should meet even when the full assembly is not in session to consider legislation. Ministers could be required to periodically appear before them for questioning. Regulations and administrative policies could be routinely referred to committees of the legislature for review and discussion. Committees could also examine how existing policies and practices in various activities are working in practice, quite apart from any pending legislation. The long neglected powers of committees to conduct investigations could be put to use. Days in the Assembly could be devoted to discussion of emerging public policy issues, even if there is no specific proposal for legislation on the agenda.

Underneath the Golden Boy remains the only series in Canada that is regularly devoted to reviewing the operations and outcomes of a Canadian legislature. Manitoba's assembly is in many ways typical of Canada. Much of the legislation that it enacts is similar to or modeled after legislation in other parts of Canada. It shares many of the tendencies seen in other parts of Canada—the routine election of 'majority' governments with less than 50 per cent of the popular vote, declining media coverage, an inadequate number of sitting days and the atrophying of its functions apart from processing legislation. In the years ahead, it is to be hoped that law schools in other parts of Canada will join with us in studying the realities and potentials associated with the institution of government that remains the predominant source of the laws under which we live.

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Each provincial assembly surely has its own colourful history: memorable moments, dramatic events, and votes that take only minutes to tally but impact the future from that moment on. I had only a passing knowledge of, and appreciation for, such events in Manitoba's legislative history before my involvement with the Second Edition of *Underneath the Golden Boy*. It took very little time, however, for me to come to appreciate the rich and eventful history that has unfolded within the walls of our own legislature.

The four events that we studied in the Second Edition involved minority rights and Manitoba's Constitution, the rare but powerful impact of a failed confidence vote, the strategic manipulation of rules of order to push through unpopular legislation, and an example of how one simple word can bring a national proposal for constitutional reform to a screeching halt. In each instance, the actions taken by a few, and in some cases, by just one, had an impact far beyond the legislative chamber itself. For those who view activities within the legislature as obscure or otherwise far-removed from their daily routines, the Second Edition of *Underneath the Golden Boy* can serve as a useful eye-opener into how the decisions and behaviour of our elected officials can impact our lives in both the short and long term.

My involvement with the production of the Second Edition ceased to be 'work' very early on. It was, very sincerely, a great pleasure for me to be involved in the project, and it afforded me the rare and invaluable opportunity to speak, one on one, with many of those decision-makers whose actions shaped the very events we had chosen to study. During the summer and autumn of 2002, I had the pleasure of interviewing current and former Ministers of Justice, a former Premier, opposition party leaders, current and former government Ministers, and some who worked behind the scenes but were, nevertheless, instrumental in many significant events in Manitoba's legislature. These interviews provided us with the once-in-a-lifetime opportunity to question how and why crucial political decisions were made, and to get answers from the decision-makers themselves.

The individuals we interviewed varied widely in political stripe, but what struck me upon completion of the project was one glaring similarity: everyone we questioned, regarding the how and why of the decisions they had made, genuinely appreciated the important task they had been entrusted with upon being elected, and sincerely believed that the actions they had taken were directed toward benefiting, and not hindering, the development and success of the province. It is too easy, sometimes, to say that an individual, a political party, or a government, made the 'wrong' decision. Hindsight is perfect, and even some of those

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interviewed admitted that, if given the chance, they might have done things differently. But it was always clear; as I listened to each individual recount their memories of these historic events that they believed in their decisions at the time, and in some cases still believe that they did what was 'right'.

It is inevitable that disagreement about the proper course of political action will continuously arise. After participating in the Second Edition of *Underneath the Golden Boy*, however, I take some comfort in the fact that many of those decision-makers, whose actions impact us all, truly believe in the legislative process, the importance of their role in that process, and the future prosperity of Manitoba and its citizens. And, that is all we can ask from a varied group of women and men we have elected to act on our behalf.

Erin Melrose

Co-editor & Contributor, *Underneath the Golden Boy*, Second Edition

My first expectation of the legislative process was to see bills produced through sessions like toothpaste caps on an assembly line. In my bottle-wielding infancy, I presumed that the bill-making process was a cinch: a concept simply popped into an MLA's head, was coughed out in first reading, snubbed by the opposition in second reading, waved in front of an empty room at committee stage, built momentum through third reading, and slid into home plate (Royal Assent). I imagined a few fans waving flags in the stands as the Lieutenant Governor stamped a rubber seal down as if to shout, "Safe! On with the game." It was only while spending a large chunk of my summer reading House debates, committee minutes, and submissions to *Underneath the Golden Boy*, that my eyes, while weary at times, began to open.

Firstly, I never stopped to consider that each bill has a unique genesis. For instance, in the 2nd Session of the 38th Legislature Bill 6, *The Cross-Border Policing Act*, was based on model legislation prepared by the Uniform Law Conference. Bill 10, *The Gaming Control Amendment Act*, originated from work conducted by the Manitoba Gaming Control Commission in 2000. Bill 15, *The Highway Traffic Amendment Act*, was a legislative response to two rulings issued by the Manitoba Court of Appeal in 2003 (*Queen v. Orbanski* and *Queen v. Elias*). Bill 23, *The Red River Floodway Act*, and Bill 31, *The Floodway Authority Act*, were undoubtedly connected to our "flood of the century" in 1997. Amendments introduced in Bill 36, *The Highway Traffic Amendment Act*, were a direct response to requests from the Manitoba Association of Chiefs of Police, and so on.

Secondly, I realized that each of the 71 bills introduced in the 38th Legislature moved through the legislative process in a unique way. Some were passed with full House support and no public notice, while other bills ploughed through great resistance in consultation meetings, committee stage, and House debates. The formulation of each bill was like the creation of a mottled piebald tapestry. Some were skilfully crafted while in other cases, insufficient preparation led to abysmal, and at times embarrassing, outcomes.

For example, Bill 10, *The Environment Amendment Act*, (passed in 2002) required cities to fog for mosquitoes at the request of the Minister of Health. Innocuous in its appearance, Bill 10 floated through the House supported on the shoulders of all members—largely due to prevalent public fears over a looming West Nile outbreak. No public participants attended the committee stage and at no point was malathion (the chemical used to fog mosquitoes) ever mentioned in house or committee minutes. Bill 10 never raised eyebrows until its implementation in the summer of 2002 when environmentalists took to the streets to protest city fogging. The vivacity of coalitions, campaigns,

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protests, and arrests raised enough of a ruckus to cover newsstands for weeks. Had the commanding clout of malathion opponents been present at the committee stage, Bill 10 might have been amended to fetter ministerial power or provide for no-spray buffer zones. Instead, this faction (sporting gas masks and sandals) appears in headlines each summer while municipal and provincial officials wag reproachful fingers back and forth. We will never know however, if yearly implementation of Bill 10 has saved Manitobans from an endemic West Nile scourge.

One of my favourite bills introduced was Bill 209, *The Legislative Assembly Amendment Act*, which has yet to be passed. Bill 209 is a private members bill introduced by Hon. Jon Gerrard and Kevin Lamoureux to 'enhance democracy' by requiring the Legislative Assembly to sit for a minimum of 80 days each year. Neither the Conservatives nor the New Democrats support Bill 209, which makes me wonder: if Manitobans knew that they elected parties that opted to sit for 37 days and 59 days in the past two respective sessions, would they still have elected only two Liberals? To avoid sounding too partisan, I must mention that this could merely be a Liberal tactic to attain a greater voice since their messages are primarily publicized through house debates (and year round news releases).

I personally would not mind if the house sat longer, so long as the drama remained spicy. I would love to have been a fly on the wall during the committee stage of Bill 45, *The Engineering and Geoscientific Professions Amendment Act*, in which the architects and engineers went head-to-head in major confrontation while the minister responsible (Hon. Nancy Allan) did nothing. MLA Myrna Driedger later explained to the assembly how "the minister sat there paralysed, unable to make any changes, until she was told to do something by her House leader." (Let that be a lesson to all future MLAs: engage in thorough stakeholder consultation). I also would have loved to have witnessed the third reading of Bill 9, *The Manitoba Immigration Council Act*, when the Liberals proposed a "hoist motion" suggesting that the *Act* be shelved for six months (which was ultimately rejected on division).

Indeed my eyes swell up when I recollect those countless hours reading house debates. Otto von Bismarck once stated, "Laws are like sausages. It's better not to see them being made." I would, however, give my eyeteeth to sit at the forefront of our Legislative Assembly. Few things in life are as deliciously appealing as laws and sausages. I hope that you too will savour reading this 3rd edition of *Underneath the Golden Boy*.

Leah Ross

Co-editor & Contributor, *Underneath the Golden Boy*, Second Edition