

# manitobaLawJournal

2022 Volume 45(5), Special Issue

---

---

## Criminal Law Edition (Robson Crim)

---

---

### Faculty Editors-in-Chief

**RICHARD JOCHELSON** LL.B., LL.M. PHD.

PROFESSOR, FACULTY OF LAW, UNIVERSITY OF MANITOBA

**DAVID IRELAND** LL.B., LL.M.

ASSISTANT PROFESSOR, FACULTY OF LAW, UNIVERSITY OF MANITOBA

**REBECCA JAREMKO BROMWICH** J.D., LL.M. PHD.

NATIONAL EQUITY, DIVERSITY & INCLUSION MANAGER, GOWLING WLG

**JAMES GACEK** PHD.

ASSISTANT PROFESSOR, DEPARTMENT OF JUSTICE STUDIES, UNIVERSITY  
OF REGINA

### Lead Student Editor

**Aiyana McKenzie** B.A. (Hons), J.D. (2023)

**Brooke Mowatt** B.A., J.D. (2022)

### Assistant Student Editors

**Ryan Hall** B.B.A., J.D. (2024)

**Selene Sharpe** J.D. (2024)

**Vicky Liu** B. Sc., J.D. (2024)

**Jessie Anton** B. Comm, J.D. (2023)

### Cover Image

**BRIAN SEED**

### With thanks to MLJ Executive Editors-in-Chief

**BRYAN P. SCHWARTZ**, LL.B., LL.M., J.S.D.

ASPER PROFESSOR OF INTERNATIONAL BUSINESS AND TRADE LAW,

FACULTY OF LAW, UNIVERSITY OF MANITOBA

**DARCY L. MACPHERSON**, LL.B., LL.M.

PROFESSOR, FACULTY OF LAW, UNIVERSITY OF MANITOBA

## PUBLICATION INFORMATION

---

Copyright © 2022 Manitoba Law Journal

Cite as (2022) 45:5 Man LJ

Printed in Canada on recycled and acid-free paper.

Published annually on behalf of the Faculty of Law, University of Manitoba.

Annual Subscription Rate: Canada: \$35.00 CDN; Foreign: \$35.00 U.S.

Back issues available from: Manitoba Law Journal  
4th Floor Robson Hall, Faculty of Law  
University of Manitoba  
Winnipeg, Manitoba R3T 2N2  
E-mail: lawjournal@umanitoba.ca

## ACKNOWLEDGEMENTS

---

Production of this issue has been supported by a major grant from the Social Sciences and Humanities Research Council program for Aid of Scholarly Journals.

*The Manitoba Law Journal* gratefully acknowledges the family of Shelley Weiss for the endowment of the Shelley Weiss Publications Office, which houses its ongoing operations at Robson Hall Law School at the University of Manitoba, and for the annual Shelley Weiss scholarship that is awarded to one or more student editors in their second year of our program.

We acknowledge the assistance and peer review administration of the editors and collaborators of [www.robsoncrim.com/](http://www.robsoncrim.com/). For a list of our collaborators please visit: <https://www.robsoncrim.com/collaborators>.

We would also like to thank the *Manitoba Law Journal* Executive Editors for providing their endless support, constant encouragement, and expert editorial advice.



THE LEGAL RESEARCH INSTITUTE OF THE UNIVERSITY OF MANITOBA promotes research and scholarship in diverse areas.

## REFEREE AND PEER REVIEW PROCESS

---

All of the articles in the *Manitoba Law Journal Robson Crim Edition* are externally refereed by independent academic experts after being rigorously peer reviewed by Manitoba faculty editors, as well as reviewed by student staff. Usually 3 external peer reviewers assess each piece on a double-blind basis.

## INFORMATION FOR CONTRIBUTORS

---

The editors invite the submission of unsolicited articles, comments, and reviews. The submission cannot have been previously published. All multiple submissions should be clearly marked as such and an electronic copy in Microsoft Word should accompany the submission. All citations must conform to the *Canadian Guide to Uniform Legal Citation*, 9th Edition. Contributors should, prior to submission, ensure the correctness of all citations and quotations. Authors warrant that their submissions contain no material that is false, defamatory, or otherwise unlawful, or that is inconsistent with scholarly ethics. Initial acceptance of articles by the Editorial Board is always subject to advice from up to three (or more) external reviewers.

The Editorial Board reserves the right to make such changes in manuscripts as are necessary to ensure correctness of grammar, spelling, punctuation, clarification of ambiguities, and conformity to the *Manitoba Law Journal* style guide. Authors whose articles are accepted agree that, at the discretion of the editor, they may be published not only in print form but posted on a website maintained by the journal or published in electronic versions maintained by services such as Quicklaw, Westlaw, LexisNexis, and HeinOnline. Authors will receive a complimentary copy of the *Manitoba Law Journal* in which their work appears.

Manuscripts and communications should be directed to:

**Criminal Law Special Edition (Robson Crim)**

Richard Jochelson	
Manitoba Law Journal	Phone: 204.474.6158
466 Robson Hall, Faculty of Law	Fax: 204.480.1084
University of Manitoba	E-mail: info@Robsoncrim.com
Winnipeg, Manitoba R3T 2N2	

**Regular MLJ**

Editors-in-Chief	
Manitoba Law Journal	Phone: 204.474.6136
466 Robson Hall, Faculty of Law	Fax: 204.480.1084
University of Manitoba	E-mail: lawjournal@umanitoba.ca
Winnipeg, Manitoba R3T 2N2	

---



# manitobaLawJournal

2022 Volume 45(5), Special Issue

---

---

## Criminal Law Edition (Robson Crim)

---

---

### CONTENTS

- 1** The Right to Counsel and the Right to Have Counsel Present  
**JOHN BURCHILL**
- 35** The Balancing Approach to *Charter* Interpretation: Theoretical and Practical Problems in the Context of Detention and Interrogation  
**ALANAH JOSEY**
- 80** Trade Unions and Remediation Agreements – Does the Criminal Law Favour Management Over Labour?  
**DARCY L. MACPHERSON**
- 110** Secrecy and Impunity: The Role of Law Societies in Canadian Wrongful Convictions  
**MELISSA MONTANA**
- 138** The Application of Gladue Principles During NCRMD and Fitness Disposition Hearings  
**MICHAEL MICHEL**
- 171** Part A – Setting the Stage: Recognizing the Importance of the Open Court Principle and Access to Justice in Manitoba During the COVID-19 Pandemic  
**SHAWN SINGH AND BRANDON TRASK**
- 215** Part B – Drawing the Curtains in the House of Justice: Analyzing the Impact of Pandemic Measures within Manitoba Courts on the Open Court Principle, Access to Justice, and *Charter* Rights  
**SHAWN SINGH AND BRANDON TRASK**
- 255** A Call for Diminished Responsibility in Canada  
**ALEXIA BYSTRZYCKI**



**CALL FOR PAPERS: Closes April 3, 2023**  
**Manitoba Law Journal – Robson Crim, Special Issue**



The Manitoba Law Journal in conjunction with Robsoncrim.com are pleased to announce our annual call for papers in Criminal Law. We invite scholarly papers, reflection pieces, research notes, book reviews, or other forms of written or pictorial expression. 45(4), 45(5), and 45(6) are the most recent Robsoncrim volumes published by the Manitoba Law Journal, and we have published papers from leading academics in criminal law, criminology, law and psychology, and criminal justice. We welcome academic and practitioner engagement across criminal law and related disciplines.

We invite papers that relate to **issues of criminal law and cognate disciplines** as well as papers that reflect on the following sub-themes:

- Intersections of the criminal law and the *Charter*
- Interpersonal violence and crimes of sexual assault
- Indigenous persons and the justice system(s)
- Gender and the criminal law
- Mental health and the criminal law
- Legal issues in youth court, bail, remand, corrections, and court settings
- Regulation of policing and state surveillance
- The regulation of vice including gambling, sexual expression, sex work and use of illicit substances

- Analyses of recent Supreme and Appellate court criminal law cases in Canada
- Comparative criminal law analyses
- Criminal law, popular culture, and media
- Empirical, theoretical, law and society, doctrinal and/or philosophical analyses of criminal law and regulation

We also invite papers relating to evidentiary issues in Canada's criminal courts including:

- Reflections on Indigenous traditions in evidence law (including possibilities)
- New developments in digital evidence and crimes
- Evidentiary changes in the criminal law
- Evidence in matters of national security
- Thresholds of evidence for police or state conduct
- Evolutions of evidence in the law of sexual assault or crimes against vulnerable populations
- Evidence in the context of mental health or substance abuse in or related to the justice system
- Use of evidence in prison law and administrative bodies of the prison systems
- Understandings of harms or evidence in corporate criminality
- Historical excavations and juxtapositions related to evidence or knowing in criminal law
- Cultural understandings of evidence and harm
- Discursive examinations of evidence and harm and shifts in understandings of harms by the justice system



Last but not least, we invite general submissions dealing with topics in criminal law, criminology, criminal justice, urban studies, legal studies and social justice that relate to criminal regulation.

## SUBMISSIONS

We will be reviewing all submissions on a rolling basis with final submissions due by April 3, 2023. This means, the sooner you submit, the sooner we will begin the peer review process. We will still consider all submissions until the deadline.

Submissions should generally be under 20,000 words (inclusive of footnotes) and, if possible, conform with the Canadian Guide to Uniform Legal Citation, 9th ed. (Toronto: Thomson Carswell, 2018) – the "McGill Guide". Submissions must be in Word or Word compatible formats and contain a 250-word or less abstract and a list of 10–15 keywords.

Submissions are due April 3, 2023 and should be sent to [info@robsoncrim.com](mailto:info@robsoncrim.com). For queries, please contact Professors [Richard Jochelson](#) or [David Ireland](#), at this email address.

## THE JOURNAL

### *Aims and Scope*

The Manitoba Law Journal (MLJ) is a publication of the Faculty of Law, University of Manitoba located at Robson Hall. The MLJ is carried on LexisNexis Quicklaw Advance, WestlawNext, and Heinonline. It is also included in the annual rankings of law journals by the leading service, the Washington and Lee University annual survey. The MLJ operates with the support of the [SSHRC](#) aid to scholarly journal grants program.

### *Peer Review*

We generally use a double-blind peer review process to ensure that the quality of our publications meets the requisite academic standards. Articles are anonymized and then, after editorial review, reviewed by anonymous experts. Occasionally, the identity of the author is intrinsic to evaluating the article (e.g., an invited distinguished lecture or interview)

and the reviewers will be aware of it. Articles are accepted with revisions, encouraged to revise and resubmit, or rejected.

This is an open access journal, which means that all content is freely available without charge to the user.