

# Introduction and Issue Overview

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This is the third issue of the *Manitoba Law Journal* of which I have been the proud Co-Editor-in-Chief. In volume 35:1 we announced our intention, supported by our colleagues, to refocus the MLJ on developments that are of particular concern to our own community. It was recognized that the only law school in this province has responsibilities that include ensuring that there is a stream of independent and informed commentary on issues arising within the society that surrounds and supports it.

The existence of such a Manitoba Law Journal has not only provided an outlet for reflections with a Manitoba focus, but inspired their creation. We are pleased to report that many of our colleagues at the law school have already contributed to the revised journal and that there have been an impressive number of student contributions as well. *Underneath the Golden Boy*, an annual reflection on political law and legislative developments, with a strong Manitoba focus, is now again part of the MLJ's annual publication program. As a result of these developments, the MLJ is now home to the great majority of scholarly articles published every year that specifically relate to Manitoba, and the overall annual amount of such Manitoba-connected material is now several times what it had been in previous years.

At the same time as we introduced a Manitoba focus to the MLJ, we emphasized that the study of Manitoba legal issues can benefit greatly by bringing to bear experience and analysis in other provinces, at the national level, and around the world. Furthermore, lessons learned in this province may be valuable to those considering similar issues around the world. We also signalled that we believed the journal should reflect upon our history and make projections and proposals about the future, rather than dwelling only in the immediate. We hope that the contents of volume 35:1, with its many and varied subjects and perspectives, was true to our vision.

The second volume (36:SI) was an extra issue, dedicated to reflections on five decades of Chief Justices in Manitoba. We thank all those whose extraordinary efforts enabled us to have it ready in time for February's forum in honour of the retirement of Chief Justice Richard Scott.

In this latest volume, 36:1, the collected articles again generally explore issues of direct relevance to the Manitoba legal community, but also illustrate the value of placing them in their national, comparative and international context.

Bruce MacFarlane, Q.C. leads off this issue by looking at a controversial topic: should the Crown, of its own volition, examine convictions obtained by it in the past to ferret out potential miscarriages of justice? The Department of Justice of Manitoba decided to answer this question in the affirmative, and the Manitoba approach has now become a model studied in the rest of the country. Professor MacFarlane was, in his previous career, the Deputy Attorney-General for the province. His article therefore offers something of an insider's view of the process to create this policy, and its effects on the Canadian criminal-justice system.

Although this was not a consideration as we placed the articles into the issue, Professor MacFarlane himself is an example of a jurist who has operated at the national and international as well as local level. A Robson Hall graduate, Professor MacFarlane remains connected to both the Law School and the province. But, this has not stood in the way of an interprovincial and international practice that has taken him to Alberta, the US, The Hague, many places in-between and back again.

In the article authored by Yemi Oke, the author relates Nigerian electricity regulation to Manitoba, largely because Manitoba Hydro is seeking to win the contract to run parts of the Nigerian electricity system. Success in this endeavour would undoubtedly link the economic development of the province (and the rates paid for electrical power by Manitoba residents and businesses) to Nigerian outcomes in the same areas. In essence, Manitoba and its main energy provider go global by establishing a presence in Africa.

In "Taxonomie Juridique des Institutions Postsecondaires Offrant des Programmes et des Services en Français à l'Extérieur du Québec", by Mark Power, François Laroque and Albert Nolette, the authors argue that not all post-secondary institutions that profess to protect minority language rights do so in the same way, or to the same degree. As a result, the authors set out convincing categories for such institutions and allow the reader to

assess their relative strengths and weaknesses. In this continuing era of bilingualism, hopefully, the categories offered by the authors will provide the basis for the assessment of new institutions that choose to offer such programs and services in the future. The MLJ is pleased to continue its recent tradition of publishing articles in each official language.

Robert Tanha's discussion of the circumstances under which trial judges may, as a matter of their discretion, decide to exclude evidence that is otherwise technically admissible is in no way limited to Manitoba. But like the article by Power, Laroque and Nolette, Tanha provides a taxonomy of these discretions. This could be help to any litigator confronted with evidence that they wish to exclude, in Manitoba or any other province.

John Burchill brings a unique history and skill set to his article, "Tattoos and Police Dress Regulations". As a former police officer, he understands better than most the importance of consistency and uniformity in the police service. As a lawyer, he understands the implications for free speech of attempting to bar members of the police service from expressing themselves through body art. There is significant jurisprudence on this conflict of important principles. After all, many groups (beyond just police and military organizations) will attempt to control some of the expressive activities of their respective memberships. Drawing the line between these two public goods is not easy, but the first task is to recognize the conflict and lay competing arguments bare for analysis.

In "Social Incrimination: How North American Courts are Embracing Social Network Evidence in Criminal and Civil Trials" authors Bryan Schwartz and Dan Grice look at how the courts have responded to the reality and pervasiveness of social media in the modern world. Many of the traditional doctrines of evidence will need to be adjusted to make room for these new technologies and the realities that accompany them. Again, this is as relevant to a Manitoba audience as it is to any other jurisdiction, whether it be north or south of the Canada-US border. Their paper was first presented at the annual Crown Defence conference in Manitoba, in 2011 and was the basis for a further presentation in 2012 at a national Justice Department conference in Toronto.

The article by Boyd McGill with respect to punitive damages is a wide-ranging discussion of the law in the area since the decision of the Supreme Court of Canada in *Whiten v Pilot Insurance Co.*<sup>1</sup> Ten years have passed since this decision was rendered; ten years of jurisprudence for assessments that simply would not have been possible earlier. Claims for punitive damages are hardly unique to Manitoba, as they are brought in the province and elsewhere in the country and the article may provide assistance to lawyers, regardless of their jurisdiction of practice.

The same can be said of Dayna Steinfeld's contribution "Leveling the Playing Field: Severance and Access to Justice at the Manitoba Court of Appeal". This case comment arose out of a case (*O'Brien v Tyrone Enterprises*<sup>2</sup>) that through the consent of the parties, the lawyers, the Court of Appeal, and the Faculty of Law, the oral hearing of which was held in the Moot Court Room at the Faculty.

The case focuses on the ability of a trial court to sever the determination of liability from the calculation of damages. For people who are not heavily endowed with financial resources, a severance could mean the difference between being able to access recompense through the courts or not.

Brendan Jowett's review of Bill Redekop's book, *Dams of Contention: The Rafferty-Alameda Story and the Birth of Canadian Environmental Law*, provides a critical analysis of a book focused on essential developments in an important area of Canadian law. Though it is generally focused outside of Manitoba, there can be little doubt that environmental concerns, both international (from North Dakota and other jurisdictions) and domestic, affect Manitoba as much as any other Canadian jurisdiction.

The last four contributions have something else in common. All four have an author (Grice, McGill, Jowett and Steinfeld) who was either a student or recent graduate when the article was first submitted for publication. All of these contributions went through the normal review process. We at the MLJ are pleased to provide a venue for publishing top-quality student writing about subjects of interest to a Manitoba legal audience. We hope that, in the future, more students will take the opportunity to submit exceptional written material for consideration by the MLJ.

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<sup>1</sup> 2002 SCC 18, [2002] 1 SCR 595

<sup>2</sup> 2012 MBCA 3, 341 DLR (4th) 618.

The piece by James Oldham (“*Habeas Corpus*, Legal History and Guantanamo Bay”) represents the 2<sup>nd</sup> Annual DeLloyd J. Guth Visiting Lecture in Legal History. The 1<sup>st</sup> Annual DeLloyd J. Guth Visiting Lecture in Legal History was delivered by the Right Honourable Beverley McLachlin, Chief Justice of Canada. Titled “Louis Riel: Patriot Rebel”, the 1<sup>st</sup> Guth Lecture was published in the MLJ.<sup>3</sup> The MLJ is happy to be able to again provide a venue for publication of the Guth Lecture. Like the oral hearing of the Court of Appeal referred to earlier, this is an important event in the Law School calendar.

Guantanamo Bay in Cuba has a US military installation that has entered the public consciousness. This occurred through both fictionalized accounts (like the Tom Cruise film *A Few Good Men* in 1992) and its real-life later use for the confinement of detainees under the American USA PATRIOT Act.<sup>4</sup> In fact, this latter use of Guantanamo Bay is intimately tied to the use of the writ of *habeas corpus*. There can be little doubt that as a province and as a country, we can certainly learn valuable lessons from our neighbours to the south.

In her introductory essay to Professor Oldham’s contribution, Professor Debra Parkes was kind enough to locate the writ of *habeas corpus* in the Canadian context, both before and after the entrenchment of the *Canadian Charter of Rights and Freedoms*.<sup>5</sup> By linking the American and the Canadian approaches, both contributions give a broader, international perspective on this particular writ.

In the concluding contribution, “Duelling Purchase-Money Security Interests under the PPSA: Explaining the Law and Policy behind Section 34(7)” the author tries to provide the rationale for and explanation of a subsection of the *Personal Property Security Act*<sup>6</sup> that is often misunderstood (or perhaps ignored) in some quarters. Given that there is a similar subsection in other *Personal Property Security Acts* in the common-law provinces, this article, too, has significant potential importance both within and beyond Manitoba’s borders.

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<sup>3</sup> (2011), 35(1) Manitoba LJ 1

<sup>4</sup> *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, 2001 Pub L. 107.56

<sup>5</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>6</sup> SM 1993, c 14, CCSM c P35

The production of a volume like this one is impossible without a highly dedicated team. The student editors, Simon Jack, Brian Lee, and Tim Brown, put in an incredible amount of effort to get this volume out almost immediately on the heels of the Special Issue. The help of student assistants Liam Black and Lynn Donnelly (often on very short deadlines) is also gratefully acknowledged.

As mentioned earlier, there would be no MLJ without authors who submitted their work, and anonymous peer reviewers who put in a great deal of time and effort to review the manuscripts, and in many cases, improve the content of those contributions. The editorial team thanks them all. A special mention is deserved for Professor John Eaton, whose exhaustive editing helped bring this issue to its current state of readiness.

The revamped MLJ never would have been possible without the support of Law Faculty Council, and has benefitted from the further assistance of Dean Lorna Turnbull, and Associate Dean for Research and Graduate Studies Debra Parkes at the Faculty of Law, University of Manitoba.

Several granting agencies deserve thanks as well. The Legal Research Institute of the University of Manitoba (under the chairmanship of the now-retired Professor Philip Osborne, and the successive executive directorships of both Professors Dr. Jennifer Schulz and Debra Parkes) provided key funding of student effort on the MLJ. The LRI itself is funded by the Manitoba Law Foundation (under the chairmanship of Garth Smorang and the executive directorship of Barbara Palace-Churchill). Also, the Endowment Fund Allocation Committee of the Faculty of Law, University of Manitoba was another key funding partner without whom our collective endeavour would not be successful.

The research assistance of the E.K. Williams Law Library staff was essential to finding sources used by authors. Head Librarian John Eaton, Reference Librarian Donna Sikorsky, and Reference Assistant Regena Rumancik were particularly helpful in this regard.

The Law Journal Advisory Committee of the Faculty of Law, University of Manitoba, comprised of students, Faculty members, and members of the practising Bar, has provided advice and encouragement.

On the aesthetic, administrative and technical aspects of the Journal, another group of people was essential to the operation. The assistance of Maria Tepper is recognized, keeping the subscription and other data in order. Brian Seed is thanked for once again allowing the MLJ to use his

award winning watercolour as our cover artwork. Jennifer Chlopecki laid out the cover that brought out the best side of that artistic vision and execution. Our printer, Friesens, [Donovan Bergman, Aron Friesen] and the other members of their team with whom we have had the pleasure of dealing over the last couple of years, turned a computer file into the permanent hard copy that you hold in your hands. They complied with deadlines that others would have found impossible to meet, and they did so with not only efficiency but smiles as well. For all of this, the editorial team is grateful.

It is virtually certain that in the process of trying to think of everyone who contributed to this process, some names will be forgotten. Three spring immediately to mind as not having been mentioned elsewhere in this introduction. Professors John Irvine and Vivian Hilder, and Melanie Bueckert have been supportive from the beginning of the revamped Journal. There are undoubtedly others who have been omitted. At many stages, if any one person had said “no” to our ideas, this might have ended this project. We consider ourselves fortunate that people were willing to let us try this endeavour.

