

The Next Great Transition in Canadian Legal Education

BRYAN P. SCHWARTZ

I. THE “GREAT TRANSITION”

Half a century ago, legal education in Manitoba followed the trend in Canada. Its aim shifted: from a focus on training practising professionals toward higher education. It moved from downtown Winnipeg to the University of Manitoba; from the precincts of the courts and law firms, to the corner of a sprawling suburban campus. Law societies in Manitoba and other provinces would become responsible for completing the preparation of lawyers, including any articling requirements or admission examinations.

We might call this change—in location, organization, mission—across Canada and this province the “Great Transition.”

Are we on the cusp of a counter-reformation—call it the “Second Transition”? While remaining part of the University, will this law school—and many others in Canada—aim to provide much more practice-ready students? That might mean much more clinical and experiential learning programs, or even a pervasive attention to the realities of practice, with almost every class spending some time on practical exercises. It could include administering much of the instruction, examination, and certification currently carried out by the bar admission course. Just a few months ago, one of our students of this school published an op-ed piece arguing that we outright move back downtown.¹

The prospect of this counter-reformation was my inspiration for proposing this special issue of the *Manitoba Law Journal*. We have interviewed many of the principal figures from the era of the Great

¹ Ben Wickstrom, “Downtown Bay fertile ground for law school”, *Winnipeg Free Press* (6 June, 2016), online: <<http://www.winnipegfreepress.com/opinion/analysis/downtown-bay-fertile-ground-for-law-school-381933961.html>>.

Transition here in Manitoba. The aim was to capture history and see what we might now learn from it.

My interest in creating oral histories stems partly from what we never did for the late Cliff Edwards. He was the Dean who presided over the Great Transition and hired almost all the professors interviewed in this volume. He headed up a productive and innovative Law Reform Commission. “The Law God” is how one student characterized his commanding classroom performances. Lord Denning counted him a personal friend and sent him the typescript of his final judgment.² I was hoping with this project to create, piece by piece, a portrait of him. We would ask and then assemble recollections of him from each of our responding interviewees. In the end, we produced some fragments, but no more. We never got around to creating and preserving Cliff’s own retrospective on his life and career.

By contrast, some time after Cliff passed away, we at the Law Journal were able to find, rescue from potential oblivion, edit, and publish the memoirs of Sam Freedman, the outstanding judge in our province during the Cliff Edward’s era. It appeared as a special issue of this law journal in 2014.³ With this issue, we attempt to inspire and record self-portraits by many of Cliff and Sam’s contemporaries at the law school during the period of the Great Transition and its immediate wake.

It is odd—to me, anyway—that law journals so rarely practice the interview form of journalism. As an editor of several of our journals, I have often employed the interviewing technique rather than inviting the

² *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds* [1982] EWCA Civ 5, [1983] 2 AC 803.

³ Samuel Freedman, *A Judge of Valour: Chief Justice Samuel Freedman—In His Own Words*, (2013) 37:SI Man LJ; Reprinted version with edits and notations by Robert G Clarke. Much of the material is based on taped interviews conducted by Lorne Brandes with Sam; see Robert G. Clarke, Introduction, xv-xxiv. In the Issue Overview, i-ii, Darcy MacPherson recalls the story of discovery of the manuscript in his preface to the issue. I would also gratefully acknowledge here the contribution to that volume by one of our colleagues, DeLloyd Guth, and of Professor Emeritus, Cameron Harvey.

standard essay.⁴ “Famous Legislative Crises”⁵ consisted of interviewed veterans from some of the most consequential and riveting crises in our Legislative Assembly. A special issue on “Five Decades of Chief Justices of Manitoba”⁶ was composed of dialogues with the previous three holders of the office. Another special issue was led by interviews with leaders from Manitoba’s four most successful political parties.⁷

One of my inspirations for pursuing the interview format is the work of Oriana Fallaci, the late Italian journalist.⁸ Her subjects were political leaders

⁴ See for example: Bryan P Schwartz & Darla Rettie, eds, “Interview with Rick Mantey”, *Underneath the Golden Boy, Special Edition*, (2001) 28:2 Man LJ 187; Bryan P Schwartz & Darla Rettie, eds, “Interview with Norm Larsen”, *Underneath the Golden Boy, Special Edition*, (2001) 28:2 Man LJ at 201; and Bryan P Schwartz & Darcy L MacPherson, eds, “Interview with Donna Miller, QC”, (2011) 35:1 Man LJ 249.

⁵ Bryan P Schwartz, ed, *Underneath the Golden Boy, Special Edition*, (2003) 30:1 Man LJ. Although the journal is not given a formal title, it deals with several famous legislative crises such as the French language debate (Bryan P Schwartz, ed, “The French Language Debate”, *Underneath the Golden Boy, Special Edition*, (2003) 30:1 Man LJ 31, the defeat of the Pawley Government (Bryan P Schwartz, ed, “The Defeat of the Pawley Government”, *Underneath the Golden Boy, Special Edition*, (2003) 30:1 Man LJ 35), the Meech Lake Accord (Bryan P Schwartz, ed, “The Meech Lake Accord”, *Underneath the Golden Boy, Special Edition*, (2003) 30:1 Man LJ 39) and the MTS Debate (Bryan P Schwartz, ed, “The MTS Debate”, *Underneath the Golden Boy, Special Edition*, (2003) 30:1 Man LJ 43).

⁶ Bryan P Schwartz & Darcy L MacPherson, eds, *Five Decades of Chief Justices of Manitoba*, (2012) 36:SI Man LJ. For specific interviews: Darcy L MacPherson, “An Interview with Chief Justice Richard J. Scott” (2012) 36:SI Man LJ 1; Darcy L MacPherson, “Une entrevue au le Juge en Chef Albert Monnin” (2012) 36:SI Man LJ 75, translation at 91; DL Brandes, “An Interview with Chief Justice Samuel Freedman” (2012) 36:SI Man LJ 105.

⁷ Bryan P Schwartz, ed, *Underneath the Golden Boy*, (2014) 37:2 Man LJ. This featured interviews with the Honourable Andrew Swan (Bryan P Schwartz, ed, “An Interview with the Justice Minister and Attorney General of Manitoba: The Honourable Andrew Swan”, *Underneath the Golden Boy*, (2014) 37:2 Man LJ 1), Kelvin Goertzen (Bryan P Schwartz, ed, “Interview with Kelvin Goertzen”, *Underneath the Golden Boy*, (2014) 37:2 Man LJ 17), Rana Bokhari (Bryan P Schwartz, ed, “An Interview with Rana Bokhari, Liberal Party Leader”, *Underneath the Golden Boy*, (2014) 37:2 Man LJ 41), and James Beddome (Bryan P Schwartz, ed, “Interview with James Beddome”, *Underneath the Golden Boy*, (2014) 37:2 Man LJ 61).

⁸ Oriana Fallaci, *Interviews with History and Conversations with Power*, translated by John Shepley, Liveright Publishing Corporation and Elisabeth Fay (New York, New York: Rizzoli International Publications, 2011). This edition is reprinted and translated into

and went far beyond diffident questioning. There were like interrogations at the time, and she did not hold back her own opinions and moral passion. Just read her interview with Ayatollah Khomeini.⁹

A role model to the more scholarly exercise here is the work of Bryan Magee,¹⁰ a serious thinker in his own right who conducted a series of television interviews with leading academic philosophers of his time. The transcripts were later published. One interview in particular—with Gilbert Ryle—struck me with the power of the format to produce a succinct and accessible epitome of a thinker’s work. I read it way back when I was a law student. I had been puzzled by Ryle’s insistence, in *The Concept of Mind*,¹¹ that we can know the minds of others through their behaviour. What about the conscious experience and its apparent inaccessibility to others? When directly questioned, Ryle admitted that there could be purely private experiences. A person might see things in their “mind’s eye” with an accompanying behaviour observable to others; Ryle allowed that this was a “big hole” in his behaviourist account, but that “it is a fairly unimportant hole. The sort of mind, ie. the sort of wits and character a person has got, has got very little to do with the things that he does see, or fails to see, in his mind’s eye”.¹² I much better understood Ryle’s position, or at least the position he presented to the public. While preparing this preface, almost forty years later, I discovered another insight by Magee, based on his own direct encounters with Ryle and of others who met him personally: that Ryle was a person of “life enhancing intellectual brilliance, but he had no inner life worth speaking of”.¹³ In this volume, we attempt to find out a bit about the person who animated a life of professoring.

The conversations recorded here, essentially intact, attempt to preserve the distinct personalities, their own ways of thought and expression—even though in almost all times and places, speakers extensively edit what they

English from its original Italian for distribution in the USA.

⁹ *Ibid* at 172.

¹⁰ Bryan Magee, *Confessions of a Philosopher: A Journey through Western Philosophy* (New York: Random House, Inc., 1997).

¹¹ Gilbert Ryle, *The Concept of Mind* (UK: University of Chicago Press, 1949).

¹² Bryan Magee, *Modern British Philosophy* (New York: Oxford University Press, 1986) at 134. The interview with Gilbert Ryle is found in chapter 6, beginning on 128.

¹³ *Supra* note 10 at 84.

say, edit even what they acknowledge to themselves. Many argue that social and enforceable legal norms of “political correctness” now hamper discussion at our universities.¹⁴

Perhaps the most poignant moment for me in this process was the response in one interview to the question: “Are law schools still a place for the free exchange of ideas?” The immediate answer was “No”. Then, almost as quickly, and even more emphatically: “Don’t print that”.

Still, my impression is that our respondents were bracingly candid with us. Perhaps it helped that those who have retired from active duties are not

¹⁴ See for example, Steven C Bahls, “Political Correctness and the American Law School” (1991) 69:4 Wash ULQ 1041. On concerns over lack of intellectual diversity within law schools, please see the Schuck/Leiter debate at Legal Affairs: Debate Club, “Do Law Schools Need Ideological Diversity?: Peter H. Schuck and Brian Leiter debate” (23 January 2006), online: <http://legalaffairs.org/webexclusive/debateclub_diversity0106.msp>; and Walter Olson, *Schools for Misrule: Legal Academia and on Overlawyered America*, (Encounter Books, 2011). On universities generally, see Nicholas Kristoff, “The Liberal Blind Spot”, *The New York Times* (28 May 2016), online: <http://www.nytimes.com/2016/05/29/opinion/sunday/the-liberal-blind-spot.html?_r=0>. While there are critiques of the academy as being biased by neoliberal forces (see Henry A Giroux, “Public Intellectuals Against the Neoliberal University”, *Truthout* (29 October 2013), online: <<http://www.truth-out.org/opinion/item/19654-public-intellectuals-against-the-neoliberal-university>>.), the statistical evidence is that most professors, at law school and in the humanities and sciences lean to the left side of the spectrum (see Neil Gross & Solon Simmons, *Professors and Their Politics*, (JHU Press, 2014); and James Lindgren, “Conceptualizing Diversity in Empirical Terms” (2005) 23:2 Yale L & Pol’y Rev 5). Perhaps law schools would tend toward left-leaning teachers even if they were institutionally autonomous, but it is possible that the influence of administrators at the central administration and external granting agencies has had some influence. Whether the skew is the result of hiring discrimination has been debated; see Neil Gross, “Liberals and Conservatives in Academia: A Reply to My Critics” (2015) 52:1 Society 47; Neil Gross, *Why Are Professors Liberal and Why Do Conservatives Care?*, (Harvard University Press, 2013) arguing that selection of students for academic career paths is the driver. For critiques of Gross’ work, please see authors such as George Yancey, *Compromising Scholarship: Religious and Political Bias in American Higher Education*, (Baylor University Press, 2011); and John Tierney, “The Left-Leaning Tower” *The New York Times* (22 July 2011), online: <<http://www.nytimes.com/2011/07/24/education/ed1-24notebook-t.html>>. On the potential impact of the tilt on the content of legal scholarship, please see Adam S Chilton & Eric Posner, “An Empirical Study of Political Bias in Legal Scholarship” (Coase-Sandor Institute for Law & Economics Working Paper No. 696, 2014) online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2478908>.

as concerned as much as those still active with getting ahead, or at least, not concerned with being held behind.

The ground rules for these interviews were as follows. Each respondent received a raw transcript of the interview and our suggested edits. Respondents would be entirely free, as they saw fit, to delete, round out, or supplement their comments prior to publication. They could even opt out altogether. Initial editing on our side was light; we tidied up grammar, eliminated some repetitions, and occasionally reordered material for flow. Our respondents themselves in the end actually changed very little. The comments you will read are extremely close to the original conversation. An exception is the interview with Distinguished Professor Emeritus Dale Gibson, the pivotal figure, along with Cliff Edwards, in the Great Transition. He reordered and pared down the text considerably to accord with his own standards of logical sequence and relevance.

For my part, I remain a great admirer, and would-be practitioner, of two potentially contradictory arts: of discursion and distillation. By the first, I mean to hold forth or converse in an exploratory and expansive manner; thought and speech move in free association, not necessarily according to strict logic, and among many topics and areas of knowledge, no matter how apparently disparate. As a student, I found I often learned the most from a brief digression than a long lecture. As a teacher, I believe I often convey the most information in improvised asides and riffs. By the second, I mean to compact from a profusion of words and thoughts a few clear drops of meaning. Perhaps you'll get a sense of my sensibilities in both respects from some of the interviews in this volume.

Now let me offer some brief views on the future after working on this retrospective on the past.

II. RESOLVING THE TENSION BETWEEN PRACTICE AND ACADEMICS

The tension between academic and practical education, I believe, is in principle resolvable.¹⁵ The integration of the two brings out the best in both.

¹⁵ For some thoughts on the state of legal education from past and present faculty members at Robson Hall, please see DeLloyd J Guth, "Judge Shadowing at the University of Manitoba & Canada's First Year Law Curriculum", (2013) 37:1 Man LJ 473; Bryan P Schwartz, "Integrating the Dimensions of Legal Education", (2013) 37:1

Theories must be about, must be tested against, must be adjusted, in light of practical realities. A lawyer can be more effective in practice by understanding various theories of how the law works in principle versus how it actually does in the real world. A practitioner might advocate for a particular interpretation of a series of cases or a statute by attempting to identify its underlying conceptual framework: “This case is based on the view that tort law in this area aims to deter, as well as compensate” or “You can understand the details of this statute if you appreciate that it prioritizes swift and final resolution of disputes, not achieving the maximum in compensatory justice”. Legal doctrine nowadays sometimes explicitly invites a court to weigh various factors, including “policy considerations.”

Higher education at its best—including legal education at its best—exposes students to different, even opposing perspectives on what is true and what we should value. It provides students with different methodologies to acquiring and valuing the truth. It equips and inspires students to engage in an internal dialectic: to ask searching questions to themselves about what they believe and how they act, to think critically about how others direct them to think and act. While much of the classroom experience at law schools assumes an external adversary—you argue one viewpoint, someone else presents a contrary one—the reality is that most of the dialectical thinking a lawyer carries on is internal. In drafting a legal document, for example, the skillful lawyer anticipates how it might be misunderstood or generate opposition. A first-rate lawyer may prove exceptionally adept at assessing a problem and proposing and crafting solutions even if—and at times, despite—the fact that the client or an opposing lawyer or a judge does not demand, does not recognize, or does not value the art involved. It has been said that “the name of the greatest general is unknown”—meaning, perhaps, that victories were achieved without bloodshed and indeed so subtly that no one recognized who was behind them.

The Great Transition produced many improvements in the academic dimension of legal education. The best teachers at our law school often were encouraged—by immersion in the research-oriented environment of the campus—to publish outstanding textbooks and articles. The quality of classroom instruction, at its best, was enhanced by the insights teachers learned from creative engagement as authors. Opportunities to collaborate

Man LJ 473; and John Pozios, “Clinical Business Law Programs at Robson Hall”, (2013) 37:1 Man LJ 473. w

with scholars in other disciplines have in some cases proved productive. With our own *Underneath the Golden Boy* (UTGB) series on Manitoba legislation and public policy, we have partnered with fellow academics in political studies, public administration, and other disciplines to produce (at least by law journal standards) an unusually multidisciplinary publication. While I question the way external granting incentives can skew the priorities of legal academics, I must at the same time acknowledge that this very law journal, with UTGB integrated into it, is currently and critically supported by its first grant from the Social Sciences and Humanities Research Council (SSHRC).

At Canadian law schools generally, including this one, we may have eventually gone beyond the culminating point of success in enhancing practical education with academic perspectives. We may at times have become too distant, even disdainful, of the need to ground theories in practice, of the mission to produce ethical and skilled professionals who could serve clients. We may have posed as free thinkers, while practising abject conformity to current dogmas. We may have tried to tell reality how it must work, rather than watching and listening to how it actually does. We may have submitted to the tyranny of academic clichés rather than demanding of ourselves that we speak clearly, precisely and forthrightly

The drive for the Second Transition is not primarily from the self-scrutiny of the academy. It is driven by changes in the legal market. The comfortable oligopoly of Canadian law schools has been broken by the discovery that legal professionals may be foreign-trained, including schools aimed at supplying the Canadian market. The articling system in Ontario has broken down. There are too many students coming from Canadian and foreign law schools to place them all. We may be called upon, as law schools, to better help students for practice rather than relying on articling and bar exams to span the gap between academic education and professional preparation.¹⁶

Our graduating students are faced with more competition than ever. The demand for legal services is being adversely affected by trends such as the ability of potential clients to find cheap—and from a layperson’s perspective—materials that are “close enough”, such as will kits and standard contract forms. Here in Manitoba, our students are starting to have to compete for local articling jobs with students who live in other provinces,

¹⁶ Leo Singer, “Shaking up the Academy”, *CBA National* 25:1 (Spring 2016) 16.

but cannot find positions there. At least one new school, Lakehead University, led by a graduate and former teaching colleague of ours, Lee Stuesser,¹⁷ responded by creating a program that is sufficiently practice-oriented that its students do not have to article at all to be admitted to the Ontario bar; writing the bar exam is sufficient. The University of Calgary has implemented a new practice-oriented curriculum.¹⁸ Eventually, in some measure, this law school will have to catch up. But we might be years—even decades—behind, and in the meantime, our students will suffer from our detachment or passivity.

It might be expected that the legal academy would respond quickly and deftly to changes in the reality of students in their charge and the clients they will eventually serve. The incentive systems within the academy, however, have tended to pull in a different direction than the market places for lawyers. For example, the incentives at the academy tend to be in favour of research, not teaching. The legal academy has tended to assimilate the wider University rule that a doctorate is needed as an entry card for professorial positions. Yet other candidates, with only master's degrees, might potentially bring alternate strengths to the classroom, and to research and writing itself. No one individual can—or needs to—embody and project all the elements needed for an overall education. There are trade-offs: years of researching and writing a dissertation can make you a better law teacher, but so might the same years of practising law. The study of texts and participant observation are both means of acquiring knowledge. An institution needs different voices and perspectives to produce an overall first-rate program.

At large universities in which most law schools operate, central administrative bureaucracies tend to exert greater control; the specific demands of a small professional faculty may not be much understood or appreciated by the administrators in command and control of a much larger enterprise.¹⁹ University administrators may tend to prioritize fiscal demands, and the relatively expensive professor can be viewed as primarily a potential generator of external grants, rather than a potentially inspiring

¹⁷ For the interview with Lee Stuesser, please see page 297.

¹⁸ University of Calgary, “The Calgary Curriculum” (2016) online: <<http://law.ucalgary.ca/calgarycurriculum>>.

¹⁹ Benjamin Ginsberg, *The Fall of the Faculty: The Rise of the All-Administrative University and Why it Matters*, (Oxford University Press, 2011).

classroom instructor. Law faculties are viewed, within universities and by external granting agencies, as part of a larger envelope of humanities and social sciences. The “Arthurs Report”,²⁰ commissioned by the Social Sciences and Humanities Research Council, began by asking why research at law faculties does not look more like research in the social sciences and humanities generally.²¹ It did not explore whether legal studies, while potentially benefitting from interdisciplinary work, might have a distinct dimension. Would anyone begin a study with the reverse question: why does research in the humanities and social sciences not look more like legal scholarship? In any exploration of hard normative problems, where you end up tends to depend on where you start. The wrong question begets the wrong answers, or worse still, as Einstein put it, something that is not even wrong.

A life spent writing a text book on legal doctrine might not involve empirical, collaborative, or multidisciplinary research. Yet the product might be considered an intellectual achievement in its own right and might help many practising lawyers, judges, and members of the public. If law professors do not produce such works, who will? Actually, there is an emerging answer. As law professors move toward writing academic articles for other academics, practising lawyers are producing the blog pieces that provide quick and often incisive explanations and evaluation. What will be missing from doctrinal commentary is the distinctive contribution of the scholar-teacher, who should be specially equipped with time, independence, and sophisticated techniques of analysis and expression. For students, the teaching of legal doctrine in the classroom will be deprived of teacher-scholars who have turned themselves into first rate analysts of laws and judicial opinions.

Feedback mechanisms for Canadian law schools have been broken in other ways beyond the increased control of central university bureaucracies.

We have always had more applications by far than places in first year. If applications fall from twelve per position to nine, we still fill all the places, and there is no immediate, visible impact. We lose in the calibre of classroom discussions and of student research assistants. Most importantly, future clients may have a less distinguished array of professionals to choose

²⁰ *Social Sciences and Humanities Research Council of Canada, Law and Learning: Report of the Consultative Group on Research and Education in Law* (Ottawa: Information Division, the Council, 1983) [Arthur’s Report].

²¹ *Ibid* at 41.43.

from. As an academic unit, however, revenue sources and audience numbers are untouched. So where is our problem?

As Canadian law schools like ours derive most revenues from federal and provincial governments, filtered through a central administration, we are somewhat insulated to feedback from graduates in the form of donations.

People are motivated by many things besides money. Honour and prestige can be powerful motivators. When a national magazine, *MacLean's*, published ranking of law schools,²² it drew much attention. Some of the responses were to find ways to game its system—for example, if rankings depend on citations to the work of faculty members in scholarly journals, the school would encourage colleagues at an institution to cite each other, or change the definition of who counts as a faculty member. Some law schools might, however, have searched for ways to genuinely improve their substantive performance. The *Maclean's* ranking service stopped,²³ and many law schools have not worked to generate their own metrics. Asking graduates of five-, ten-, or twenty years' vintage about the value of their education, and their current job placements and satisfaction with them, might be a spur to reflection and reform.

There is one site of interaction where the Faculty suddenly has to try to align its direction with the pressures on students: when it seeks a tuition increase. The Faculty (I among them) tend to believe that the salary structure has to be competitive nationally in order to attract and retain first rate professors. So the faculty support tuition increases that can fund market supplements—stipends for members of professional faculties beyond ordinary professor pay. Due to provincial government policies on tuition increases, Robson Hall has only been able to substantially increase tuition with the permission of the provincial government—which in turn requires consent of the current student body. A push for a major increase several years ago stalled in the face of considerable student skepticism. The students were apparently not fully convinced that increases in their costs would be coupled with improvements in program quality, including preparing students for practice. The faculty might benefit next time by recognizing the

²² “Maclean’s first-ever ranking of Canada’s law schools”, *Maclean's* (17 September 2007), online: <<http://www.macleans.ca/education/unirankings/macleans-first-ever-ranking-of-canadas-law-schools/>>.

²³ It appears as though the last *Maclean's* ranking of law schools occurred in 2013. See www.macleans.ca for more details.

potential for the Second Transition to take place here, and provide a reasonably specific plan of action.

III. THE CONDITIONS AND PROSPECTS FOR A SECOND TRANSITION IN MANITOBA

If this law school chooses to engage in a Second Transition, it might seek to overcome some of the excesses in the abstractly academic dimension, yet avoid lurching too far into an extended articling program rather than an exercise in higher education. We have only three years—really, about twenty months of classroom semesters—to provide the contribution a law school education is uniquely suited to provide: the foundations for a life of informed and critical reflection. Our graduates may enter into immersive and assimilative environments—places in practice and government where there is little time and no incentive to start asking hard questions of yourself and the system you engage in.

Here in Manitoba, the Second Transition could draw on the best thinking about legal education from everywhere, and the distinct experience and conditions right here in this small province. I would suggest the following:

- Our most important stakeholders are those whom our graduates will eventually serve in a professional capacity. It is their needs that form the basis for the monopoly of lawyers and law schools, which explains why private taxpayers contribute most of our funding;
- The practice of law should be considered as a helping profession. The task of the legal professional is to help a client solve a problem or achieve a goal. Success is measured by ethically, effectively, and efficiently serving a client. The objective is not to win cases as such, but to achieve a feasible outcome. The effective lawyer will be resourceful and practical in helping the client to find a path: that might mean compromise with an adversary; it might mean walking away from the pursuit of justice to obtain peace—extrication may be a wiser goal than vindication; it might mean alternative roads to progress, such as taking a problem to a political official or bureaucrat or journalist or medical professional rather than a court. As teachers, we always question everything. While mediation has been trendy, can its use in some cases itself add to the length, cost, and emotional cost of dispute resolution? Where battle must be

joined, the effective lawyer has the moral courage and stamina to be an effective and ethical warrior;

- We have to respect the aspects of professional service that require helping individuals with what appear from the heights of academia to be pedestrian. We cannot embrace humanity and disdain individuals;
- Our classrooms and our writing have to be engaged in a spirit of openness to many perspectives, not platforms for indoctrination. The entry of new professors cannot be screened by ideological litmus tests; human rights law, and the principle of academic freedom, actually prohibit discrimination on the basis of political belief. Our commitment to intellectual freedom, freedom of expression, and non-discrimination should be declared openly and explicitly as a matter of our own principles and policies;
- The embrace of diversity includes, first and foremost, intellectual diversity. We have to open our classroom podiums to individuals, regardless of social identity, who can bring their own ability, experience, insight, and arrays of technique. We should include, as part of our complement, teachers who have practical experience, as well as some advanced academic credentials (although possibly short of a doctorate) and inclinations, who are interested in teaching clinical and experiential courses.
- We should not, however, “outsource” clinical education to practitioners. We should instead aim for these courses to be led and supervised, if not solely delivered, by teacher-scholars who ensure the dimensions of critical reflection.
- We have to ensure that students are not so busy with running around doing simulations and practicums that they do not have the time to focus on more traditional academic exercises, such as studying cases and legislation and practising research and writing of essays.

The particular circumstances of the University of Manitoba include the following:

- The University is the only law school in Manitoba, and most practitioners are its graduates. This carries special responsibilities. For example, the persistence of this law journal is because some of us thought, despite a move from some quarters to eliminate it, that there must be a forum for academic commentary on the legal affairs

of our own community. It also carries opportunities—such as calling on alumni to assist with our teaching program, while still maintaining our overall leadership and direction;

- Closer proximity to the spaces where law is practised—firms, courts, the Legislative Assembly—might begin with a partial, rather than total, move back downtown. The law school might acquire or lease a branch space downtown where part of its curriculum, as well as clinics might be administered and delivered. Perhaps we could start by scheduling one day a week at a downtown location—or an intensive two-week module in an area like practice management. Perhaps the entire last half of the final year would be delivered downtown, rather than having students running back and forth on a regular basis throughout the program. Let us see what happens, and learn from it. After a trial run, we might retreat back to the campus or end up moving downtown entirely. Or we might find that the dual site system works well. We will only know by experimenting;
- The University of Manitoba has a small student cadre. A defining part of its character can be to maintain a friendly, personal form of education, including small class sizes, especially in first year. The faculty has so far resisted central administration pressures to increase class sizes in the name of efficiency;
- There are over sixty First Nation communities in Manitoba; it has a significant Metis population, and a substantial and growing part of its population, especially the younger population, has some kind of indigenous ancestry and self-identification. The Aboriginal component of the curriculum can be strengthened in at least two major ways. First, the teaching of legal issues can address Aboriginal issues more pervasively; for example, the distinct regime concerning wills for First Nations citizens on reserves can be taught as part of that course, child protection issues involving indigenous peoples can be incorporated into the general family law course, and so on. Second, there could be more courses focusing on administering Aboriginal self-sufficient government and the business

development in Aboriginal communities, thereby expanding our focus beyond those of constitutionally protected rights;²⁴

- Manitoba is to some extent an officially bilingual province and home to a still-thriving francophone community. Its law school has been developing some opportunities to study and practice in French, and can continue to do so;
- Winnipeg is the home of the Canadian Museum of Human Rights. The University has, in light of this development, defined its first strategic priority as “human rights and social justice”. We need to move beyond narrow definitions, however, of what human rights are. The *Universal Declaration of Human Rights* and the *Canadian Charter of Rights and Freedoms*²⁵ have many dimensions. They are not confined to non-discrimination rights, let alone the equality rights of a few selected groups. They embrace many forms of freedom, including expression. They include the rights to due process and freedom from cruel treatment or punishment. When a defence lawyer works effectively for a client, including a guilty client, to ensure that their process rights are protected—from police interrogation to trial, that the sentence is not unduly harsh, that the terms of any confinement are not gratuitously or excessively harsh—that defence lawyer is serving the cause of human rights. We have to pursue our study and teaching of human rights with an

²⁴ Almost all of the first indigenous students to study at the University of Manitoba Law School arrived after the transition from downtown to the campus. The story of what inspired them to attend, what their law school experience was like, and how their careers unfolded will be the distinct focus of another special issue of the *Manitoba Law Journal*, which we hope to publish in 2018-19. We are again conducting a series of interviews, and from what have already heard, we expect the issue to be a valuable source of insight into how the law school can welcome and support more indigenous students, expand its curriculum (in respect of issues involving indigenous peoples—including learning about aboriginal legal traditions) and draw on indigenous experts in legal practice, public policy, and community leadership to enrich our teaching resources. Bryan P Schwartz & Darcy L MacPherson, eds, *Manitoba Law Journal, Special Edition on Indigenous Issues*, 40:1 Man LJ [forthcoming in 2018-19].

²⁵ *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948); and *Canadian Charter of Human Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

openness, pluralism, and concern for practical human realities that befits the subject;

- Manitoba has relatively few national and international head offices, but many small, medium, and large enterprises that were built by an individual, a family, or a small group of entrepreneurs. We can rebuild centres like our endowment centre for business and enterprise law in ways that draw on the experience and expertise of local businesses and, as in all matters, integrate rather than separate the academic and practical, the clinical and theoretical.

Our particular conditions can help us, rather than prevent us, by offering a calibre of student education and experience that matches the best in Canada. We do not have the money, prestige or location to emerge as a pre-eminent research institution, but we have been a home over the years to some excellent scholars and, as a group, we can be very good. Our past can inspire our future. In the 1920s, the law school at the University of Manitoba was regarded as a national leader. At times in my own career, I believe we have had a cadre of teachers and a curriculum that was as good as any in Canada.

As a small ship and the only one on the lake (at least in Manitoba), we should now be able to manoeuvre with agility. We cannot do it, however, under the strict control of central headquarters. The cumulative impact of more central control over almost everything—from selection of Deans to controls over classroom space to information technology—can hamper the ability of a law school to respond effectively to changes in the profession and the need of the clients it serves. This law school must seek to recover some of its lost autonomy from the central administration of the University.

Curriculum reform has been a subject of debate and contention at this law school over the past decade. The curriculum established in the earlier 1980s, by consensus, was ahead of its time. It aimed to include a solid foundation of learning of doctrine, practice skills, and critical perspectives. Through time, while some other law schools have recognized the need to enhance the practice orientation, we in some ways moved in the opposite direction. We have scaled down some of the foundational elements of our program, such as reducing Legal Systems from five to two credit hours, made first year Legal Methods (including research and writing) a pass/fail course, and at times resorted to teaching some mandatory upper year courses through sessional or in single all-year sections. Just a few years ago, we recognized we had almost no faculty specializing in business or private law.

We had been known for producing students with an unusually wide and strong foundation in the fundamentals, but that brand may have been eroded. Very recently, however, we adopted a report that focused on developing existing experiential²⁶ and clinical programs,²⁷ and a new Dean²⁸ was selected who has defined the objective of the program as preparing students for professional practice.

Debates over curriculum reform here have been, to some extent, inter-generational. New faculty saw our unusually high level of upper year courses as a relic from a previous generation that was focused too much on practice, and not enough about academic perspectives. There was some loss of institutional memory; the rationales behind the curriculum, including its unusually extensive mandatory components in upper years, were not transmitted. As an appendix to this volume, we have included the 1982 curriculum report,²⁹ still the official foundation of our program.

Also attached (in Volume 39, Issue 2) is the 2014 Report for the Academic Innovation Committee.³⁰ Seeking an objective basis to find a new consensus, the report relies extensively on the educational objectives established by an external body—Federation of Law Society, which sets out requirements for professional recognition of an academic law program. A number of emerging developments, however, are touched on in the report, such as ferment in the Ontario articling and bar admission system, the Lakehead model, and some of the trend in Calgary toward a more practice oriented program, and the Report contemplates that in crafting a new curriculum, consideration will be given to eventually adopting some of these reforms.³¹

²⁶ Sarah Lugtig, “A Vision for Experiential Education at Robson Hall: Supporting Students’ Transition to Practice” (2016) 39:2 Man LJ 397 [*Experiential Education Final Report*].

²⁷ Law Faculty Council, “Excerpts from Law Faculty Council Minutes, Meeting on March 24, 2016” (2016) 39:2 Man LJ 473.

²⁸ Dean Jonathan Black-Branch joined the Robson Hall faculty in July 2016.

²⁹ Jack R London et al, “The Report of the Curriculum Review Committee on a New Curriculum”, (2016) 39:2 Man LJ 155 [*Osborne-Esau Report*].

³⁰ Mary Shariff et al, “Academic Innovation Committee on the Robson Hall J.D. Curriculum: Consultation Paper” (2016) 39:2 Man LJ 241.

³¹ *Ibid* at 349. It is found on page 108 of the Academic Innovation Report:

After discussion at Law Faculty Council, a resolution was adopted that included a set of principles, clarified through some debate, drawing on the lengthy report of the Academic Innovation Committee. They include, happily, the following fundamental program objective: “To deliver a rigorous and student-centred program that engages students in an enriched conception of legal practice as knowledgeable, skilled problem solvers, critical thinkers and creative actors, attuned to law in context and with a developing identity as humane, ethical and reflective professionals.”³²

The in-detail review of how the current curriculum meets this objective, and other broad principles, and the definition and implementation of concrete curriculum changes, may take many more years to accomplish. When it is finished, where will we end up between aiming at Tier One (academic accreditation) and Tier Two (professional admission)?

IV. A PROPOSAL: A “PATHWAY TO PRACTICE” DESIGNATION WITHIN THE EXISTING J.D. PROGRAM

It has been suggested in the past, and adopted in principle, that students should be able to voluntarily pursue various specializations at this school, such as in human rights, Aboriginal or business law. I would have suggested that we define and offer a practice-ready specialization. **We could call it the “pathway to practice” designation. Students who earned it would meet, or come as close as reasonably possible within our abilities as a law school, to being admitted to professional practice.** In other words, students who pursue this track would not only fulfill what we might call “Tier One” requirements—those concerning adequacy of academic education—but also meet or closely approach “Tier Two requirements”—those required for admission to the bar.

Our 1982 curriculum was actually one of the best platforms in Canada from which to build a practice-ready program. It required more

Recommendation 14.2 The Faculty should consider, following the example of Lakehead University’s IPC, whether, at the point of implementation, it should expand “skills training” in all years of the J.D. Program by requiring instructors of substantive courses to offer assessments other than examinations, such as memos and written and oral advocacy exercises.

³² Academic Affairs Committee, “Memo Regarding: Academic Innovation Committee Consultation Paper on March 9, 2016” (2016) 39:2 Man LJ 453 at 459; please see page 6 of the memo found on page 459 of Volume 2.

foundational courses, more credit hours than perhaps any other program across Canada. Instead of continuing to cut down, perhaps it is time to offer, as an option, a set of courses, like the Lakehead program, that place students in the best achievable position to be accepted in, and succeed, in legal practice. Students who pursue this designation might take some extra courses beyond the minimum. They might write law society exams in partial fulfilment of course requirements. We could create new practice-oriented programs, such as a cutting edge “practice management” course, where students would acquire critical perspective on issues like the ethics and commercial dimensions of private practice in a firm, solo practice, government practice, and in-house counsel practice. The ethical and practical dimensions of issues like billing and marketing could be explored. Students would have better insight into what kind of practice they might wish to carry on, and learn how to recognize and deal with challenging issues such as handling stress, work life balance, and finding ways to find meaning and honour in what might appear to be routine tasks, carrying them out with ingenuity and even artfulness. This program might be delivered in the regular timetable at the campus, and perhaps it could be delivered at a downtown satellite of the law school in an intense week or two concentration, while other classes are suspended.

At the initial stage, the “practice-ready” designation within the J.D. program would be voluntary all around. No student would be required to take it. Only willing professors would be enlisted to deliver. We might avoid miring ourselves in the enduring debate between the freedom of students to choose and ensuring the integrity of the program by ensuring that every graduate has a foundational knowledge. We would respect the choices of our faculty, some of whom are not equipped by their experience and education to teach in a more practice oriented way, some who might not believe in doing so as a matter of academic judgment. We might offer, with the consent of the main class instructor, that a clinical supplement be offered by an adjunct teacher who is well equipped to instruct in a particular set of skills. As an alternative to a designation within the usual J.D. program, graduates might emerge with a new J.D. (Honours) degree.

A coalition of willing professors and students would take the lead on creating a pathway-to-practice path within the three-year framework. Perhaps someday the program would become the new standard three year program, but we would not prejudge that.

Another option: the Law School could enable students to achieve Tier Two competency within a special LL.M. program. The Law Society of Upper Canada and Ryerson University are currently offering an eight-month post-J.D. program that substitutes for articling, but not bar exams. A University of Manitoba LL.M program could include a pathway-to-practice track. It would enhance traditional graduate level studying and learning by including externships, participation in clinics, and administration of exams that satisfy law society requirements.

The various “pathway-to-practice” tracks that the law school might create might be offered in whole or in part at a downtown satellite campus. We might even consider outright moving back downtown. The return would be geographical, but not conceptual; a reform rather than a regression. Before the Great Transition, academic education was effectively an adjunct to apprenticeship, and the faculty did not produce much published research. In the Second Transition, the academic law school would take the lead in ensuring that students have an integrated education that satisfies high academic standards in all respects, including the teaching of practice skills. A move downtown would facilitate drawing on the expertise of practising professionals, but as academics we would maintain a lead role in the design of instructional programs and remain extensively involved in their delivery. As scholars, our understanding could be enhanced by the ability to derive and test insights from more direct observation of what happens in places like law clinics, courts of law, and the offices of government policy makers. Our scholarly observations might then more readily find an audience beyond scholars. Practising jurists might find that our observations about how the legal world works tend to reflect its actual complexities and paradoxes, and that our ideas for change are as humane and practical as they are imaginative.