

# Interview with Justice Freda Steel\*

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R Y A N   T R A I N E R

## I. INTRODUCTION

**Ryan Trainer (RT):** Let's start by going back to 1975 when you received your law degree. What made you decide to go to law school?

**Justice Freda Steel (JFS):** I was studying sociology. My older brother was a lawyer and he said to me, "What are you going to do with a sociology degree; how are you going to support yourself with that" and I didn't know. He said, "Why don't you consider law?" and I said, "No, no, no." For me, at that point, law represented men in a boardroom in three-piece suits arguing about money. I did not know any women who were lawyers. My brother was very clever and pointed out that Ralph Nader<sup>1</sup> had gathered a group of young people in the United States who were challenging a lot of issues, including consumer protection. They used to call them "Nader's Raiders." He said to me, "No, you have the wrong idea; you can do a lot of different things with a law degree. Why don't you take the LSAT and see how you do?" So I took the LSAT after only two years of university and I got in and thought, "What have I got to lose?" I'll start and see if I like it and I fell in love with it. I loved it from the first week we were there. In 1972, we were the first class that had any substantial number of women in it. Before me, out of a class of a 130, there were six women. In my year, there were 25, so it was a tremendous increase. Everyone was quite shocked. It was a new

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\* Interview conducted by Ryan Trainer. Justice Steel graduated with an LL.B from Robson Hall in 1975 before receiving her LL.M from Harvard University. She has spent time in private practice, as a professor of law at the University of Ottawa and the University of Manitoba, and as a labour and human rights arbitrator. She was appointed to the Manitoba Court of Queen's Bench in 1995 and to the Manitoba Court of Appeal in 2000.

<sup>1</sup> Ralph Nader is an American political activist, author, and attorney. He is a five-time candidate for the United States Presidency.

building that had only opened a couple of years ago and obviously the architects had not contemplated that there would be any significant number of women. The men's washrooms were numerous and large but the women's washrooms were very small. The Dean, who was Cliff Edwards<sup>2</sup> at the time, had to actually change the washrooms so that there would be sufficient facilities for this influx of women. I was on the very cusp of the influx of women into law school.

**RT:** Jumping from six women to twenty-five is a major jump in a single year. I wonder what the catalyst was for such an increase?

**JFS:** The 70s was the beginning of women entering the professions in larger numbers. What was significant during our three years was that the National Association of Women and the Law<sup>3</sup> was created. The faculty at Robson Hall supported a few representatives to go to an initial meeting in Windsor that I remember going to. Then, as part of the steering committee, most of my third year was taken up planning the founding conference for the National Association of Women and the Law, which was held in Winnipeg. We had people come in from all over the country; the whole class was involved, men and women.

**RT:** I'm glad you brought this up; I was hoping you could speak to some to some of the causes and student groups that you were involved with.

**JFS:** Planning the conference took up most of the third year. We were young law students; we had never planned a conference of that magnitude. It was a lot of work for the faculty and us. The entire school was very supportive.

**RT:** It's encouraging—given that the new law building was constructed without any real consideration that women would make up a substantial portion of the class—that as soon women entered law school in greater

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<sup>2</sup> Cliff Edwards, Dean of Robson Hall 1964-79.

<sup>3</sup> National Association of Women and the Law (NAWL) was founded in 1974 at a conference held at the University of Windsor law school. NAWL has played a major role in several milestones regarding Canadian women's equality, such as the inclusion of ss. 15 and 28 in the *Charter*.

numbers, the faculty and the school were supportive. The culture had already changed by that point.

**JFS:** It was in the process of changing. I certainly remember incidents in various classes. For example, family law, well, there was no family law in the 1970s. There was very little actual legislation. The legislation was the *Deserted Wives and Children's Act*<sup>4</sup> and the *Divorce Act*.<sup>5</sup> There were lots of humorous cases about adultery and private detectives, but there was no real discussion of the feminisation of poverty or its impact. Criminal law was different; I remember to this day a long argument I had in the student lounge with one of the male law students, who insisted that a woman could not be raped, that it was impossible to rape a woman if she really resisted.

**RT:** Wow.

**JFS:** All of the issues we take for granted now; third party disclosure, the rape shield laws: none of that was there. This really was just the beginning of the recognition of a lot of issues that we take for granted now.

## II. WOMEN AND THE LAW

**RT:** While researching for this interview, I came across a story from 1981 in the build-up to the *Charter of Rights and Freedoms*<sup>6</sup>. Doris Anderson<sup>7</sup>, who was leading the Canadian Advisory Council on the Status of Women, sought to conduct a study to explore the impact of the *Charter* on women, but the federal government stepped in to prevent the study from happening. In fact, the government was hesitant to have equal protection for women made explicit in the *Charter*. It strikes me as odd that the government would

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<sup>4</sup> *The Deserted Wives and Children's Maintenance Act*, RS S 1940, c 234, s 1.

<sup>5</sup> *The Divorce Act*, RS C 1985, c 3 (2nd Supp).

<sup>6</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

<sup>7</sup> Doris Hilda Anderson (November 10, 1921-March 2, 2007) was a Canadian women's rights activist and journalist. She was the editor of *Chatelaine* from 1957-77, and was appointed Chair of the Canadian Advisory Council on the Status of Women in 1979. She was also the President of the National Action Committee on the Status of Women from 1982-84.

be concerned about the implications of the study while trying to draft one of the most progressive pieces of legislation.

**JFS:** Doris was, first of all, the editor of *Chatelaine* and as you said, the Chair of the Advisory Council. I think they were focused on getting the *Charter* through. It was not a done deal and they figured they didn't need any extra problems. However, as Doris Anderson said, "No one is going to tell women to shut up and go home anymore." It was a very exciting time because it was the first time I was exposed to the power of lobbying. I was teaching for four years at the University of Ottawa and when I came back to Winnipeg in 1982, I started getting calls and faxes from people about mobilizing; it was very electric. People started saying, "We have got to do something; can you call so-and-so," all the names you have probably heard about now started organizing. There was a huge campaign to get Section 28 passed. By coincidence, I'm organizing a conference right now for 2015 to celebrate the thirtieth anniversary of the passage of Section 15.<sup>8</sup> The passage of the *Charter* was the beginning of many changes.

**RT:** In an interview you did with the Canadian Bar Association, you said that women entering the profession today may not be aware of the struggles of the last generation of women lawyers, to be treated as equals.

**JFS:** Yes. For example, when I went into law school, I did not know of another woman lawyer. When I graduated, the only woman lawyer I knew in Manitoba was Myrna Bowman.<sup>9</sup> One of the areas that I practiced was family law. When I started practicing, a woman would come in who had been married for thirty years and who had worked equally with her husband and I had to tell her that nothing belonged to her. That the farm, the store, whatever they had worked on: all belonged to him. It was all in his name. You should have seen the look on their faces. For thirty years, they had

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<sup>8</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c11, s 15.

<sup>9</sup> Madam Justice Claudia Myrna Bowman (May 18, 1932-March 25, 2004) was called to the Bar in 1966. She was an active member of the Canadian Bar Association and Manitoba Bar Association. She was a judge of the Court of Queen's Bench for Manitoba, where she served in the Family Division with distinction from 1984 until 2004.

thought they were a joint couple working together, only to lose it all. Having gone through those sorts of experiences led one to become radical. Maybe you wouldn't call it radical, but to lobby for change. So not only was I involved in the lobby with respect to the *Charter*, but then I became a member of the National Board of Directors of LEAF (Women's Legal Education and Action Fund)<sup>10</sup>. I was involved in the passing of the family law legislation in Manitoba. I still remember going to the committee hearings for the passage of the *Marital Property Act*<sup>11</sup> as a part of the delegation from the Family Law subsection of the Canadian Bar Association, the MLAs said to us, "You can't be serious; all the business will leave Manitoba; if we pass this legislation, it will be an economic disaster, and everybody will leave."

**RT:** Today, that would be an absurd statement, at least one made publicly.

**JFS:** They were absolutely serious.

**RT:** Speaking of absurdity, in the early 1990s, the Attorney General of Manitoba stated that there would be more women judges in Manitoba if only there were more qualified women. I'm sure you've had to share this story many times before but I was hoping you'd share it one more time.

**JFS:** I wouldn't be a judge today if not for him (Manitoba Attorney General McCrae)<sup>12</sup>. He was asked why there were not more women judges—and there were very few, only a handful on the Queen's Bench—and he said, "We would appoint more but there are no more qualified women lawyers." That got a few of us riled up. But what was interesting was that it wasn't just the women lawyers who got riled up, it was all the women's organizations. They all coalesced from the Junior League, to the church groups, to the YWCA

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<sup>10</sup> Women's Legal Education and Action Fund (LEAF) was founded on April 17, 1985 to ensure that the rights enshrined in ss. 15 and 28 of the *Charter* are protected.

<sup>11</sup> *Marital Property Act*, S M 1977, c 48; repealed & replaced by S M 1978, c 24. This Act was eventually renamed and recast to include common-law spouses in the *Family Property Act*, S M 2002, c 48, s 16 (CCSM, c F25).

<sup>12</sup> James Collus McCrae is a Manitoban politician and was appointed as Manitoba Attorney General on May 9, 1988. After leaving the assembly, he was elected to Brandon city council from October 2006 to April 2013.

groups, and the Manitoba Advisory Council on the Status of Women: everyone got together to start lobbying. What they did was lobby for the appointment of more women to the bench in general, not necessarily a specific woman. They made up a list of all the women lawyers who were over ten years (which is the requirement for appointment). I got a call one day asking if I would put in an application. What you have to understand is that it never occurred to me that I would be a judge; I was pretty happy being a law professor. I was not political. I never thought I would get appointed. They said it didn't matter, that we just want to create—as Mitt Romney<sup>13</sup> phrased it—binders full of women. We just want to create a number of applications. I agreed, so I put in an application. Women who I knew, many who I didn't know, took my CV; they made sure politicians saw the CV. People wrote letters on my behalf; people wrote letters to emphasize the need for the appointment of more women and what diversity on the bench would mean. Then I got the call and I was the first academic from Manitoba to be appointed to the Bench. I should say that I was still in practice at the time I was appointed. I had been a labour arbitrator for more than ten years. Still, I was the first academic appointed from the law school and I don't think there has been another since then.

**RT:** It must have been quite a feeling; given all the work you and all the women did to lobby the government.

**JFS:** I woke up to Peter Warren<sup>14</sup> telling the world what a ridiculous appointment I was. I was an academic; what did I know about the law?

**RT:** Right... despite the fact that as a professor you spend your time studying, teaching, and analyzing the law. It was your job to critically engage with the law.

**JFS:** Well yes, and as a labour arbitrator I had written many, many decisions. He was entitled to his opinion but I was the subject of his radio show.

**RT:** Did you continue listening to the rest of the show?

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<sup>13</sup> Mitt Romney is an American politician. He was the Republican Party's nominee in the 2012 election for the United States Presidency.

<sup>14</sup> Peter Warren is a Canadian investigative journalist and former talk radio host (1971-98) of the *Action Line* morning talk show on CJOB.

**JFS:** No, just the beginning; I'm not that masochistic.

**RT:** On the topic of judicial appointments, in 1988, only seven percent of all federally appointed judges were women. As of July 1<sup>st</sup>, 2014 that number is now roughly thirty-four percent. It is an impressive increase given that it was only twenty-six years. Considering the activism associated with your appointment, would you consider yourself a pioneer, breaking the glass ceiling to allow other women to follow?

**JFS:** I think that we (my colleagues who were appointed at the same time, and I) were viewed as a bit of an anomaly. People were worried about us; we were "the other." The criminal defence bar was worried about whether we would be biased against the accused in sexual assault cases. It's funny, but nobody asked whether male judges were biased in favour of the accused in similar cases. There was concern about what we were going to be like. I think that [changed] once they saw that we were just like any other judge, except that we brought a different view point to the bench, which was good for the bench. Over time more women went into law school, more women became senior partners, and so it followed.

**RT:** Do you think the long-term trend is towards equality on the bench?

**JFS:** Well I think you have read the same articles that I have. In the last five years, there has been a decrease in the appointment of women to the bench. I think that it is something that always has to be fought for. The bench is better for a diversity of views. That includes people of visible minorities and different ethnic backgrounds, as well as women. You have to go out looking for those candidates and you have to keep on lobbying in favour of diversity. As you can see, as soon as we slack off a little, the numbers drop. The general decrease in the number of women is unfortunate.

**RT:** Right, the pattern is trending in the wrong direction. Have you seen an increase in ethnic diversity on the bench, at least in Manitoba?

**JFS:** Yes, certainly on the provincial court. I was appointed in 1995, so yes, I have seen an increase but I would like to see more. We all bring our backgrounds with us. I have had experiences that I can share with my

colleagues or I view things differently and people from different visible minorities and backgrounds would be the same. It's not so much anything that I might write but it is part of the discussion with my colleagues.

**RT:** Right, and Canada itself has changed over the years and its judiciary should reflect those cultural, social, and ethnic changes.

**JFS:** Absolutely and especially in Manitoba. The representation of First Nations and Métis is especially important on the bench.

**RT:** And it's important we continue to see a rise in the number of First Nations and Metis students enrolling in the law school. The first female Aboriginal lawyer graduated eighty years after the first woman. There are obviously a number of historical reasons for this.

**JFS:** And financial.

**RT:** Yes, and I think that is one of the problems as tuition increases. We are facing a potential \$6,000 increase per year at Robson Hall. This affects access to justice and education, and we may never know who decided against applying because of financial exclusion, but it is something that we should turn our minds towards, something we should be concerned with.

**JFS:** Well if the scholarships, bursaries, and loans that are available increase at the same rate as tuition, then I have no problem with it. It was one of the things that I saw when I was Associate Dean. The people who can afford will pay, but let's make sure we have a commensurate rise in the scholarships. That is a problem with access to justice that I see. Only the rich can afford to go to law school in the United States, for example.

**RT:** Right, and of course proponents of the increase will argue that application rates will not drop as a result of a tuition increase. Last year, placement rates were one in ten. Although, it could have the result of skewing the profession back to what it was, a profession of the privileged. Looking at the profession itself: what were the barriers that women faced when they entered the profession when you finished law school?

**JFS:** First of all, we used to have articling interviews right at the law school. I was in the top ten academically and it would be quite common for all the top firms to give interviews to all the top ten and that was not the case for me. I was not given interviews at some of the firms. Some of the firms that did offer me a job, did so because I was a woman. They said, "Oh, so you will be our first woman." Certainly, in the articling interviews, there were lots of questions about birth control pills: "Was I using them," "Did I intend to get married." They didn't want to spend money training me if I was going to leave them and get pregnant. It's interesting because men leave firms for all sorts of reasons but it was the women who were questioned about their commitment.

**RT:** While they are not allowed today, I know that it is still a concern, even if the questions can no longer be asked.

**JFS:** The truth is that right across the country, women are leaving private practice at much greater numbers than men. Women are fifty percent of most law schools; they get the jobs at this point when they are young and they work for a couple of years but then the statistics skew. With the first child, many continue to work in private practice but once the second child comes along, they may decide it is too much. If you look at partnerships, the numbers are skewed significantly. Then, if you take a look at in-house counsel, you see the percentages are heavily favoured towards women.

**RT:** I can only guess, but I imagine the numbers of law firms made up exclusively of women are extremely low.

**JFS:** Even if you look at the number of senior practitioners in Manitoba who are women, there are not too many. For a long time I thought that the influx of women into private practice would change the nature of private practice. I thought that, for example, in family law they would practice job-sharing or reduced workweeks; bring in social workers and mediators; change the nature of the practice. Yet, that is not what I saw. What I saw were women trying to act like men but with the added burden of trying to raise a family. Given the nature of work when you are a young lawyer in private practice, they burned out. But you know, in the last few years I actually see the whole issue a little differently. I don't think this is a

sustainable for men or women. I no longer see it as an issue of gender. I think that the nature of private practice is simply not a sustainable lifestyle.

**RT:** There has been, or at least there seems to be, a generational change in attitude. I don't know how many of us are keen on working a seventy-hour workweek. Just in case my future employer reads this, I will be pretend that a seventy-hour workweek is exactly what I am looking for. To your point though, I think that private practice has not accommodated for—that's actually the wrong word—private practice has not *adjusted* to broader changes.

**JFS:** Well exactly. The emphasis used to be about accommodating women in legal practice. So let's give them maternity leave; let's do reduced workweek. To keep women, we have to accommodate them. What I say is, you don't have to accommodate women; you have to accommodate men and women. You need to change practice itself. The whole nature of legal practice is changing. People don't want to pay high legal fees. The number of unrepresented litigants has soared. Heenan Blaikie<sup>15</sup> has collapsed. I don't know where legal practice is going but it is going to be different.

**RT:** Which is why I think there is opportunity in the articling crisis that is happening in Ontario and to a lesser degree elsewhere in Canada. There is a glut of students, potential lawyers who can't access articling positions, who as a result can't practice at the same time that people cannot afford lawyer fees for when they go to court. It would seem that basic rules of supply and demand could lead down a path where the lawyers are able to attain the work-life balance they want while providing legal fees at a price that a much broader part of society can afford.

**JFS:** Yes, you could see more boutique law firms, and unbundling of services. In London, there are lawyers who are drafting wills in a drug store. The employer is the drug store. I'm not sure that's a model I think we should adopt; all I know is that we better start being a little more creative about the structures in which we provide legal services or else the rest of the world is going to do it for us. Now, lawyers are going to have to adjust their

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<sup>15</sup> Heenan Blaikie LLP is a now defunct Canadian law firm, which closed on February 28, 2014. It practiced business, labour and employment, litigation, tax, entertainment, and intellectual property law.

expectations. You are not going to end up making a half-million a year or something, but you will be able to see your children. Many of the men who I know who are grandfathers now were not around for their children when they were growing up. It is really quite sad to see the joy which they take spending time with their grandchildren. They say to me, “I want to spend time with my grandchildren because I never got time to spend with my children” because they were at the firm. That’s time you cannot get back.

### III. LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT

**RT:** What other changes do you see going forward?

**JFS:** One of the major changes I have seen is the way that young lawyers are mentored. The way we used to learn was we used to carry people’s briefcases. I articulated with Charlie Huband<sup>16</sup>, who is still one of the best litigation lawyers I have ever seen. I would just follow him around, sit beside him, and listen to a case being put in. That’s how you would learn. A senior lawyer would come to a case with a junior lawyer beside them. Sometimes, the senior lawyer would say to the junior, “You take this witness” and that’s how you used to learn. Today, it is very rare to see a second chair because you can’t afford it. The clients won’t pay for it. So how does one learn? They send you off and tell you what to do and you discover it yourself. A lot of the work, such as putting together affidavits of documents or discovery is now outsourced. On the bench today, we see young lawyers by themselves in situations where they should not be by themselves, where they have never watched it being done before. That’s been a change over the last few years.

**RT:** That’s an interesting thing to hear because one of the complaints the Law Society and law firms level against the university is that students are not graduating practice-ready. Law schools should be picking up the bill and be much more active in training.

**JFS:** The academy and the profession have long had an argument between them over whether law is a trade or a profession. I think this is a false dichotomy. If you are training a doctor, you would never graduate a doctor

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<sup>16</sup> Charles Huband, sessional lecturer 1956 to early 2000s. He was a judge of the Manitoba Court of Appeal from 1979 to 2007, and currently practices at Taylor McCaffrey. For his interview, please see page xxiii of this issue.

who had never touched a patient. Think of the teaching of the law of contracts; you are not going to have any other opportunity in your career to learn the foundational principles anywhere else. You don't have time in practice. Your law school should spend a lot of time teaching you foundational principles, and professionalism. At the same time, you need to learn how to draft a contract as well as the principles of the formation of a contract. I don't see why you can't do the two of them together.

**RT:** I agree that there should be a balancing of the theory of the law and actually getting down to writing a contract.

**JFS:** When you learned contracts, did anyone show you a contract?

**RT:** Not once. In trust law, we never drafted a trust.

**JFS:** You know the first thing that medical students do is that they are given a cadaver, right?

**RT:** Yeah, you have to know and understand the subject matter with which you are engaging.

**JFS:** I don't understand why the legal profession is so focused on this separation instead of integration.

**RT:** One of the potential stumbling blocks to integrative learning is that most new professors now hold a Ph.D. and have very little practice experience. This is probably mostly to do with the high level of competition for professorial jobs, but where we are going is towards a faculty that is primarily concerned with research. I think that will be problematic for a balanced education.

**JFS:** In fact, I don't have a Ph.D. When I was hired to teach in Ottawa, all you needed was a Master's of Law. Very few professors had a Ph.D.; Bryan Schwartz<sup>17</sup> was one of the few. Many of us had practiced. I know that it is very difficult when you are hired as an academic; in order to get tenure, the

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<sup>17</sup> Bryan P. Schwartz, Robson Hall faculty, 1981-present.

research aspect of the job is primary. It's "publish or perish." You are spending a lot of time on your research as opposed to your teaching.

**RT:** It's an unfortunate system where the education of students, what appears on the surface to be the *raison d'être* of an educational institution, falls secondary to research and publication.

**JFS:** You could develop different tracks. It seems to me that if you want to develop a clinical program or experiential learning, then you could allow for a tenured track position for clinical professors who wouldn't necessarily be evaluated on their research, but rather on their teaching and work in developing programs. You know, when I was a young professor, there was a Canadian law teaching clinic so that the teaching of law was valued. I don't know if there is such a thing anymore.

**RT:** I don't think the great teaching skills are sufficiently valued anywhere in academia.

**JFS:** I've often found it amusing that to teach kindergarten you need to have an education degree, but for university we just pick anybody and assume that they can teach. You've had a wide variety of professors; you know that is not true.

**RT:** Absolutely, I've had professors who've been at the top of their field but can't teach and others who are great instructors and somehow can't secure tenure. Returning to the issue of preparedness for practice: when you graduated from law school, did you feel ready for the practice of law?

**JFS:** No, not at all. Fortunately I was in a firm (Richardson & Company)<sup>18</sup> that mentored their students. For my articling year, part of my responsibility was to watch. I was taken along to everything where I sat and observed. Very slowly I was given work to do. My firm allowed me to take legal aid certificates, not because they wanted legal aid but because it would be small pieces for me to do. I used to be duty counsel at legal aid; I did speak at sentences; I took family law certificates; all of those kinds of things. It

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<sup>18</sup> Richardson & Co. merged with McCaffrey Akman Carr Starr and Prober in 1979. Later, this company merged with Brazzell & Co. in 1980 and to Newman MacLean in 1991 to form Taylor McCaffrey LLP.

allowed me to learn gradually. I still remember a six-week trial on a personal injury matter where Charlie Huband was counsel and there were seven or eight lawyers and my job was to show up every day and watch. I learned a great deal.

**RT:** That commitment to training by the firm is incredibly valuable and as you said before, something young lawyers aren't getting.

**JFS:** The other thing that I see is an abandonment by the law societies of their responsibility towards training. In 1989, I was hired by the Law Society of Manitoba to redo their Bar Admission Course. When I came in, students would show up on Fridays and they would have a day of lectures and I was to remodel it to be a skills-training course. As I developed, the students developed their skills in small seminars, practiced those skills, and then received feedback. We would give them a whole set of materials and precedents, drafting, etc., so it was a combination of some content they had not received but in the form of skills-training. We were not alone in Manitoba. Other provinces were doing this as well. Today, this is being dropped. It is mostly a computer-based course. For some skills this is good. For example, for drafting documents, students are given a fact scenario where they draft and send it in. The draft is reviewed and comments are provided. But students no longer have the opportunity to come together and learn from each other in the same way.

**RT:** Then the long-term effects are negative for the profession as a whole, as those skills that were the industry standard are not passed on. Speaking of training, I wanted to get your opinion on the matter of mandatory classes. Robson Hall makes fifty-seven of the ninety-four credits mandatory, which is higher than most schools, although it appears that recent reform efforts by the Federation of Law Societies will see an increase in mandatories at other schools.

**JFS:** I think that just confirms that Manitoba was right all along.

**RT:** Absolutely, like we are with most things.

**JFS:** As a law student, you don't know right now what you need to know in the future. You get a general licence. The day that they start giving

specialized licences to lawyers then I am fine with having fewer mandatory classes. Yet, so long as you continue to get a general licence, and you can hang your shingle and take anything that comes through the door to pay the rent, then I think those classes need to be mandatory. A law student doesn't realize right now, but a simple divorce problem that walks through the door may have aspects of tax, trusts, wills—all sorts of things. People don't come in categories. So I am very much in favour of mandatory courses.

**RT:** On the first day of Family Law, I remember learning that even if you have no interest in practising family law, say your interests lay in business law, there will be overlap and you need to be able to turn your mind to those legal issues. I think being able to understand how issues overlap and how different areas of the law intersect is especially important considering we are taught classes as silos of subject matters. Maybe by third year there could be more of a focus on how they overlap, but given that we are not there yet, a good balance of courses should let us come to an understanding of how they overlap on our own.

**JFS:** I think you have to be taught in silos in first and second year to some extent because you need to learn those foundational aspects, with the practical exceptions that we have discussed. I think third year law could be very different than it is now. I know that the University of Victoria has a co-op program that would be very interesting. I think you really could use third year for a lot more integration. Most of the third year law students I know are pretty bored by the time second term of third year comes along.

**RT:** I know for myself I've tried to get into as many clinical classes as possible to try to use third year as a stepping-stone to articling instead of an extension of what I have already been doing.

**JFS:** We could do a lot better for our third year students.

**RT:** One of the standout programs of Robson Hall is the first year judge shadowing program. Getting out of the classroom and into the courtroom in first year was great for putting some context to what we were learning.

**JFS:** That sort of opportunity is not just limited to the courthouse. There are lots of areas of law where lawyers never touch the courthouse and that's

what I mean by doing more in third year. You could place students in all sorts of internships for short periods of time so they could use some of their skills and see what it is like. Third year really has the opportunity to be quite an exciting year. Most students who enter law school intend to practice law. They may not all go on to do so or stay in the profession but that is their intent.

#### IV. COMMUNITY INVOLVEMENT

**RT:** You are on the board of the Canadian branch of the International Association of Women Judges<sup>19</sup>. I was hoping you could speak a little about your involvement with the organization and what the organization does.

**JFS:** The International Association of Women Judges unites women judges from diverse legal-judicial systems who share a commitment to equality and the rule of law. It has a number of goals. One of them is to increase the representation of women judges in all countries; second, to support those judges; and thirdly to deal with issues relating to women and girls in the justice system. I don't want to minimize any of the gender issues that arise in North America, but in May [2014], I just came back from a meeting in Arusha, Tanzania. Having the opportunity to talk to women judges from Nigeria who were trying to get their government to take some active role to find the 200 missing school girls who were just abducted, or to women in some Muslim countries where they have no property rights or have no custody rights, one begins to realize the magnitude of the problem. It seems to me that I am a very privileged white woman. If I can do something to help, then I should. Our organization has developed three programs. One is called the Jurisprudence of Equality Program. It is a program that discusses equality jurisprudence with both men and women judges. For example, I remember one African woman judge who had a case where a husband wanted a divorce because his wife had AIDS. She had been kicked out of the property. She had no access to her children, no money, nothing. On the basis of customary law, there would be nothing that she could do but this woman judge had attended the conference and used those

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<sup>19</sup> "The International Association of Women Judges (IAWJ) is a non-profit, non-governmental organization whose members represent all levels of the judiciary in over 75 countries/ areas worldwide and share a commitment to equal justice and the rule of law." Excerpted from their website: <<http://www.iawj.org/>>.

principles to write a ground-breaking decision that although the man was entitled to a divorce, the woman was entitled to support and some property division. Let me give you one more example. In many African countries, the courts that deal with family matters are the customary courts. Often there is a legal court that follows a civil or common law system and there are the customary courts that operate in the villages. In Tanzania, those courts are run by women elders; they are called Mothers. When a woman is raped, these Mothers felt that the remedy would be for the woman to marry the rapist. The reasoning was that no one would want her, and she would be taken care of this way. The organization brought in African women judges who had gone through training and law school, and brought them together with the Mothers; they had a conversation about the nature of sexual assault and why this was not a good thing to do. The Mothers gradually accepted that they were wrong and there were other things that could be done. This is an example of women who are in positions of privilege and power gathering together trying to help their sisters.

**RT:** What I like about the organization and the programs you mentioned is that it is not top-down in the way that it is advocating for the removal of customary courts or trying to impose their values on the customary courts.

**JFS:** Right, it's a conversation. We talk about access to justice in Canada. Customary courts are a way for people who couldn't otherwise access the court system to have access to justice. It is also respectful of the fact that there are sixty-eight countries that each have their own culture and way of doing things. All we are saying is that women and girls have traditionally been in a secondary position and some of those ideas have to be changed.

**RT:** One of the reasons why I wanted to discuss your involvement with the organization is not only that I was fascinated with the work that it does but I wanted to highlight some of the things that can be done with a law degree. In this edition, we will have interviews with recent graduates and current students. When you ask current students what they plan on doing with their degree, rarely does a particular cause jump to the forefront of the conversation. Yet, when asked about their law school experience, most speak of their work—for example, with legal aid or the community outreach program. It's important to note that these can be life-long projects and causes.

**JFS:** One of the reasons why I am in love with the law is that you don't have to practice law in a traditional sense. I have many colleagues and friends who are doing a wide variety of things. What a law degree gives you is an analytical way of thinking. You can, as a result of your three years of legal training, read vast amounts of material, select the salient points and put them into an organized fashion. You are accustomed to getting to the heart of the matter. You are familiar with time management, or you wouldn't have been able to make it through first and second year. I don't think you realize all the skills you are accumulating. And lastly, and most importantly, you are learning how to lubricate the wheels of society. You understand how government works, how courts work. You understand how to problem solve. It may not be a legal solution, but the skills that you have learnt at law school will help people solve problems. Those are very valuable skills.

## V. CONCLUSION

**RT:** I have one last question. Looking back now on everything that you have accomplished, would you mind sharing a few examples of what you are most proud of?

**JFS:** Well first of all, my greatest accomplishment is my children, my son and my daughter. I know that may be a cliché but we talked about the balance between work and life and I would have to say that, that is who I am most proud of. Besides that, there are two things. In this job people think judges can do anything they want. They can't. There have been many times when I have had to follow the law instead of justice. However, there have been some occasions when I could give someone a break who I thought deserved a break. That comes up primarily in sentencing which I find to be the most difficult area. I like to think that there are a few people out there that I gave a break to. Lastly, I would say the most satisfying area in a larger perspective has been my work with women: women lawyers, women law students, and the change that I have seen in the last forty years. When I started with Richardson & Company in 1975, I went down to the reception area to greet my first client and he looked me up and down and said to me, "You don't look like a lawyer." That would be different now. I think I may have had a little something to do with that change and I'm proud of that.

**RT:** Thank you.



# Interview with Lee Stuesser\*

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B R Y A N P . S C H W A R T Z

## I. INTRODUCTION

**Bryan P. Schwartz (BPS):** About forty to fifty years ago there was the first great transition, from practice being physically downtown and taught by guys in practice, to the academy. Now it looks as though there is a lot of pressure – which incidentally I agree with, but that’s not the point – that we went too far in the purely academic direction, and should move more towards the professional direction. So is the pendulum going to move back to some extent? And of course, your program at Lakehead<sup>1</sup> is the one that’s moved farthest in that direction so far.

Theoretically, if we were to move in the Lakehead direction, what would we actually have to do? Not in excruciating detail, but just a broad understanding of what we do, which I think is a lot less than people think. I think people have the idea that your model is much more radical than it is, but I think for our school, it’s surprisingly incremental.

We’ll start this off by tracing your own odyssey through here. To begin in primordial times, Lee, you were in education before you came to law school. So were you actually a practising teacher?

**Lee Stuesser (LS):** Yup. I taught high school Geography and History for two years. I have an education degree.

**BPS:** And what would make an individual, who is interested in teaching younger people, interested in all of a sudden going to law school? Did you want to be a practitioner or did you want to teach law?

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\* Interview conducted by Bryan P. Schwartz. Lee Stuesser, Robson Hall faculty 1988-2008, Lakehead University Dean 2012-2015.

<sup>1</sup> Lakehead University’s Bora Laskin Law School opened in 2013 in Thunder Bay, Ontario.

**LS:** I wanted to be a practitioner, as I think most students did, but I was at a time of declining enrolment in Ontario. So the basic reality was, yes, I was very fortunate to get a job. Very fortunate. But when you start looking at the realities, it doesn't look good. We were north of Toronto by about 100 miles. We looked at the situation and said, "Well, let's write the LSAT."

So you write the LSAT and, ok, you did pretty well. Then you start thinking about it and think, "Well, do you want to be a teacher for the rest of your days?" And yes, it was fun with the students, etc. But I'll give law a try. So that's basically the story. Did I have an idea that I would be a law teacher? No, not at all. Unlike other people who went in, I think I had a better idea, because I knew I liked criminal law. So I went in to be a practitioner.

**BPS:** So how did you know you wanted to do criminal law? What exposed you to it?

**LS:** If I was reading any novels or anything, it was always criminal-related. Fortunately I was a little older. I don't know how old I would have been when I went into law, probably 26 or 27? So you reach a certain stage where I knew that I didn't want tax, I knew I didn't want family, but criminal was always an area that interested me. I was in an era where —some of you at this table will remember Perry Mason<sup>2</sup> and that type of thing — where he was helping the innocent who were always charged with murder, and it was amazing how many people were charged.

**BPS:** And always the wrong guy! Amazingly, the guilty guy is always somebody who testifies briefly earlier in the trial.

**LS:** And I always wanted to be the defense, because if any of you recall from the Perry Mason days, Berger, the prosecutor, was always a really obnoxious character. He was the bad guy.

**BPS:** I think you mean Burger.

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<sup>2</sup> Perry Mason is a fictional criminal defense lawyer who is the main character in works of detective fiction written by Erle Stanley Gardner.

**LS:** Yes, Burger. So I always wanted to be the defense counsel. But that's just the impressions that you get with things.

**BPS:** So any particular reason you came to U of M law school?

**LS:** Because I was from Manitoba, but also from Saskatchewan, I only applied to Manitoba and Saskatchewan. I figured my marks were pretty good and the LSAT was pretty good, so I would get in, it was just a question of where I wanted to go.

**BPS:** So that would have been class of...?

**LS:** We were the class of '84. So '81.

**BPS:** Unfortunately for you, you got to be one of the first students I ever taught!

**LS:** That's right! I think it was your first year of teaching!

**BPS:** I just want you to know that I got better over the years.

**LS:** You were good then!

**BPS:** So impressions of the law school at the time: did you have a sense of the balance we were supposed to have between academic and practical, clinical and legal writing skills? Or did you just go with the flow?

**LS:** I think most students don't have any idea of this whole notion of practical versus theory. Is it overwhelming in first year? You know, we had some practical exercises, and some of them didn't seem to make too much sense. I think they just did them for the sake of doing them. I think the one interesting thing – because of my teaching background – I would sit in class and I would watch the teachers. I could critique them; I could see who was better at teaching.

But I must say, I think we had some really good teachers. You know, you were starting out, but we had some very experienced ones – Phil

Osborne<sup>3</sup> comes to mind; there's no doubt about that. I mean, he was always great back then. Nemiroff<sup>4</sup> was always terrifying, but good.

**BPS:** He was “Scary Gerry.”

**LS:** Yes, he was. But you know, I learned enough to realize that his bark was worse than his bite and basically he had little time for people who weren't prepared. So I would always prepare for his class.

**BPS:** He taught Insurance, right?

**LS:** No, I missed him for that. I had him for Automobile Insurance. He was on leave for that time, but I had him for another course.

**BPS:** Because you taught Insurance at Ottawa, right?

**LS:** Yes, and I used a lot of his approach.

**BPS:** I'll throw out a few names of people we've actually interviewed: Jack London<sup>5</sup>...

**LS:** Jack taught Tax, and was good. Jack, I think, was more of a policy kind of person. He was tax airy-fairy in a way, but he made Tax half-decently interesting, which is, you know, something.

**BPS:** And you had John Irvine,<sup>6</sup> way back then?

**LS:** Oh yeah. And John was a story-teller. One of the things that you see when you look at education, you are told, “You need to teach like this.” I mean, this day and age, we always have learning outcomes and all that kind of stuff, and everyone has to go the same way. But you start looking at the

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<sup>3</sup> Phil Osborne, Robson Hall faculty 1971-2012. He is a Senior Scholar.

<sup>4</sup> Gerald Nemiroff, Robson Hall faculty, 1968-2008. For his interview, please see page 135 of this issue.

<sup>5</sup> Jack London, Robson Hall faculty, 1971-88, 1990-94; former Dean of Law at the University of Manitoba; now senior counsel at Pitblado Law. For his interview, please see page 191 of this issue.

<sup>6</sup> John Irvine, Robson Hall faculty, 1970-Present.

faculty and how they teach differently, they can be equally as effective in so many different ways.

You know, everyone in this day and age wants to do PowerPoint. I have to do PowerPoint. But you know, some of the best teachers I've seen don't use PowerPoint at all. The longer I've taught, the less PowerPoint I use. So it's an interesting transition, but John was a story-teller. And what he would do was come in, of course, from the farm, so the manure would be cleared off at the door. But he would come in and he'd start telling the stories, and you'd learn through stories.

**BPS:** And it's funny, because for most of us, the manure starts at the door!

## II. REFLECTIONS

**BPS:** One figure I can't interview, tragically, was a mainstay player all those years ago, Butch Nepon.<sup>7</sup> Do you have any recollections of him?

**LS:** Well, I worked with him—and you obviously worked with him, too—Butch was very earnest. He had so many ideas going on in his head, I think one of the problems was getting them translated into simple terms for students at times. So I think, sometimes there was so much going on, it was like, “Butch, give your head a shake. What are you trying to say to the students?” But you know, the thing was, most of the people that I recall, at least as students, they were all committed people. They were here; they were available for you. They had different styles, different personalities; but I think it's fair to say that they were dedicated academics.

**BPS:** And by academics, you mean teachers?

**LS:** Teachers, yes, but scholars as well... in different ways. Gerry, for example, was interesting; he didn't write very much but he knew his subject thoroughly. Trevor Anderson<sup>8</sup> never really wrote very much, but Trevor knew so much and, of course, would give us all so much photocopying over the years on things. Sometimes people write and it doesn't make them a scholar; sometimes people don't have to write and they're a scholar. I think

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<sup>7</sup> Butch Nepon, Robson Hall faculty 1969-1998.

<sup>8</sup> Trevor Anderson, Robson Hall faculty, 1971-2007. He is a Senior Scholar.

we had a couple of those. Trevor, I would say, would be a scholar. Gerry was a scholar as well.

**BPS:** Transitioning a bit towards your thoughts on academic freedom, my understanding has been that the institution can designate what subject areas you have to cover and there's a lot of freedom for the individual professor to determine how to present that. As somebody who engaged, throughout his career, in many agonizing fights for academic freedom— including being a leader of the '95 Strike<sup>9</sup>—I never quite understood the concept that academic freedom included subject area coverage. What is your opinion on this?

**LS:** We actually had this debate recently on an issue with Criminal Law and Procedure.

**BPS:** What was the issue?

**LS:** Well, the issue is do you teach the course: Criminal Law and Procedure. Well, criminal procedure is a large area, plus a substantive criminal law. And, of course, Barney<sup>10</sup> did a good job and wanted to do substantive criminal law. In other words...

**BPS:** What are the offenses and the defenses that are available?

**LS:** Yeah. *Mens rea*, *actus reus*, defenses and such; whereas I took the view that we should do both and divide it up. We had five credit hours, so two hours would be devoted to criminal procedure and three to the substantive law. And we couldn't resolve it! Barney didn't feel comfortable with criminal procedure; maybe the ideal was that we should have divided the course into two and had the criminal procedure people teach procedure. And keep in mind this isn't a full-bore course into criminal procedure, it's

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<sup>9</sup> The University of Manitoba Faculty Association, the certified bargaining agent for over 1,100 full-time faculty members and professional librarians at the University of Manitoba, began a legal strike on October 18, 1995. The 23 day strike was one of the longest in Canadian University history and was triggered due to an attack on both academic freedom and tenure.

<sup>10</sup> Barney T. Sneiderman, Robson Hall faculty 1971-2007.

an introduction to procedure, but the whole point is—and we see in the NCA<sup>11</sup> (National Committee of Accreditation) for example—they have Criminal Law and Procedure. That’s the requirement they were forcing students from other countries to come and have both criminal procedure and substantive criminal law.

**BPS:** I just had this vision in my mind of someone who goes into court and says—when they call judges now, you don’t say, “M’lord or M’lady” anymore...

**LS:** Your Honour.

**BPS:** Someone just going in and saying, “Your Honour, I’ve got a heck of an argument to make, but I don’t know when to make it.”

**LS:** Or how.

**BPS:** “...or how to make it, because I just took law, but not... procedure.”

**LS:** “Just give me a nod when it’s ok, Your Honour.” (Laughs) But that’s a classic example, isn’t it? If that’s an issue of subject control, then we didn’t resolve it. That often happens, because you want to defend the way that you do it and I wouldn’t want, for example, Barney to teach Procedure. The idea would be that someone else would come in and assist with that.

**BPS:** Lee, traditionally, we law professors are not taught how to teach. The theory seems to be that if you know enough about an area to have—well, to get to be a prof, you must have studied from other people for many years and seen how they do it; you must have acquired a substantial expertise in that area; you now require at least an LL.M. and *de facto* we often seem to

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<sup>11</sup> National Committee on Accreditation (NCA) is a standing committee of the Federation of Law Societies of Canada. “The NCA applies a uniform standard on a national basis so that applicants with common law qualifications obtained outside of Canada or with civil law training in Canada do not need to satisfy different entrance standards to practise law in the different provinces and territories of Canada.” More information can be found on their website: <<http://flsc.ca/national-committee-on-accreditation-nca/about-the-nca/>>.

require a doctorate. But the assumption is then that how you teach is something that can be left entirely to your judgment.

There's another school of thought that is very heavy on teaching method, that there are universal skills that can be applied across the board. Any views, especially as a former professional teacher in the secondary school system, on whether teaching can be taught? Are there skills that everybody should at least have some exposure to, given some material which suggests how to do it? Or is this something that is more safely left to individual judgment?

**LS:** You know it's interesting, because what's happening in Ontario now is that they've done away with the one-year accreditation that you can take, get an honours in physics or whatever you want and then take a one-year Bachelor of Education program. It's now two years. My own view was, you know, going back to George Bernard Shaw:<sup>12</sup> "Those who can't do, teach" and I added on, after being at Teacher's College: "Those who can't teach, end up teaching teachers."

I found that a lot of the educational stuff is something that is basic common sense, but I would not want to impose upon people a formal teaching requirement of a substantial length of time. What could be of value would be a teaching boot camp for all of the new instructors coming in.

There are certain fundamentals about course planning, course outlines, learning objectives. You know, we learn that just by talking to other people and watching and seeing. That would be the extent that I would say in academia that we should impose. The biggest issue on the teaching part is does the University take teaching seriously. They all say they do, but I have real doubts about that, that they actually do place a high weight upon teaching and that's probably a later discussion, but it's certainly an issue.

**BPS:** Certainly a theme that we've explored throughout these interviews and we will definitely come back to it.

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<sup>12</sup> George Bernard Shaw (1856-1950) was an Irish playwright, critic and polemicist who became one of the leading dramatists of his generation.

### III. PURSUING A MASTERS / LEGAL SCHOLARSHIP

**BPS:** So you were the gold medalist at Robson Hall Law School, did you go on and do your Master's directly after that?

**LS:** I'm trying to think. No, I was articling. Then I had abridged articles at Myers Weinberg.<sup>13</sup> But I had worked there for two summers as well, fortunately. So during the articling year, I applied to Harvard.

**BPS:** So what happened during articling that made you want to apply? Was that another "I'll see how it goes"?

**LS:** Yes. We'd been to Boston; always liked Boston. No offense to Yale, but you know, who'd want to be in New Haven versus Boston? Especially when you can go to Fenway<sup>14</sup> and such...

**BPS:** Well...when I went, you got the extra adrenaline rush of never knowing when you were going to be murdered! (Laughs)

**LS:** Exactly.

**BPS:** I don't know if you got that rush in Boston.

**LS:** Certainly in areas of Boston.

**BPS:** At a very primal level, I used to see police inside the gated community at Yale and I would always wonder what they were doing inside the gate because we weren't doing anything and I think they were there for protection. It's rough outside!

**LS:** It was one of those ones where—and obviously I'd done well in law school and I was enjoying working with the people at Myers Weinberg—

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<sup>13</sup> Myers Weinberg LLP is a Winnipeg law firm that provides a full range of legal services.

<sup>14</sup> Fenway Park, home of the Boston Red Sox.

Hymie Weinstein,<sup>15</sup> Rocky Pollack<sup>16</sup>—just great criminal lawyers, great people. The whole firm was great people. But you say to yourself, “You know, there’s a chance to give it a go.” Was there any long-term plan? No. The dollar at the time was 62¢ USD, so...

**BPS:** We’re getting back there!

**LS:** I know. So it was costly, but the wife and I talked about it and we had a child at that time! And a dog! So when we went to Boston, we couldn’t stay near Harvard, because we had a big dog. So I flipped a coin: Cape Ann or Cape Cod.<sup>17</sup> Came up Cape Ann, so I figured, there’s cottage communities. The first place I saw in Cape Ann belonged to teachers going on leave, so we ended up with a beautiful place in Danvers, Massachusetts,<sup>18</sup> and drove into Boston. There wasn’t a plan. When I was at Harvard and talking to the people in Ontario in particular, how naïve a prairie boy I must have appeared! There was myself and a couple from Saskatchewan. The Ontario students had everything planned, from their clerkships at the Supreme Court or Ontario Court of Appeal to this. We had none of that.

**BPS:** Just do it, and then figure out what’ll happen.

**LS:** Yeah!

**BPS:** That’s interesting, because some of our other interviewees have said, at that point, they really weren’t worried about what they would do if it didn’t turn out. How is it different from the students you’ve seen over the last say, ten to fifteen years, because you’ve seen two different provinces, two different continents?

**LS:** They’re planning, that’s for sure. They seem to have a lot more going on. It was expensive to go to Harvard, that’s for sure. But you know, we’d

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<sup>15</sup> Hymie Weinstein is a senior partner in Myers Weinberg LLP, and is the firm’s longest serving member, having joined in 1972.

<sup>16</sup> R.L. (Rocky) Pollack was appointed to the Provincial Court of Manitoba on December 14, 2006.

<sup>17</sup> Cape Ann is located approximately 40 miles northeast of Boston. Cape Cod is approximately 62 miles southeast of Boston.

<sup>18</sup> Danvers, Massachusetts is located approximately 22 miles northeast of Boston.

already moved from Winnipeg to Guelph and then to Midland, Ontario and then back to Winnipeg; so we were used to moving and we said, “Look, we can do this. What will be, will be.” I also had a firm that was very supportive, and said, “We’d love to have you back, but...”

**BPS:** “...Go do it.”

**LS:** Yes, and there’ll always be a place for you, which is great.

**BPS:** A question that I ask a lot of people in these interviews is: if you could start it all over again, would you still end up being a law professor? Now it seems like you would probably have to have a doctorate in most Canadian law schools. Would you have been willing to invest the extra time and so on?

**LS:** No, and I often say that to students who are looking at an LL.M, and I’m not sure if you’ve changed yours from a two-year program, but I just look at them and say, “It’s not worth two years. Go to the United States; go for the nine-month program; get your LL.M.” For a Ph.D. at three years—I mean, I had a Master’s in Arts and I looked at that regime to teach – and I said, “For four years or three years? No.” Especially when you have a law degree and you put it in perspective. I’ve got a family; I’ve got a dog. I could be out earning; I’ve got to pay for these things! So the answer to your question quite simply would have been no, I wouldn’t have.

**BPS:** My sense of you, and a lot of other people from earlier was not only a question of the material cost of doing that, but a certain inclination to be out of the world for a number of years. In those days, we worked in front of word processors and we would have this sort of monkish-existence for a number of years, with an indefinite end termination date, by the way. Work in a very specialized area, doing comprehensive research...I’m not sure a lot of people who wanted to be law teachers—they were probably temperamentally unsuited to that long period of preparation. You’re saying that is probably the case with you?

**LS:** Well, I’d already done a thesis in my Master’s of Arts. I’d done that two year program and I’d done an advance paper at Harvard and I don’t know if it was Attention Deficit Disorder or what, but I really don’t think I could

zone in on something so narrow. Because that's what you have to do with a Ph.D., unfortunately. I would prefer to look at things that interest me.

**BPS:** You know, I've never done a systematic study, but just impressionistically I'm not sure that there's a strong positive correlation between acquiring a doctorate and research productivity once you become an academic. I've tried to ask myself what the causal links might be because you would think someone who has put that extra time into becoming a scholar would, on average, be likely to be a very productive scholar. One of my speculations is that there may be some actually surprisingly counter-intuitive effects here.

A Master's is a result-oriented project, right? I take my courses, do my fairly short thesis and then I'm done. The doctoral thesis encourages you to work with a rolling time horizon, to have a very extensive deliverable, and to adopt a certain perfectionist approach—I need to check out everything; I have to examine literature exhaustively; I have to consider everything—and maybe to some extent, it makes you have a lesser sense of urgency in getting deliverables out the door, a certain perfectionism that may inhibit you being productive. There's always a balance between the ideal and the good. Is this making any sense to you?

**LS:** It does. I find sometimes, with the younger scholars, they keep talking about research agendas and I don't know about you or other people, but when I came to Robson Hall, I had no research agenda. I said to them I would like to write, but if you're going to tell me what my agenda is for the next three or four years, it won't work. What happens is through your interest in your teaching—I think of courses or some of the other interests that you already had—you start writing and you start growing, because you have the freedom to write.

The first article—or second, or third—I ever wrote was about insurance, because I was teaching Insurance and that's what I found interesting. I actually find that creates a livelier mental set, because you've got the breadth. I see some people that they've researched—and they use it quite often—in their Master's and then they've built on their Master's into their Ph.D. in the same area and then I'm thinking, "Wow, do you know anything other than"—I mean, the hot topic today is international human rights—"do you know anything other than international human rights?"

**BPS:** I've never thought of it in those terms before, Lee. But if you think of someone who's vested so much of their life and built up such human intellectual capital to do the doctoral program, then to some extent, people come in with that agenda and they're going to keep going with it, and they're also looking to adapt their teaching assignments to the research agenda.

But your story is about someone from perhaps the older school, you came in and it's like, "I'm the new teacher," and they usually give me the courses, pretty much based on what the institution needs, not so much what I'm interested in, and then I do research which is geared to what I'm teaching, and rather than trying to adapt my teaching assignments to what it is I'm researching. I guess your model has some advantages. That was more consistent with my own experience, which is it makes you more likely to fall into teacher-scholar mode.

The reason we had scholars teaching is supposedly—and I believe this is the case if things were working properly—it's better teaching because you had this creative activity and your teaching is also contributing to your scholarship because you're getting this feeling back in the discussions.

**LS:** See, the other problem with the Ph.D. mode and legal education—I think Gerry Nemiroff said it—is that there are too many doctors and not enough lawyers to a certain extent. That's not fair, because there are many very good scholars who are doctors and many good scholars who are not doctors.

One of the problems that happens—and I've been seeing a lot with the younger scholars who have been applying for jobs at Lakehead—is that they get into the Ph.D. program and of course, the graduate programs are all supporting them to conferences, all of them always in the same area. So you're right; by the time they get to the Ph.D., this is where they're at.

They're always committed to that track because they're part of that organization—the example we used earlier was international human rights; so these scholars will join the International Human Rights group—suddenly, it's the one track that they've got. A lot of them, the younger scholars will come in and say, "Well, I'm to be hired as your international human rights expert." And for a small university, you think, "Yeah, that's good...but how about Torts? I need someone to teach that."

**BPS:** Coming off these tracks or staying on these tracks, which there is such an emphasis, institutionally from the Social Sciences and Humanities

Research Council, from universities that tend to assimilate that point of view, that research should be collaborative, and network-based. It's a very different approach because the kind of research you did—and almost everything that I did—was: pick a topic and write something about it. It wasn't: I need to line up a bunch of collaborators. My idea of finding was that I need a student to help me find stuff and citations, but it wasn't working with a whole bunch of other people to get the ideas.

So if you're on that track, you're going to these conferences and you've made your connections, and funding isn't an issue, so you're going to be even more committed to staying in that track.

**LS:** I don't know if the UM has this, but tenure and promotion...is that still internal or does that go to an external committee?

**BPS:** It goes up the chain, but I can't think of a time it went up the chain and wasn't accepted.

**LS:** Ok, see, at Bond,<sup>19</sup> they had developed an extra process, and it wasn't too bad at Bond because the law faculty there was probably one of the strongest and wealthiest faculties, so we had a lot of power in that committee. But when you look at Lakehead or some of the other universities, they've now gone to a centralized model. So there isn't really an internal faculty decision but more so a submission by faculty members to the central body. The question is: who's nominating the central body?

The science and research humanities are almost dictated by the grants, that's their agenda, and it doesn't fit us that well. Scholarship comes in so many different forms, and if you were a person like myself—I think over my thirty years I've had only two or three grants, because I didn't want to spend my time on the grant things; I wanted to do the writing and do whatever I'm going to be doing—then the centralized tenure and promotion, which is dominated by the social and natural sciences, and grants, is forcing law into a mold which isn't comfortable. That's the situation that we are currently experiencing at Lakehead.

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<sup>19</sup> Bond University is a private not-for-profit university located in the suburb of Robina, Gold Coast, Australia.

**BPS:** I think the epitome of what you're talking about, Lee, is the *Arthurs Report*,<sup>20</sup> which, of course, was a report done by a committee that was commissioned by the SSHRC.<sup>21</sup> Basically, it starts off with the question: "Why doesn't legal scholarship look like other scholarship?" All the recommendations are how to make legal scholarship look like other scholarship. That's, I think, representative of how often the institutional framework drives the philosophy or ideology at the law school.

So coming back to your own career track, when you came to the University of Manitoba, what was your sense of what was expected of you? Was it mostly teacher with a little bit of scholarship, 50-50, or "I'm a scholar who does some teaching"?

**LS:** I think the message I got, whether it was right or wrong, was always 40-40-20, with 40% teaching, 40% scholarship and writing, and 20% service. I always thought that was about right. It always felt like you had to do it all. But in terms of the scholarship part, I had a very simple view that I always thought maybe still holds true. I think that if a person in a given year can come up with two good pieces of scholarship—if you keep doing that over the course of thirty years, you've got sixty good pieces of scholarship. One of our standard questions we would ask candidates at Lakehead for hiring was "Out of all your publications, what are you most proud of and why?" Because there are some that we know aren't of the moment, to a certain extent. I mean, they may have been interesting at the time but they didn't really *mean* that much.

So that was the notion that I had. There wasn't an enormous pressure on scholarship, that's for sure. You mentioned the *Arthurs Report*—that was part of the whole idea that law schools have to become university-oriented—we had people, Keith Turner<sup>22</sup> for example; great guy, but I don't think Keith would really write that much. He was pretty much a pure practitioner. So he wouldn't be that comfortable in the scholarship mold. But I came from Ottawa, so I taught in Ottawa first and then came here. I had a

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<sup>20</sup> Harry Arthurs' Law & Learning report of 1983 documented the low productivity of academic legal scholars in Canadian law schools. It recommended creating distinct streams for the academic study of law and professional legal education.

<sup>21</sup> Social Sciences and Humanities Research Council (SSHRC).

<sup>22</sup> Keith Turner, Robson Hall faculty, 1957-65, 1970-87.

recognition that there was a need for scholarship and I was comfortable with it.

**BPS:** Trying to look at scholarship institutionally, one of the things that influences it is who is supporting it, who is sponsoring it, and now increasingly, the law school is embedded in the University, which has its own approach. It has grants, interdisciplinary study and collaboration. Another question I might ask is: who am I writing this for?

**LS:** Exactly.

**BPS:** Who are you writing for?

**LS:** I have no hesitation in saying I don't write for other academics. My audience are judges and lawyers, and if you like, students. That makes it very unattractive to the social sciences. One of the key things that I have—and you may call me naïve and I probably could do this—was when I was starting out and there was a hot topic or case, I could phone up Don Stuart<sup>23</sup> at *Criminal Reports* and say, “Don, this case just came down, are you interested in a case comment?” or something like that. Don would be hitting to the same audience.

So I wasn't fixated on the idea of tailoring my papers to go through peer review. So one of the things that I looked at—because you learn over the years—at Bond, the problem was that we had a narrow definition of what scholarship was, and it was forcing us all into that grant-model. I know at Lakehead, they had a broader view of what scholarship was. My own view is that there is room for all kinds of scholarship, just like there's room for all kinds of teaching, but we shouldn't all be forced under the same mold.

**BPS:** If you look at the giants of Canadian legal scholarship from an earlier time, the ones I think of, the ones that wrote the magisterial textbooks—Waddams on Contracts<sup>24</sup>—if you ask who that's written for, it's written for lawyers and judges. It's not a collaborative project and it's not

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<sup>23</sup> Don Stuart (B.A., LL.B., Dipl. in Criminology, D. Phil.) is the Editor-in-Chief of the *Criminal Reports* and Professor of Law at Queen's University.

<sup>24</sup> Stephen M. Waddams, *The Law of Contracts*, 6<sup>th</sup> ed (Canada Law Book, 2010).

interdisciplinary. I just think it's really good, and very useful to people who are arguing cases and want to know what the law is and make an argument. Hogg on Constitutional Law<sup>25</sup> was written for lawyers, judges, and students; it's not that theoretical, not particularly philosophical. Nowadays though, a young person starting out would say, "Is this really what I want to do?" I've got to get all of my stuff peer reviewed, so they might say, "Well, you're just describing a case and analyzing it; I've got no theory and no interdisciplinary stuff in here."

Is the stuff that is written for the public more respected, or is the stuff written for the academy more respected? My intuitive sense is the message while we are embedded in this institution is primarily you're writing for other scholars, and there may not be the same value put on something that is practitioner or judge-oriented. What do you think?

**LS:** Absolutely. That's one of the things that I was trying to do at Lakehead, is to educate the powers that be that there is a difference, that law is different. If you have someone who is writing to judges and lawyers, don't disparage that and don't look at it as suddenly not worthy. But that's part of why a law faculty needs to continue to emphasize that there is scholarship in many different forms.

I could even go further. If you look at David Paciocco<sup>26</sup> and I when we did our first evidence text, which is now over twenty years ago, our actual audience wasn't judges or lawyers; it was students. What we wanted to do was explain the law of evidence, to show and work with it and try to state the rules in a simple enough way for students to understand.

And then, of course, what happened was that judges and lawyers started picking it up, because now they understand hearsay because we explained it and we showed it. So of course, the text gets thicker and thicker, as we go through, and I think that's valuable because you're actually helping people! But is it valued in the academia and the university? I'm not sure.

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<sup>25</sup> Peter Hogg, *Constitutional Law of Canada*, 5<sup>th</sup> ed (Toronto: Carswell, 2007).

<sup>26</sup> David Paciocco is currently a judge of the Ontario Court of Justice. Before this, he was a professor at the University of Ottawa, and wrote *The Law of Evidence* with Lee Stuesser, which is Canada's leading text in evidentiary law in criminal and civil cases: David M. Paciocco and Lee Stuesser, *The Law of Evidence (Essentials of Canadian Law)*, 7<sup>th</sup> ed (Irwin Law, 2015).

**BPS:** We have had discussions within the faculty about whether everyone should be expected to teach theoretical or empirical perspectives. Now, by the way, I'm all in favour of teaching this way; I think I've done this throughout my career. It seems to me, though, that there is real value in taking things that judges have said or statutes say, and try and organize it and figure out what it's actually saying, and distilling it, and seeing where the contradictions are and that it is a useful contribution to society, in and of itself. But I don't think that's where a lot of the institutional rewards and incentives are right now.

**LS:** No, I would agree with you, and as I say, I'm not disparaging the theory part. Go right ahead! Write to other academics. The theory may, in fact, have major ramifications, but much of it may not, just as many of our other pieces of work which may help in terms of explaining the law, may be valuable, it may not be. But that's a major issue, and we seem to have a younger group coming in who are all heading in that direction. This gets back to the question of where law schools should go. If they are all heading in that direction, what does that do to all of the more practical-oriented subjects?

**BPS:** One of the things, Lee, that I've noticed about your career, is that your texts, the things you've written that have been larger projects, have tended to be cited a lot by judges.

**LS:** Yes.

**BPS:** And I think there's your legitimate argument, saying that judicial citation should count as well as academic citations when you evaluate the impact of the work. So you can substitute proof of impact.

But I'm always curious; when you take on a larger project—and you've done a lot of books: three on advocacy, six or seven on evidence...

**LS:** Oh yeah, but those are all different editions and they don't count.

**BPS:** Yes, but it's one line on a CV, but it's a huge undertaking as opposed to an article that you may be able to pump out in a month or maybe two, if it's a longer one. But those bigger projects, when people look at your CV, look the same. Is that a problem in that we don't value books in the same

way that we value particularly, as we say, the black letter law book that judges pick up because they say, “Ok, I need to enter this question; what do the people who don’t have an interest in this area think that the law is?”

**LS:** You know, it’s a problem, and I’ve seen some of the CVs that the younger people come and show me. I call them bowel movement CVs. We’re training our young academics to write down every...single...thing that they’ve ever done. If they came in and did a guest lecture for you on one topic, suddenly it’s on there. It’s one line, same as the book! They’ve got a successful bowel movement; let’s put it in there! And you end up with a forty-page gobbledegook, and so I try and say, “Narrow it down, and prioritize.”

I’ll look at it, and see, “Oh, look, a peer review,” and then all of a sudden, I’ll see their book, and it’s on page 4! Start with the book! It seems to me that a book is more valuable; it shows that you have got staying power and a long-term thing. I encourage them, too; I say, “Go on CanLii,<sup>27</sup> and QuickLaw,<sup>28</sup> and see if you’ve been cited. And start throwing in the citations.” That will hopefully show somebody that you’re having an impact in the real world.

**BPS:** ...with judges and lawyers and academics.

**LS:** They’re trained that way, the bowel movement way!

**BPS:** Metrics are pretty important. If you look at the apparently now-defunct *Maclean’s* annual rankings...

**LS:** Yeah, I don’t know what happened to that.

**BPS:** My guess was that it was just too expensive to keep doing it for a fairly small audience, because it was a lot of research on their part. But their primary metric, 50% of the value was citation counts, but it had to be a

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<sup>27</sup> Canadian Legal Information Institute (CanLii) is a non-profit organization managed by the Federation of Law Societies of Canada. More information can be found here: <<https://www.canlii.org/en/>>.

<sup>28</sup> QuickLaw is a Canadian electronic legal research database owned and operated by LexisNexis.

periodical article and the only citations that counted were other periodicals. So if you use that metric, somebody like Stephen Waddams is...

**BPS:** ...not that interesting. Phil Osborne, or John Irvine, these major scholars at our place; the other major scholar that I've mentioned before at UT; they actually rarely show up. They're basically invisible, whereas if you wrote a theoretical piece, or even a practical one that is cited by many other people, then the count runs up.

**LS:** We went through that in Australia. Australia has a tendency to adopt the best practice from England, ten years after the fact, when England has realized that their best practice was wrong and have abandoned it. And of course Canada picks up the Australian best practices, and assumes it's the best practice, so now they're about thirty years behind what they should be. When I was at Bond, they had the metrics. They were coming in, and they had their formula, which was citation by others and it creates a game: you cite me, I cite you; the buddy system. Actually, I think it crumbled under its own ineptitude.

**BPS:** What is a citation worth? I mean, you can have a footnote saying this is the literature in the area; here are eight articles. This is the American tradition of extremely extensive citations that even the author may not have read. You can especially run up counts if there is a sense of collegiality, but whether that's a very good proxy for the actual merit or in fact, what's being done is questionable.

**LS:** It's a problem, Bryan, what's occurring because we shouldn't be disparaging black letter law. Black letter law is good because black letter is helping people with the law, applying and understanding the law. You know the interesting thing I find about academia? It's how intolerant academics are. They're probably the most intolerant people. Here we are in a law faculty, which should appreciate diversity and the equality of ideas. But you get someone who disagrees with you and suddenly, it's an era of intolerance. It's my way or no way. And it's amazing how that occurs and you hear that with the theoretician...

**BPS:** ...Your theory is wrong.

**LS:** Yes, or you have to do it this way or you're not a scholar. Of course you have other people saying, "Well, we'd like to do it *this way*," and they disparage the theoreticians, but usually, there's such an enormous intolerance, which is just sad.

**BPS:** Does it also create short-termism, in the sense of citation counts?

**LS:** Well, I used to take great pride in the fact that I was always cited in the dissent of the Supreme Court. Now I'm starting to be cited by the majority, which worries me.

**BPS:** There's a theory that if you live long enough, you will be vindicated; it's at the end of *The Count of Monte Cristo*.<sup>29</sup> All we can do is wait and hope. I don't believe that hope is always realized in the end, so I'm gratified to hear that you've achieved something in your time, but I don't think the world necessarily guarantees it.

#### IV. CAREER AT BOND AND LAKEHEAD UNIVERSITIES

**BPS:** In terms of your career—we're moving way ahead—but when you ran for Dean, I had the sense that people had seen you as the "black letter guy." In your own practice, I think your scholarship was a lot more diverse than that. For example, I remember reading your piece of jury trials,<sup>30</sup> and it was one of the very few pieces, I think, in the *Manitoba Law Journal* that did serious empirical study. But your point, I believe, is not everyone should be doing what Lee Stuesser does, which is basically writing for that teaching, practitioner, and judge audience. It's a valuable thing, but there are other valuable things; so you do your valuable thing, and I will do mine. It takes all kinds was my more benign interpretation of what you were saying.

Now you were a part of the major curriculum reforms that we did at the University of Manitoba law school, were you involved in the time when we did the Osborne-Esau report?<sup>31</sup>

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<sup>29</sup> *The Count of Monte Cristo* is a book written by Alexandre Dumas in 1844. The quote reads as: "...all human wisdom is contained in these two words, 'Wait and Hope.'"

<sup>30</sup> Lee Stuesser, "Lawyers Judge the Jury" (1990) 19:1 Man LJ 52.

<sup>31</sup> 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].

**LS:** No, I was a student. We were beneficiaries of that. We were the last of the large class. We went from 120 to 90 students, and of course, the argument was that it improved the teaching, which really wasn't the case, but it sounded good. So we were just all part of that. But as a student, we didn't realize all of that. Like I don't think any of us realized what was going on. It was a lot of work; it was three or four years to get that so-called balanced curriculum.

**BPS:** So you worked within that framework for about two decades? Eventually you decided to—I think you just did it as a sessional thing—go and teach at Bond University in Australia...

**LS:** Mmhmm.

**BPS:** ...and eventually you moved out there full-time. What caused you to embark on that fresh adventure? The people I've interviewed over the course of these studies have all had remarkably long careers at the same place. You are unusual in that after a couple decades here, you went on to explore a whole other vista. Anything you can share with us about why you ended up there?

**LS:** Let's be honest, when you've been at a place for twenty years as a full professor, it's very difficult to transfer as a full professor, because universities will look at the cheaper option. Why should we be paying Professor Schwartz his professorial salary, plus an incentive for him to move when we can get some entry-level person at half the salary? So a lateral employment transfer is tough, and I think that's why a lot of people after you've been here six or seven years and you're a full professor, you're not attractive.

**BPS:** We don't do that anymore. Six or seven years will not get you a full professorship.

**LS:** When you've reached that full professor level you appreciate it, unless there is some special thing. For example, Evar Oshionebo<sup>32</sup> in the energy

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<sup>32</sup> Evaristus Oshionebo, Professor of law at the University of Calgary. Prior to joining the University of Calgary he was a tenured associate professor at Robson Hall, receiving the University of Manitoba Faculty Association Merit Award for Excellence in teaching.

area—now he wasn't a full professor—but still, you could see his movement there because of his special niche. My area, criminal law, was frankly a dime a dozen. There are a lot of criminal lawyers all around. So why Bond? Well, the opportunity was because they were expanding and looking at the Canadian program, with which I was familiar and I had a lot of lateral opportunity.

Let's face it, the other thing is—and we can all relate to this—is that Bond was not a public university. In fact, Bond's ethos was not to be public so as to avoid the pitfalls of public institutions: avoiding rule by committee and having committee after committee, to emphasize teaching, and to be a practitioner school. It was going to be a lawyer-oriented school.

**BPS:** Lawyer-oriented as in turning out good lawyers, or bringing in practitioners to teach?

**LS:** Skills mostly. The practitioners could come in, but the academics would be teaching it. But they would also be looking at the skill necessary for a lawyer and focus on those things. It was a very comfortable fit, because I taught Advocacy here, which is a lawyer skill for decades. It was a good fit, the Gold Coast is beautiful, the people at Bond are wonderful, and they had a full transfer opportunity. We were ready; our kids at that time—they'd been to Australia before—were all grown up, and we had no dog! So it was a time to travel.

**BPS:** One of the things it seems to me, in many ways, your own career has engaged with each major shift in Canadian legal education. You came in as we were settling into the academic rather than practitioner model.

When you went to Bond, it was the beginning of a development, which in retrospect was very much underappreciated, and here's my take on it—you can tell me whether or not you agree or disagree. We had this supply management of legal training for a very long time. There was a small number of Canadian, particularly English-speaking law schools, with an increasing population, so we were pretty much in control on the intake end. I think that led to a certain lack of feedback. We didn't have competition, or alternatives; everything was in a public university. To some extent, there was a self-replicating ethos. But what people didn't count on was that you didn't have to teach Canadian law only in Canada: Bond and a couple schools in

England, and increasingly, schools in the United States that have joint programs.

It turns out that you can acquire most of your Canadian legal education outside of Canada, which basically blew up the supply management system. Then it turns out there is a whole lot of other people from other jurisdictions, mostly going to Ontario, who wanted professional accreditation, and it was that increased supply that led to the pressure on the articling system which ultimately facilitated the new model that you developed, is that fair?

**LS:** Yeah. We took a very practical-oriented approach to it at Bond. Dealing with the NCA, we said, “What does it take? What do you need?” One time it was a crapshoot; we had absolutely no idea what courses they would require our students to take, and we would tell the students that. We’d say, “You’ve got to take seven. We can predict that it might be these ones, but we don’t know.”

**BPS:** Constitutional and Criminal were always there.

**LS:** Anyway, it had to be objective and transparent. The whole problem was that NCA crapshoot. So then they said, “Ok, we require these: Criminal, Constitutional, Admin, and foundations.” I started the discussions with Vern Krishna and said we would teach Canadian Constitutional, and we would teach it the Canadian way. He was worried that they would do the Thomas Cooley<sup>33</sup> approach, which would be providing Canadian Constitutional as a two credit hour course.

We said we would do a full-bore, however many credits it would be. I think it was six hours at Bond. And we would do it with Canadian instructors, Canadian assessments—everything along that way. And then it started us down the path of doing all of them. The attraction that we had was our students could do those as elective courses; they have a very rigid core requirement under Australian legislation, but they had enough for five electives, and all their electives would be the Canadian subjects.

But the thing is, in a three-year term—and actually, we would go year-round, so it would only be six semesters over two years—those students not only got an Australian accreditation, they also got a Canadian one. So it was

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<sup>33</sup> Western Michigan University’s Thomas M. Cooley Law School.

not like the joint programs in Canada and the States, where it was four years. We actually were doing it in two, for the full-year: Canadian and Australian.

I mean, wow! As for transparency, we could say, “Look, Eric Colvin<sup>34</sup> has taught Criminal Law at Saskatchewan for over twenty years; I’ve taught Criminal Law in Manitoba. We’re teaching it!” It shows, I think, how we should be more flexible. Of course, it became too successful and of course, then they got worried; well, what happens if Lee leaves? And Leicester and Arizona State started doing it, and my response was what you should do is dictate to them: Canadian instructors, Canadian standards, Canadian timeframe. There it is; you can do it. So it was interesting times. We would have almost two hundred Canadians at a given time.

**BPS:** Yeah, if you add up the English and Australian institutions, with the creation of at least four or five times the number of University of Manitoba students...

**LS:** Actually, more like six or seven.

**BPS:** ...six or seven hundred students in total. My sense is that we didn’t really notice as this was happening. Things are changing and then all of a sudden, the pressure came when the Ontario articling system seemed to be at crisis point. But now you’re back! You came back to run for Dean of University of Manitoba law school...

**LS:** I wouldn’t say run actually, because when I was contacted and asked whether I would be interested, I generally said, “No.” I took the view that I would be willing to be the Dean, but I indicated the vision that I had. It was one of these things where I was very fortunate at Lakehead; I told them my vision and said, “If you don’t like it...” and they accepted.

So I went through the process, put my name in, was prepared to be the Dean, but I didn’t *need* to be the Dean.

**BPS:** That was my next question. You didn’t have a general desire to be a dean, you had a desire to accomplish a particular vision and being dean

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<sup>34</sup> Eric Colvin served as Dean of Bond University law school from 1995-2000. He is currently the Head of the School of Law at The University of the South Pacific.

would help accomplish that, but it wasn't like a long-standing career objective to be involved in administration.

You were a very successful law teacher, certainly; and have gone multiple places. What is the thing that made you do this? You knew the headaches that university administrations can cause.

**LS:** I think, in fairness, I taught for twenty years here, and I was a student here. This place means a lot to any of us who have been around here. And I didn't like the direction it was going; I didn't like it when I was here. I thought we were going in a theoretical direction and I think it was the wrong direction, and so I was prepared to say that we need more balance. You talk about the pendulum [of legal education]; well, the pendulum was over here.

**BPS:** You mean, theoretical?

**LS:** Yes, theoretical. And so I looked and said I would be willing to try and bring the pendulum back. I think people who didn't want me to be the Dean would say, "Look, who wants to bring the pendulum over here? No one wants to go back to the old place."

**BPS:** So you wanted to bring the pendulum back to 50-50, a balance between theoretical and practical. As opposed to letting the practitioners run as they did twenty years before you went to law school at Osgoode Hall, the old version of Osgoode Hall when it was downtown and part of the community.

**LS:** Well, the old version of Manitoba.

**BPS:** ...or the old version of Manitoba when the practitioners had a lot of impact. Let me just talk about the pendulum. In the United States, there is a very significant literature about hiring bias, and what that literature has found is that, if you look at the elite institutions, almost everybody there would be largely Democrat; there are almost no Republicans. People followed up, like Eric Posner,<sup>35</sup> saying, "What is the relationship between the scholarly literature and the political dispositions of the academy?" And they found that there was a very strong correlation.

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<sup>35</sup> Eric Posner is a professor at the University of Chicago Law School.

Then there's a debate about whether that disproportionality is a result of bias, or self-selection, etc. I tried to find out whether you can do a comparable study in Canada and so far, I can't find empirical evidence like you can in the United States. Is it your impression that faculties of law are equally open to different perspectives? People want to focus on what you did, people on the left versus people on the right? I don't want to ask any leading questions here, just hoping to do it in this way. Is there equal opportunity to get hired if you're excellent, regardless of your approach, methods, or politics, or is there some skewing there?

**LS:** Some faculties are obviously more political than others, but I go back to what I said before: I find it sad how intolerant some faculties are. And it all depends on who is on the hiring committee. In some faculties you end up with groups and if those are the groups that mandate hiring—either theoreticians or practitioners—then suddenly it becomes unhealthy. That is problematic, and happened partly because there was a natural bias in that you hire who you're comfortable with.

**BPS:** In social sciences, it's called an affinity bias.<sup>36</sup> People who are similar to us are more excellent.

**LS:** So if that occurred, you can see that you're increasing the pendulum in the direction that you're already headed. But let's face it, the practitioner pendulum was holding sway for quite a while until the mid-70s and into the early-80s, and then suddenly there was a need for more scholarship and more university academia, and it started heading the other way.

I think we're now at a point where the pendulum is over in the direction of the theoretician. I've been around tables, listening to people hiring, and they say, "Oh, he's spent five years at Blakes."<sup>37</sup> Ugh." And I'm thinking, "Geez, that's pretty good." But my take—because I've got a practitioner-oriented take—is that's good but from a theoretician's point of view, they ask, "Well, what has he published? Has he done any extensive research?" And I think, "Well, no, because he was a practitioner for five years." So

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<sup>36</sup> Affinity bias refers to a form of interviewer bias resulting from interviewers showing preference for certain types of people for whom they have an affinity, such as respondents who are similar to them or that they find attractive.

<sup>37</sup> Blake, Cassels & Graydon LLP.

you're right; that is occurring. You know, then you start saying, "Well, we need a practitioner representative, a theoretician; that's the difficulty."

Hopefully you've got people, and I think one of the things that happened in the early 1980s or so, I think you had people who put their egos aside and who had a greater vision and I am find that is a rarer quality now, that people have the vision to look beyond their own self interest, that I think you had in the early 1980s.

**BPS:** I think it is a real paradox that people might have misunderstood or mischaracterized you at times as "I write practitioner oriented stuff, everybody has to write practice oriented stuff" and as I understood your message when you were running for dean it was, if you are a brilliant theoretician, that is a good thing.

I think you said in your talk, "If you are Gretzky, even if you are not doing anything that immediately needs to be taught, we can hire Gretzky. Gretzky can be a brilliant theoretician as well as a brilliant doctrinally oriented person, but we should hire a diverse range of people on some non-political standard of excellence. Some people will have masters, some people will have doctorates, some people on the left, some people on the right and the collective result will be that students will be exposed to all sorts of different perspectives. It is one that is open to eclecticism.

The paradox we have identified in this interview is that some people who talk of diversity and so forth are actually, I think, intolerant of people who might have a different view of how you teach and what it means to be taught. The ideal is not everybody becomes like Lee Stuesser and teaches like Lee Stuesser, the ideal is that we end up with a bunch of different personalities, a bunch of different backgrounds, and so forth. It seems to me that you were pretty clear on your vision when you ran for dean. My sense was that some people had the view that because you had your own particular perspective on what you thought was valuable in your own career that you were somehow not equally open to other points of view.

## V. CENTRALIZATION AND THE LAKEHEAD MODEL

**BPS:** You were quite clear in your interview that the dean is an advocate for the law school and that we live in a time in which central administrations think that the dean is essentially the advocate of central administration to the law school, rather than of the law school to central administration.

We saw this at the University of Saskatchewan, where the faculty wanted somebody and the central administration wanted somebody else. It is a very difficult question, and it is easy for me because I do not have to live it. I am not a dean and I do not have to live the pressures of central administration and be accountable to them.

**LS:** Well I am not either.

**BPS:** Well so it is easy for me to say that the dean should be an advocate for the faculty, but obviously the truth is not on one extreme or the other. The dean is a part of the administrative apparatus and has certain accountabilities and duties there. Have you found that deans are increasingly seeing themselves as adepts of central administration? Did they formerly view themselves as more a part of the faculty?

**LS:** Yeah I think, especially for law schools at one time, they had strong deans.

**BPS:** And they were separate from the university in some way.

**LS:** They were at least regarded with a lot more respect. You would not want to cross them too much on things. That has changed. Centralization, managerialism is sort of the phrasing that they go through. University administrations do not want strong people under them, they want compliant deans. They want you to come within your budget, don't make waves for the university, support the university. That means if the university has initiatives it is almost like cabinet solidarity, you come in and support the initiative. I have never believed that. I do not think that centralization is good, I actually think it is bad. I think that, to a point, decentralization is the better route.

Lakehead as an example, we had terrible centralization of the physical plant service. I was in favour of giving every faculty say \$100,000 and saying "Deans, here is \$100,000 for new painting, new rooms, whatever you need it for, because you will be more efficient than you will if you go central." Well that simply does not fly and as a result the costs just spiral.

My experience is that central does not want strong deans, that is certainly what I saw at Lakehead and I think that it is the same thing here. What they want is a bureaucrat. They want a person who is going to do primarily what they want them to do. They do not want a dean who is going to say "No, that is not right." or "We are not going to do it" or "We can't

do it and here's why." Isn't that common throughout the corporate world now?

**BPS:** A very resonant book titled *The Fall of the Faculty*<sup>38</sup> by a political science prof at John Hopkins describes this dilemma in the American context. Fall of the faculties means academic faculties are not running things anymore, they do not have the respect that they used to. The managerial class are running things now and I do not think that is by any means unique to Lakehead or the University of Manitoba, as it is a very widespread phenomena.

In practice what I think it means for professional faculties like ours is you are drawn towards the imperatives of central administration, the bureaucratic culture, the emphasis on certain kinds of research and controls on raising money and so on and so forth. Because of this you are actually less accountable to the profession itself and my sense is Canadian law schools have not been very swift to appreciate a change in the environment out there.

We have gone from a small number of law schools basically controlling the supply to this much more open market for legal education which has largely been created outside of our borders and we can't prudently ignore what is happening. Because we in the academy are increasingly embedded, ideologically, in career terms, in the central administration, I am not convinced that we can respond quickly to the changes as they occur. My guess is that sooner or later reality wins and we will have to respond. By respond I do not mean we have to give up being an academic place, I never saw a division between the academic and the practical.

The best teaching to me includes both, and I have said at Law Faculty Council meetings, "I do not think we should view the taking on of more training practitioners as a bad thing, I think it is a great opportunity." Everything that the profession is doing we can now do, but we can do it with an academic bend. So as academics we should be looking at doing more of it because we can be doing it in a way that is really effective, and is not only practical but also attempting to look at things critically. What is your sense of how well non-law academic schools are responding to the new realities?

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<sup>38</sup> Benjamin Ginsberg, *The Fall of the Faculty: The Rise of the All-Administrative University and Why it Matters*, (Oxford University Press, 2011).

**LS:** I think once again it depends who you are asking. I think the majority are not responding well because it's their turf. They are comfortable with what they are doing and as you've indicated they've got a monopoly. You mention a good point about the profession out there because the profession right now is exercising its muscles through the federation and through their required courses, *et cetera*. They had not done that before. They left law schools alone for fifty years or so until Thompson Rivers and Lakehead came along, and what did we do? I think that is an opportunity actually for law schools to identify themselves, to separate themselves a little bit from the university mold because, you are right, central wants one size fits all. That is the problem, and they are not prepared to allow law schools to be slightly off-centre.

I actually found one of the most important things for a small school is accreditation. Especially for a new school it enabled me to throw accreditation at the university whenever they were trying to do things that would impact us. For example, we all know that physical space is an issue in law schools. In Australia the law schools do not have their own buildings, they basically use whatever room is available and so space is precious.

At Bond I had to fight in order to get a separate building where our law school could have priority. It came down to accreditation because the federation has certain dictates and certain requirements for physical space and you need to recognize that. I was using accreditation to offset the central monolith that was there, so I think the profession is starting to exercise their muscles. There is good and bad in that. You listed before your list of mandatory courses and I could see suddenly them throwing in a bunch of silly mandatory courses, because that is the same thing that happened in Australia. There needs to be a happy medium, but I think this could be an opportunity for deans to assert that we are different and that we have these accreditation requirements. It is an opportunity, whether the deans seize it is another matter.

**BPS:** I think to some extent the academy has been very strong that we are part of a university we have our own sense of integrity and mission and you do not dictate to us. If I thought they were dictating to us I would be firmly on the side of protecting the law faculty.

If the profession told us to stop wasting our time on perspective courses, and they wanted all mandatory upper year course so that there was no space for students to do exploratory stuff, to investigate subject matters and so on, I would certainly be on the barricades resisting that. But, the challenge right

now is that our students are telling us, and the world is telling us, “the articling student system is breaking down, you are going to have to produce more practice ready lawyers or your students will not be competitive.” So we can say “Oh, this is bad because now the world is telling us what to do” or we can look at it as: if we are responsible for more that gives us more opportunities to prepare students in the way we think students should be prepared, which is not narrowly, form filling and purely pragmatic.

We have an opportunity to do more but if we are responsible to cover more of what it takes to make you practice ready we can rise to the challenge. If the world wants people to be practice ready then practice management has to be part of our preparation, as we do not traditionally do a lot of practice management. I think that is a great opportunity. We can ask questions that people go through their whole lives not asking: Why do we bill on the basis of time rather than result? What is the appropriate work life balance?

The profession once you are out there tends to value you in terms of your monetary productivity, but are there other models of valuation that you want to put on yourself and your life? I am not saying we preach one thing or another, but what a great opportunity to get people to go into the profession thinking critically.

**LS:** I think the reaction of most of the mainstream schools has been concern, as everyone is worried about change. If you step back and look at what Lakehead is doing, it is not revolutionary. When I look at your required courses you could easily do what we are doing at Lakehead. The academia could still be there, in fact the theoreticians could still be there and we could augment them in terms of the teaching.

What does create pressures though is size. You cannot keep increasing your size. Queens just increased by, I think another fifty or so. What we are doing with sixty, making money and offering a tuition that is the lowest in Ontario, it worries them. A lot of schools have fat in the sense that they have reduced the teaching loads of so many of their faculty members. Lakehead has a higher teaching load, and thus less fat.

**BPS:** And what is the teaching load?

**LS:** Fifteen credit hours a year instead of twelve, so that is higher but we have smaller classes. You go to some schools and it is less than that, so they

feel threatened by our teaching load because that means they might have to teach an additional course. No one wants to do that.

The experience that I have had with the legal profession that, especially with regard to the integrated performance curriculum, was that the law society did not come with inspectors. Instead, they have asked me “have you done certain things,” I said, “yes, here is what we have done.” They are doing exactly what you said. They are saying “We trust you.”

I think that level of trust is one of the things that is lacking. I did not realize this, I don’t know if you do, but there is real mistrust between the law schools and the law society in Ontario. I do not know the whole history but there is a lot of bad blood between them.

**BPS:** Is it recent?

**LS:** No, I think this has been building for ten or fifteen years. The law schools would not give the law society boo and then of course that is part of the Common Law Degree task force and the articling task force. Then the law society started to flex its muscles and started to push back, because the actual relationship with the Ontario schools is pushback, everything was pushback.

Now I think the deans are recognizing pushback is not working and I think some of the schools, Calgary for example, are saying “We can do this. We can do what Lakehead is doing.” They are prepared to be more amenable. I think the bigger thing, Bryan, which is interesting which hasn’t happened yet, is the Government of Canada is quite happy to send seven hundred Canadians or more overseas to study.

As soon as you get private law schools coming into Canada saying “We are going to be a practitioner school. We are going to be a school that will prepare you for the practice of law” and maybe have theory as well, it does not matter, but as soon as you have that, that could really be a game changer. Because suddenly we know that you can fill a private law school.

**BPS:** You could fill a soccer stadium with the people wanting to get in.

**LS:** You could charge \$20,000 and you are off and running. Forgetting government funding, you don’t even need government funding you just do it with a tuition base and as soon as you do that I think it is going to be a real changer.

## VI. IMPLEMENTING LAKEHEAD MODEL AT ROBSON HALL

**BPS:** Lee, I want to walk you through what you did at Lakehead. It is my intuitive sense that we are unusually well positioned at Robson to turn out students with what I call tier two competency. Tier one would be the minimum to be accredited, tier two would be the point at which the profession basically says you do not have to article.

The reason I think we are unusually suited is firstly, we teach ninety-seven credit hours, I believe most places are at ninety. Second, we have an unusually large mandatory upper year program which probably covers most, maybe almost all of what you do at Lakehead. I want to do this very pragmatically and systematically.

First year law at our school we teach the same mandatory courses that everybody does, which is contracts, criminal law, property, torts, constitutional, legal methods, which is supposed to be an introduction to clinical skills and is primarily memorandum writing and research, and we do legal systems which is an introduction to perspectives and puts the legal system in context and is an introduction to jurisprudence. What would we have to do, we have thirty-three credit hours, what would we have to do to be on par with what you do at Lakehead?

**LS:** Very little. The one thing that we did, which Bond did, was we integrated skills in all of our courses. In criminal law for example the skill is oral advocacy so our students will do a bail and do a sentencing hearing and an oral argument. You do that a little bit in your methods, at least you used to do that, but we probably do a little bit more. Memo writing would be done in torts. Legal argument writing in constitution. So we had set skills identified for every course. The easy change could occur there, as you still have your small classes I believe?

**BPS:** We do thirty-five. We have been under some pressure to go from three sections to two, but we have got the smaller classes. You hired, as I understand, people who were comfortable doing those smaller classes and you were in an unusually favourable position from that respect because you could start from ground zero. My sense of it is, if I were an administrator, which is never going to happen, I would try to find a way where I can implement this without asking anyone to go outside of their margin of comfort. Where do you do your legal argument, is it constitutional?

**LS:** Yes.

**BPS:** My inclination would be to say that a credit of constitutional will be devoted to doing a mock legal argument, but you as the professor do not have to do it. If you do not want to do it we can bring in a sessional to do it, or we can have one of the three professors do it, or do it in a way in which we are not asking you to do something that you do not want to do, something that you are not equipped to do. We will provide you with the extra resources to do it. At worst it is cutting into the rest of your time. Is that how you do it?

**LS:** Yeah. In fact, you would not even do it for the one credit. You have certain advantages, first of all you are the only law school in Manitoba. You have over twelve hundred or thirteen hundred lawyers in the city as a resource. You could just beef up your methods. We have thirty-six hours in first year not thirty-eight, Manitoba used to be thirty-eight hours, in other words students can handle more hours.

So one of the easiest things you can possibly do is say, “ok, let’s keep our existing courses the way they are.” Unfortunately that does create the divide between theory and practice because suddenly you have one course which is like writing and methods. We wanted to try to avoid that by integrating the practical elements, by providing the resources, be it one practitioner or two practitioners, having them handle whatever the exercise is going to be and providing the instructor with an opportunity to be involved if they want to be. Please keep in mind that you have to mark these things. There are going to be written arguments that have to be marked. Easiest thing to do is assign skill instructors for those courses and if the instructor wishes to, they can be part of it. You have to look at it progressively.

Probably your objective down the road is to have all the instructors become skills teachers as well, but starting off you are going to have resistance and you are going to find that if you can make life easier by having the skills instructors that would be very easy to do. You do not even need one credit, incidentally, like the bail. What we would do for bail is, sure, I talk about advocacy, just basic principles of advocacy, give information, we would do a demo with defence counsel and crown. We then have them do the exercise and we limited time but we bring in judge practitioners who give feedback and then three weeks later they do sentencing. So we

progressively build on it, but it does not take a lot from the actual subject and would not even require one credit.

**BPS:** Now we are under enormous pressure resource wise. Central administration just subjected us to a four percent across the board cut. On the other hand we do have incredibly cheap tuition by Canadian standards and we did propose a tuition increase last year, but students were very unfavourable to it. My view is students were unfavourable to it because they did not see a connection between increased burden to them and the deliverables.

If you said to them “we are raising your tuition by a thousand bucks.” A thousand bucks times three hundred students would buy you a lot of sessionals. It would not be difficult with even a modest increase if students saw it as getting to tier two competency to use some of that money, maybe hiring one faculty member who teaches the skills stuff or maybe a bunch of sessionals but I cannot see how if we were just adding three credit hours and it was for particular purposes how that would be very expensive.

**LS:** It isn't and that is the fallacy, because a lot of times people think skill education is expensive, it is not. At Lakehead we have to pay them a certain salary, I think in Manitoba it is lower, something like \$7,500 for a course. Yeah it is pretty cheap, but you still have to sell it. You have to show them how it can be done. Just look at it very simply. We hire, because I am involved but say I was not involved, you know what I could get a skilled sessional and two other people involved for less than \$5,000 a course. You have all of those courses, and I am not talking about one section I am talking about the full course, one hundred students. You could have say three of these practitioners.

**BPS:** So it would cost you \$15,000 to get the people you needed.

**LS:** No crim is five, because all we are asking is that they come in and preside over a bail. Practitioners love to come here to preside over exercises, provide feedback, prepare a problem. It would be a very inexpensive option.

**BPS:** I mean looking at the most cost effective options, suppose you had to hire three sessionals to do this stuff, the cost for us would be about \$10,000. For a hundred students the cost per student is \$100. If that is what is required, then it is a very inexpensive route.

**LS:** And that is your first year covered.

**BPS:** So imagine with a \$1,000 tuition increase—which is a lot less than we proposed—what you could do in terms of enhancing us to tier two competency. It seems eminently doable. I think it is doable politically on the following constraints: first, you tell people like me that they don't have to do something extra, they don't have to change what they are doing. The faculty will get the extra resources and in doing so would address people's anxieties about being forced to do a different mold. Second, the faculty stating that they recognize that the world has changed and the specific deliverable that they want to give the students is the ability to avoid having to article. I would think from the students perspective that would be quite attractive.

**LS:** I think it would be. The one advantage of the Bond model is the integrating and mapping of skills. You map the skills so that you can see what skills you have in second year and what skills are required moving into third year. It is not an expensive approach. The model of methods for example, Methods as a course could disappear if you incorporate it into other courses. The difficulty in Manitoba has always been that you are doing this practical skills thing that seems divorced and as a result the students seem to take it as a second rate because it is not a real course. Suddenly when you are doing a memo as part of torts or a contract draft exercise, constitutional argument, it has more meaning and it is taken seriously.

**BPS:** Our Methods course is by far the most expensive course right now because we have five people who teach five credit hours in methods. And I am not criticizing those people at all, but from an economic standpoint there is no other course in which we have five full time people.

How do we—and I am trying to think very operationally here—get to be in the position where we can go to the Law Society of Manitoba, the Law Society of Upper Canada, and say “We’re tier two competency just like Lakehead.” How do we know exactly what we have to do so that they say “Yeah, your student’s don’t have to article?”

**LS:** I think what you do is you go to the Federation, and frankly they have simplified the whole competencies that they have got. One of the difficulties that you will find is it will require courses, you are not only making a decision that the student is competent in law but that they are competent

in lawyering skills. So that means, under the Federation requirements for law, they require wills and estates. We have a mandatory wills and estates course.

**BPS:** We don't, although almost everyone is takes it.

**LS:** Yeah and maybe you will have some students who will opt out, who do not have to be part of this. We have taken the view that it is all mandatory. It is who we are. It is all in the Federation. It is quite straight forward. You start with the skills in first year, you identify the skills. I think what they would want to see in the second year is, what do we have mandatory in the second year? Advocacy I think you need. It should be a capstone course, which would mean more resources. For example, in our civil practice program we had five practitioners involved as well as an instructor, so it was almost like Methods. That is \$35,000 for the one course, but it is a full year course.

**BPS:** Again, going to second and third years, what we would do operationally if we wanted to do what you do, keeping in mind that we are not going to do exactly what Lakehead does. We are doing it in our own way. It is going to be a Manitoba thing. What we would do is go to the Federation of Law Societies, see what they would require for tier two competency, look at our program, and adjust what we have to in order to qualify.

So we would either take on new hires who want to do this sort of stuff, or use additional resources to hire sessionals. The first way to do it could be a modest tuition increase. Nobody would have to change what they are doing. My view is that there is no point in saying that the Law Society of Manitoba should give us this money because we are saving them the burden. That is not going to happen. The Law Society of Manitoba is still going to have to do some professional education for people who come from out of province and out of country so they are not going to go out of business.

In any event, I don't think you hold up what you want to do based on a complicated negotiation with somebody who is not under your control. You say, "What can we do within our own abilities." Our own abilities certainly in the future will include a modest tuition increase, which we are not going to get unless we can tell students what they are getting for it. I think what they get for it is the ability to get out of here without articling.

**LS:** If there is a will there you can easily do it. I think you have to increase your hours slightly. Keep in mind what you do in second and third year, correct me if I am wrong, you reduce your hours in second and third year, don't you?

**BPS:** Only modestly. It is sixty-four between the two.<sup>39</sup>

**LS:** It is interesting how you start with thirty-three hours and go down to thirty-two in the final two. We go thirty-six, thirty-six, thirty-six.

**BPS:** The only reason I bring it up is that one of the suggestions is that we go the opposite way. What do you think about that?

**LS:** What do you mean?

**BPS:** We go down to ninety because that is what the norm is and that is what students by and large are in favour of. Now I recognize that not every student government speaks for every student but when you sit in faculty council and say "the one thing we can do for sure without increasing tuition is go down to ninety, because the law society requires ninety and everyone will go "Yay!"

**LS:** I am not sure students would think that way. It depends on how it is sold. Here is the interesting thing, I got lambasted from the faculty of nursing, rightly so, for a comment I made about how hard law students work. They said, "You know what, you have no idea. Our people go for these hours *et cetera, et cetera* and you are complaining about eighteen credit hours." Other faculties do have hours that are exceed those of law.

**BPS:** You mean for teachers or students or both?

**LS:** For students mainly. You cannot just have everybody planning to do their exercises in the same week. We sit down and we organize it. We sit down and say "week one we have this, week two this" so we all know when the assignments are coming in. You have got to do that if you are going to increase the hours, but I think students are willing to go the extra hours if it is going to get them more.

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<sup>39</sup> Robson Hall requires 32 credits each year in second and third year of law. Please see online: <<http://law.robsonhall.com/current-students1/registration/>>.

**BPS:** If they have an extra three credit hours a year but they save themselves a year of articling.

**LS:** It is six because it is three in the first term, three in the second. So if you added six credit hours you do not have to get into a battle about some of the electives disrupting others. The beauty of what you have got is you are going to keep everything the same, but you are just going to add where you have to.

For example I think one course you would need in second or third year is a course that we have created called 'The Business of Law'. Most students have no idea about the business of law, so we talk about how to bill, how to deal with clients and all of that stuff. Everyone is raving about it and I have seen the outline from the instructor, it is going to be a great course. That is quite easy to add.

**BPS:** It is a small incremental change for us already because our baseline is thirty-two to thirty-three so you are adding three credit hours. Again it is going to cost more but my view is students would accept a modest tuition increase if they saw it as giving them the option of tier two competency.

That brings me to the last point. I have raised it a couple of times, as we have a constant debate here about mandatory versus non-mandatory. Nobody seems to have a problem with the idea that you can get specialized in a particular area here. A couple of years ago we talked about becoming certified as a specialist in human rights, a specialist in Aboriginal law, a specialist in business. What if we said you can keep on the old curriculum for anyone that wants it, even loosen it up a bit, allowing you to take whatever you want, but if you want to do this program then it is thirty-six hours a year and you will get a practice ready certification.

I don't necessarily like that option because I think we have a certain responsibility to ensure that everybody who comes out of here meets a certain standard. Not all of my colleague agree, but certainly as a compromise I can see saying to people, "You don't have to do this enhanced program, you don't have to do the tier two competency program, but if you want, you have the option of doing thirty-six hours a year and you end up saving yourself a year of articling and you get to identify that you're practice ready on your resume, which will help you get a job." I would think the take up would be at least ninety-nine percent.

**LS:** I think I would keep the option to opt out because there are always a few who would do that and that way you avoid that battle quite frankly. It is not unique, the University of Queensland already has that, they have had that for decades. If you want to go into practice you have to take civil procedure and evidence for example, then you are credited you can write the bar or whatever. If you do not take those you simply get your law degree but are not accredited. So they already have that. I don't know the numbers of who does what. It seems to me bizarre. Why you wouldn't take those courses and get accredited I don't know.

**BPS:** There is an episode of South Park called "The Simpsons Already Did That" about how every plot has already been done by The Simpsons. Of course someone has already done that, so it turns out that my idea of having the option of being practice ready or not, Queensland has already done it. But that is a good thing because I think it is easier to sell ideas when someone else has already done it.

**LS:** I think everyone is in favour of some practice oriented experience. Our students in this coming year, Lakehead students, half of them are going on placement in the fall term, half of them are going on placement in the winter term, and these are unpaid placements because they are university credit courses. You people already have a lot of credit hours, but there is nothing stopping this from occurring during the summer. There needs to be some sort of practical oriented work in a law firm for periods of time. The beauty of it is you have a large city, Winnipeg. In Thunder Bay I don't have as many lawyers.

**BPS:** Now how do you address concerns over control of academic quality if clinical work is supervised by a practitioner?

**LS:** Well here is my suggestion. To avoid that you call it a placement. It is a work placement. When you look at nursing or medicine or whatever they are not marking, they are generally assessing. Now at Lakehead we have one hundred and eight hours because we have thirty-six, thirty-six, thirty-six. Eighteen of those are the placement. So we are not there worrying about evaluating.

If someone does not do a placement, if they don't act professionally, they will fail. On top of that we still have the ninety core courses that we assess. We want experience in the law firm, we want an articling experience

if you like, for a shorter period of time. Can you do that here? I think you can do that. I think the Winnipeg firms would be amenable.

We had issues with a lot of the firms wanting to pay and we had to fight them to say “no” and the reason for that is quite simple. Our students don’t have to article, they are getting out a year early. They do not have to pay articling fees that are associated with that and we want them to go to smaller centres where practitioners generally won’t take articling students because smaller firms don’t. It is a big ask and we don’t want to get into a bidding war in terms of salaries *et cetera*, and university insurance, *et cetera*, *et cetera*.

**BPS:** Then they are not really a student. If they start getting paid you want them to produce deliverables to the law firm and we want this to be an educational program.

**LS:** Exactly, and to go back to how do we assess. We have a small staff, but we have a person who would be contacting the firms, contacting the students, ensuring the firms are accredited establishments, just as much as they do for articling if not more.

At the end of the day it is a placement, it is experience based more than anything else. The feedback we were getting from the firms was that they were saying “I am going to have the student sit in on a trial.” And I am just thinking when I was an articling student I had to fight to sit in a trial. They are taking it as a mentorship. They are not looking at it as billable hours because they say “We don’t have to worry about paying this guy.” It is a real change that occurred. You may find opposition from firms that are used to articling here. You can still say “you can still article, you can still do that whole process but would you be willing to take a placement student for three months?”

Students do recognize, as with nursing and medicine and teaching, that placements can be part of the education. With teaching for example, we all went on placements as teachers, we were not expecting to get paid for that, but when we graduated in May, guess what? We can write the bar exam.

**BPS:** How do you get around that?

**LS:** They have to write it. They don’t have to article but everyone has to write the exam.

**BPS:** One thing that I think we could start doing here, we are already starting to do this coming year, is use the CPLED exams with the instructors concurrence, so that they can administer the CPLED exam. Say you are teaching family, you use the CPLED exam as part of your evaluation and students can say “I already passed six out of twelve CPLED exams.” They are even closer to being practice ready.

**LS:** You could do that. There is not one way of doing it. You could certainly do it that way but I think there would have to be a practical component. However, it could certainly be abridged over the year of articling.

## VII. DEAN OF LAKEHEAD

**BPS:** The last thing I want to cover was your experience deaning over at Lakehead. You have almost the unique opportunity of starting a law school from scratch. I say almost because Chris Axworthy<sup>40</sup> did that recently at Thompson River. Trinity Western is trying to set something up, but it is relatively unique.

Now you had to fight some battles with central administration distinctively geared with the legal profession. You also had many encounters with the Law Society but you managed to persuade them. It seems to me that being a dean in an academic environment is an exceptionally difficult task emotionally. Most of the people that come into your office are something of a problem, if they are doing fine they are not in your office and you do not hear from them for years because everything is fine.

You came from life as an academic where you could have quite a contained life. There were certain student pressures to teach a certain way and you were quite demanding and did not have any trouble fighting those off. Now you are in an environment where I am guessing you have to deal with a lot of people who are difficult not only because they disagree with you on policy terms but as one often finds in academia, they are difficult people and quite emotional. Is there anything you can tell us about how you survived that, what advice you might give?

**LS:** Well I don't know that I did survive all that well. You know it is interesting, Chris, when he left Thompson Rivers, made a comment that

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<sup>40</sup> Chris Axworthy was the Founding Dean of Law at Thompson Rivers University's law school in 2011. Prior to that he served as Dean of Robson Hall.

his biggest problem was the university and I think that is actually a fair comment for me. Especially smaller universities which are not used to professional programs.

We had constant battles. I mean the battles were focused on the fact that they had a way of doing things that you just shake your head at. Remember, I am not a centralist believer in “Yes we do it that way.” But why are we doing it that way? It does not seem to make too much sense. So we had constant battles from the get go. You have to keep your sense of humour because they were so bizarre, that if you did not keep your sense of humour you would go nuts.

I mean, just to share with you some of the silliness, we had to go to battle to get keys to have access to our building. We would have to be nine to five or else we would have to call security to gain access. It reached a point where I said “Enough is enough. I want a meeting with the President, we are going to sit down and damn it all we are going to get those keys.” We fortunately won that but the university wanted us to go in a certain mold which was difficult. The Law Society has been excellent. The legal profession has been excellent. They have been so supportive. The Law Society has shown nothing but support for us and has not interfered either. That is the other thing. That is the worry that a lot of law schools have, but it has not been an issue for us at all.

**BPS:** What about the other law deans? Do they always see you as threatening? Were they seeing you as subverting the academic autonomy?

**LS:** Yes, it wasn't so much me that they were worried about because they could always isolate Lakehead. They could always say “That was the northern Ontario solution.” Their biggest worry was that one of the southern Ontario six would jump ship.

The one they were most concerned with, was not Queens, it was not Windsor; they almost isolate Windsor. It was Osgoode that they were worried about because they were the so called experiential school. They were actually worried that if somebody else went down this route they would all have to follow. They were not really receptive to what we were doing but they could live with us because we were isolated and unique.

**BPS:** Yeah, that is like, “We are not really competing for the student market for Lakehead so we are ok for now.” We have interviewed a lot of people who have followed this career arc. Maybe it is a romantic vision but what I

spout these days is really the old way was better when a dean was doing it as a part of their career, it was not about advancement, “I want to be a Vice-President” or “I want to be a judge.” It was somebody who was giving back as a service at the end of their career, who had the maturity that comes with being beaten up over a lifetime.

Maybe they were not as invested in their own stature, instead trying to leave the world a little better and not being concerned about every slight. That is probably on the whole what you want in a dean. Somebody who is doing it as a service at the end of their career, not doing it as part of the managerial progression. From hearing you describe this whole experience it kind of sounds like the way your career worked out. It is something you did at the end of your academic career, you did not need a job.

**LS:** I think frankly we have gone full circle because that is what universities don't want. Universities don't want someone who doesn't need the job. Someone who doesn't need the job can tell administration what they think. The interesting thing, which you may or may not have been aware of, is that of all the universities, Manitoba would not be any different; they all have the senior management crew, and of course the deans are involved in the senior management crew, and they have the administrative arms, well I have been involved in those at Lakehead, the only people who would say that something is not working, the only people who would say that something is wrong, were the deans.

Why? Because all have tenure, what is the worst you are going to do? You are going to remove me from dean? Fine, I am a full professor. All of the other administrators wouldn't say boo, but that is what central wants. They actually want the person who will be more compliant because they get to control that person a little more. I think I have respect for the president but I would look at him and say, “Brian, I don't think that is going to work and here is why.” I don't think too many other people would do that but I would hope that universities would appreciate that.

**BPS:** I wanted to ask one more question. This has to deal with this whole ability to speak your mind. There is a natural tendency to think everything was better in the old days. We sometimes don't remember what things were really like and instead “recall” a golden era that is largely imagined. But here is what I remember.

I remember when I started out, and you started out not much later, we would have sometimes very frank conversations on issues at faculty council

and people would be quite assertive in what they thought was right and what they thought was wrong about proposals. I don't remember any of us being scared about taking a controversial minority position on faculty council having it counted against us at tenure or promotion time. Or that if we were really demanding of the students that bad reviews on the SEEQ would come back and we would not get tenure or promotion. Impressionistically I see a generation of new people who seem quite apprehensive, considering things like, "Well if I say this to faculty council then students will hold it against me and it will show up on the SEEQs and I won't get tenure" or "I can't afford to tick off my senior colleague who will hold it against me at tenure and promotion time." I don't remember thinking that way in the old days.

**LS:** I don't think we did, because we are used to arguing, used to disagreeing. At the end of the day I may disagree, I may not be happy with the decision, but I had my say and I move on. You are not going to get that with administrators these days, they have very thin skins. So if you challenge them or argue against them it becomes personal and suddenly you are marked. That is a change.

When I look at mistakes made I think about Thompson River and how many people they hired in the first year. I guess they needed to because they lost the government funding so they needed more tuition and therefore more classes.

At Lakehead we needed to hire some grey hair and of course we did not have anyone applying to come to Thunder Bay. It is not one of the most attractive places but we needed that experience and that was a weakness that we had. I was very frugal so we would always hire what we needed to cover but not extra and maybe we needed to hire extra because we are still short, there are still not enough, they are still going to be hiring. So there were mistakes made in that regard, but younger faculty are so preoccupied with tenure and promotion for the most part that just drives their agenda. I must admit I did not even think about it until three years in and I said "Oh I guess it is time." That actually is being foisted on them by the administration, not by myself but by the administration. It is a different atmosphere.

**BPS:** There are several dimensions to it. One of them is security in your position. Looking back at my career I am still very proud of the fact that I had a great role in the strike of 1995 because the issue really was in effect the preservation of tenure. I know a lot of people just think it is feather

bedding by academics and lack of accountability but I actually have very strong sense as somebody who is always taking controversial positions on large scale issues, not just small issues, that it was very important to have some security.

The other issue I think is a cultural issue. There are certain things that just, I always say, aren't done because they just aren't done. Forget about the formal rules and the job security. What would have been unthinkable for a central administrator, like having career consequences for challenging them, that was unthinkable in the old days even by really strong minded administrators. I don't think people have those unspoken cultural barriers that things aren't done because this is a university. I do not have the sense that the managerial university has the same tolerance for dissent that it might have had culturally a while back.

**LS:** Yeah, I am not sure about that. My only experience, and maybe it is just Ontario, but the administrations are extremely timid. With respect to faculty members they do not want to do anything. If anything the faculty members have far far too much power.

**BPS:** You are never going to fire me, let's go?

**LS:** That's right. If anything Bryan, it's the administrations. They are typical administrators who want to do nothing. The easiest thing is always to do nothing. I was at Bond and we did not have tenure, but I also saw the excesses there when management decides to go after someone who is just speaking out. So it is problematic, I have seen both extremes.

**BPS:** My sense is that there is a price to be paid for tenure and job security and it does mean at a certain point if someone wants to do the absolute minimum or even a little bit less than the absolute minimum, there is a fair amount of ability to get away with that. The benefit that you are getting from that is you are generally giving daring creative people the ability to do their daring creative thing and yeah, one of the prices you pay for having that measure of freedom is some people will take advantage.

Tenure allows some individuals to keep writing books and making speeches that criticize people in power, maybe the reason for doing so is that they have a certain amount of job security. However, I don't delude myself, I think it is quite probable that for a certain number of people tenure is like, I can kick my feet up, gone sailing, what have you.

**LS:** I guess from a dean's perspective, and we actually had this round table discussion of all the deans at Lakehead, we came to the conclusion that we could do nothing.

**BPS:** You could change nothing?

**LS:** We could do nothing. If we had a faculty member who wasn't doing their job, we could do nothing. It was a very sad conclusion around the table. We had one of our faculty members from another faculty who said, well the person has not done any writing so I am going to put that in their annual report, give a negative assessment on that and the provost said "You can't do that." And he said, "Well what do I do because I have eighty percent of the faculty working very hard, but they will grieve." The response was, "Yeah but if they have not done any publishing, what is the problem?" We had an administration that was not prepared to back up the deans. With tenure there is good and bad. I guess we are always sitting with that, and maybe twenty percent of the faculty is too high.

**BPS:** Five to ten?

**LS:** Yeah, there is a percentage who are not doing their job and you should be able to do something with them. The reality is that over the twenty years that I was here in Manitoba there were some members not pulling their weight and we often rewarded them by having them do less.

**BPS:** The price of freedom is a certain amount of indolence. Earlier in the interview there was something I said we would get back to, a question we have asked a lot of our interviewees about: what is the incentive system? You mention that it is forty-forty-twenty but what is the incentive system? My sense is that the reward system, the credential system, not just in the university but in the outside world, if you are thinking in purely careerist terms I would advise any person to put more into the scholarship because that is where the money is, that is where the recognition is, that is where the reward is.

**LS:** Yep, that is exactly what has happened. The unfortunate thing is that it is very difficult for the administration to identify poor teaching. Basically, the university structure says that our hands are tied in terms of identifying poor teaching and I think that is true for most universities. If we say to a person, "that person is a poor teacher" how do we prove it? Whereas if there

is a scholarship issue it becomes much easier to identify. Let's be clear, I think the vast majority of instructors are both good in the classroom and good scholars. They do their job, but you do have this percentage that don't.

**BPS:** Looking back you have people who were excellent teachers at our place who were also outstanding scholars. It did not seem to be a pattern of someone being a great scholar and as a result not paying any attention to teaching. If you look at people like Phil Osborne, John Irvine, and Barney Sneiderman, it seems to be a very high synergy, a group who were all very productive scholars and very excellent teachers.

It seems to me in principle how it should work because as you were mentioning earlier, if it is working properly you are bringing your scholarly insights into the classroom and if you are good at classroom teaching you are getting student feedback which helps your scholarship. I kind of question whether one has to be at expense of the other or if they are mutually reinforcing.

**LS:** It is interesting because we have new instructors at Lakehead and I was invited to provide advice to them, so I was there to just watch and listen. Lo and behold some of the senior people urged the new instructors to get a research agenda, and I am just sitting there thinking, "Holy these people don't even know how to teach." So I spoke up and said, "I don't think that is the way to do it at all, it seems to me that you should focus on teaching and recognize this. For your first time teaching you probably will have no time to do the research. Give yourself some time." But the message that central was giving was totally contrary to that and with all due respect to central, I think it is wrong. We should give new people time and tell them to get their teaching first.

**BPS:** We send the opposite signal now. It is a central university program to give you release time in your early years teaching so you can focus on your scholarship. The message I am receiving from central admin is that research is what is important.

**LS:** Exactly, but they will pay lip service to the primacy of teaching, you know this whole thing of student experience, as long as it does not cost the university money. I really believed in student experience at Lakehead. That means we had to fight for common rooms, we had to fight for amenities, we had to fight for things for students because the university just did not

get it. The whole package is important and that means having your own faculty of law building, your own library, those things. I insisted when I went there that I had control of the library, that the budget was in the faculty of law, not through the central library. It is all a part of student experience, which I don't think central likes because it costs them.

**BPS:** To me this is a problem of feedback. We always have enough students to fill our places. I will never forget I had a meeting once where we were trying to find ways to get the best students to come and one of my colleagues actually said, "Well we always have enough students, we always fill the spaces." On the other hand good scholarship, or recognized scholarship, which are not always the same, brings in money. So central administration of course prioritizes when good teaching does not bring in an extra dime but scholarship brings in a big SSHRC or NSERC grant.

To backtrack a bit, we were talking about credentialing and one of the problems was that period in the 1990s where there just weren't academic jobs. There was that very serious problem where the generation before you was still around and they were not going anywhere for a while and so people who were academically minded said, "Ok I don't really want to go into a job where I am going to put on the golden handcuffs, because if I am in a law firm for four years I am going to be making way more money than I am going to see working academically and I am academically oriented so I will go do a PhD."

Once we did that you are now comparing somebody who did a masters and then a PhD with someone who just did a Masters. Nobody wants to say, "A PhD? Come on, you were just spinning your wheels." So suddenly it became comparing apples and oranges so you have one plus one is four essentially. Masters plus PhD is far and away better than Masters alone. I think it is fair to say that you favour the practitioner-scholar model, but due to demographic conditions that had nothing to do with getting better teachers or even getting better researchers, but simply because they had better credentials, we have strayed from that. So what do you do with that now that you have got it?

**LS:** Don't forget the other thing is once that has occurred now you have the PhD mills in Osgoode and Toronto in particular, who have to justify why you have to do a PhD so they are pushing to insist upon that type of thing because that becomes the norm. Look I don't think we should hold a PhD against someone but surely we have to recognize that someone else, through

a different pathway, has an enormous amount to give to the law school as well. The problem is, once again this whole notion, and I have seen it before, I saw it in Australia at Bond. Don't forget that Bond was a different mold, but we were forced through federal funding, so you have got to hire PhD. That is almost exactly what had occurred. There were very limited exceptions.

**BPS:** But you were a private university.

**LS:** We were getting government funding.

**BPS:** The power of the purse.

**LS:** The power of the purse was indicating that you have to do certain things and that was unfortunate.

**BPS:** And we are now seeing that if you want to go through into central administration, or if you want to do other things, suddenly well wait a minute, you don't have the basic credentials anymore, you don't have a PhD.

There are very few Canadian law schools that offer PhD programs, which means people are being funneled through a very small number of schools. I think some of them have very strong ideological perspectives, which means you are tending to reinforce the ideological monism of the academy.

**LS:** Yes, that is fair. Look at Harvard, I cannot speak of Yale, but let's face it, the top American schools, when you look at the hiring going on at Harvard they are not all PhDs. They have the self-confidence to go with the best people however they are created. However, for smaller schools, who don't have that confidence, it seems to be that they have to go this particular route. That route is the indication of quality, which is the PhD.

Look, the PhD is a good thing to have, but what about four or five years of practice plus a great LLM plus marks? I mean in terms of hiring I always looked back at the law school grades, I had to. I think Bryan, you are the one that said this, "If you have a professor that is not smarter than half of the class then you have got trouble." You would often go back to the grades from undergraduate and it was shocking in some cases. We would often know why people are going into grad school, it is because no law firm was going to hire them.

**BPS:** Can I ask you about two other names we have not mentioned yet? One because I think it is important to you, and that is Gordy Dilts. I think you have talked in other venues about Gordy Dilts and you took great pride in being largely built in that mold.

**LS:** Well I think Gordy Dilts was a superb character and you know what, no education background or whatever but he put together the common sense view, which was the advocacy program and did a great job, there is no doubt about that. But he was part of that period, Keith Turner, himself, practitioner oriented. But you know wouldn't it be wonderful to have a Gordy Dilts around? We have got yourself, we have Bryan, strong academics, what is wrong with having a strong practitioner there as part of the faculty? Not isolated as a clinician over here but part of the faculty. That just makes things so much richer.

**BPS:** We have gotten rid of the practitioners.

**LS:** I think that is the problem. Gordy Dilts would never be hired full time now and sure there were too many Gordy Dilts' and Keith Turners and such in the 1960s and 1970s, sure there were. But now where are they? There are none of them and they brought a wealth of experience. Gordy was just a character. We need characters.

**BPS:** Cliff Edwards.<sup>41</sup>

**LS:** Yeah what can you say about Cliff? I always tell the stories, there is nothing new in legal education because Cliff, and Bryan you remember this, at Law Faculty Council meetings, Cliff would always say, "Yeah we tried that, back in 1973, didn't work then, won't work now." Cliff was a person of integrity. What a wonderful person to have actually created the law school here.

**BPS:** I think it was ironic to me that people who did not know him from the old days and came onto the faculty viewed him as sort of this stuffy old guy who must be from some upper class environment since he was born somewhere outside of England and was a missionary in Africa. This is a guy that was head of the Law Reform Commission for thirty-three years. This is

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<sup>41</sup> Cliff Edwards, Dean of Robson Hall 1964-79.

a guy that brought people from all kinds of backgrounds who had never been in legal education before.

Cliff hired people who had radically different political views from his own. Like I said, Cliff was there, Cliff was actually remarkably open to trying just about anything and giving people leeway to try stuff. Yet people would hear the accent or know that he was a fundamentalist Christian and just have all kinds of stereotypes, “Oh he must be close minded or very narrow minded in his perspective on the world.” What was it that he taught?

**LS:** Legal History.

**BPS:** And that was part of the legal systems course?

**LS:** Yes.

**BPS:** What was that like when he was at his prime?

**LS:** You could see he loved teaching. He loved it. He loved history. He was a great teacher. He knew great teaching and he cared about it. And you have to hand it to him, he created the culture that carried through for a long time at Robson Hall.

**BPS:** And yet he would not be hired again. Did he even have a Masters?

**LS:** I think he may have had a Masters.

**BPS:** But he did not have a PhD and if you look at the traditional forms of education I don't know if there is anything there. The Cliff Edwards of today, just like the Lee Stuesser of today, probably would not have been hired. That does not mean that everybody should be. It is not that I don't want people to be very successful in traditional scholarly formats, it is just that we do not have an openness to hiring differently educated people.

**LS:** It is interesting, we go right back, it is the lack of diversity and that is actually a message that I had when I was here, which was what is wrong with diversity? What is wrong with having the great scholars here, the great practitioners here? Everyone has got to teach though. I mean I always think there is this pressure to move to teaching-only-hiring and from a dean's perspective there is a certain attraction to it.

**BPS:** Teaching only hiring?

**LS:** Basically a person does not have to research, they can do teaching alone. I know a lot of deans are in favour of that but of course that will mean that we will have researchers only and I think that is the negative.

**BPS:** Yeah, at our place, and what we have heard at clinical conferences, one of which you came to here, is this sort of two tier law school. There are people at a lower rank, lower prestige who deliver more of the teaching and it sort of reinforces the view that if you are only a teacher then I guess I am only a scholar, rather than encouraging this kind of integrated view of the world.

**LS:** I think there are certain people on the faculty, Lisa and Vivian, they were basically teachers, but what contributing people they were, and are, I mean wow. Once again, what is wrong with a little diversity.

**BPS:** That is a very interesting approach to it. This has been for me extremely informative, thank you Lee.

**LS:** It has been nice to see you guys again. It has been an interesting ride to be on both sides. To be on the administration side sometimes you have to give your head a shake because as professors you have it pretty easy. As an administrator, everybody comes to you with their problems.

An interesting thing about students is we have found early intervention with students was critical. We let the word out to all of the faculty, if there is someone not attending, because we have mandatory attendance too, or if somebody is struggling, tell us immediately and we found usually it is the first month or so someone is not doing well. Call them in and ask, "What is going on?"

The fact that we knew that they were attending or not seemed to really have an impact. Some of them, I know one of them in particular sat where you are sitting Bryan and said, "We have certain results coming in, I know you are working, I know you have a family, but you know what, you cannot do both. It is up to you but if you continue to work you are going to fail." He said, "I have been thinking about that too." The bottom line is most of our students cannot work. It is nice to see we have these students who, if we had not done anything, they would have crashed and burned.

**BPS:** I was talking to Gerry about how we gave out tough marks back in the day and the philosophy then was that you are doing the student a favour

because if they are not making it in first year and are just falling over the finish line in future years, then not getting a decent job, they are sinking time and money into that. But psychologically my sense is that it is pretty hard to fail first year. People still fail but the psychology is, they are getting pressure from their family and they don't really want to be in law school so you shoot me.

**LS:** They want the policeman to shoot them. Suicide by cop. We see the same thing.

**BPS:** We have made it virtually impossible if you stay long enough. If you make it through first year you are going to graduate.

**LS:** Yeah I know, and we have tried to offset that, the error of Manitoba's way, if we could, not only Manitoba, most of the law schools are like that.



# Interview with John Eaton\*

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B R Y A N   S C H W A R T Z

## I. INTRODUCTION AND BACKGROUND

**Bryan Schwartz (BPS):** Your background is that after a career as a touring rock 'n roll musician you went to law school. I am just trying to locate where you were in this great transition from physical books to cyber. You went to law school because you wanted to be a lawyer?

**John Eaton (JE):** I went to law school for the same reason I think a lot of people do: because I had an Arts degree and wanted a career. Can I give you the whole biographical tale?

**BPS:** Certainly.

**JE:** As a young fellow in my early teens, I learned to play drums and I became pretty good at it. I became absolutely besotted by rock 'n roll music and playing drums in rock bands. I did like a lot of kids in suburban Canada; I played with a bunch of friends. I had always been a fairly decent high school student, but all of a sudden in grade 11, my marks started to fall off because the only thing I cared about was playing drums in rock bands. Finally, in grade 12 I came to the realization that I really only cared about playing drums in rock bands so I quit high school. I did not graduate high school. I played around in various bands. I lived in the Toronto area but I ended up playing with bands that toured pretty rough places in Northern Ontario and Atlantic Canada. At one point, I played for a really, really, *really* third-rate female impersonator named Ricky Day out of Hamilton, Ontario. He headlined the "Ricky Day Revue" which consisted of: Ricky; a guy from Boston named Ramon Lee, who was a poor man's Johnny Mathis; and a

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\* Interview conducted by Bryan Schwartz. John Eaton is Law Librarian & Associate Professor at Robson Hall. He was Reference Librarian at the E.K. Williams Law Library from 1991-95 and has been in his current position since 1999-2014.

very entertaining, but completely mad and insane British guy named William Bonney, who had been through the musical ranks. Bonney had played in a number of bands in Britain that had gone places but he moved to Canada and became sort of a comical magician. So this entourage toured around parts of Canada and is just one of many bands I played with.

**BPS:** So what you are telling me so far is that most people think that William Bonney died during the range wars...

**JE:** That's right; he might still be alive, as a retired magician in Hamilton, Ontario. I did this throughout all of my twenties. I was on the road playing in rock bands for all of my twenties and it started to wear thin. It was thinner and thinner and thinner until finally I found myself in Victoria, British Columbia and talked myself into a job as the manager of the student union pub at the University of Victoria in 1979. I was 26. I bluffed my way into this job and I had to hire students to work my pub. I always assumed they were vastly my intellectual superior and I quickly realized that was not the case. A lot of them were actually rather dim and I could hold my own in a conversation with most of them. I started to think about maybe going a little further in life than managing bars and playing in rock bands. After about three years doing that, I began university as a mature student at the University of Victoria when I was 29. I did an undergrad degree there and excelled at it but it was in the Humanities; I was a student in history with a minor in linguistics. The reality set in that I was not going to get a job out of this, so somebody said, "Why don't you write the LSAT?" Wrote the LSAT, got a good score and realized I could go to any law school I wanted to. At this point, I realized I wanted to return to my home base of Ontario. So I applied to all of the Ontario law schools, was accepted to, and attended U of T.

While there, I realized a couple of things: I realized I liked the whole process of research but I did not like the notion of lawyering. I also realized that the issues I found the most interesting were in the areas of criminal law and family law. But I quickly realized that to actually practice in those two areas would be soul-destroying; I just could not do it. I had always worked in libraries as an undergrad and as a law student. I just loved that environment and I loved the process of research, but I did not like lawyering. I was 35 years old when I graduated from law school, so the year that everybody else went off to article, they were all ten years younger than

me. I felt like I had to get my career going and I had decided on a law library career. So I went off to Library Science school at the University of Maryland and spent a year and a half there. That is sort of how my career got launched.

**BPS:** Let me go back to your history background and enjoying the process of research. People, at least from your generation, who are historians, that was part of the thing that attracted them—the dust of the archives; the actual treasure hunt notion; finding a document, an actual real document that existed 200 years ago.

**JE:** Yes, the detective work of that is a real thrill.

**BPS:** Which culminates in an actual physical find. “Here is a document signed by Louis Riel,” or “here is an actual photograph from 1890” and so on and so forth, but it was not just finding information in representative and homogenous ways on the screen, it was more like stamp collecting or coin collecting in a way. You were actually finding documentary archives and physical objects which start to tell the story. Obviously, it was something that you enjoyed. You had no idea when you started all of this that you were at the beginning edge of the transition of the cyber world.

**JE:** No. I had no clue whatsoever.

**BPS:** When you are going to library school at the University of Maryland, what year was that?

**JE:** That was in 1988-89.

**BPS:** What did they call it then? Did they call it “Librarianship,” or Information Science?

**JE:** They were all basically Library and Information Sciences. I think mine was College of Library & Information Services. There is no library school left—that I know of—that has kept the word “library” in the title. It is just simply not sexy enough, or not expansive enough. Most now are called Information School or even I-School.

**BPS:** Just trying to think of the origin of the word library; it is Latin, isn't it?

**JE:** Yes, from *libros* for book.

**BPS:** That is what I was thinking.

**JE:** It is actually from the physical book.

**BPS:** It is from the object. It is one of the tragedies of civilization, like when the Alexandria Library burned and we lost the last remaining copies of plays by Aeschylus. That generation, you did not know you were on the cusp; you could not imagine that 20 years later people would be going "Books? Who needs books?"

**JE:** No, I do not think I foresaw that particularly but I am of the age—and maybe you are too—where I thought that the computer is just a fantastic tool for speedily and easily finding and locating things. If I am heavily involved in research, I like to use the computer to locate what I am after and then use the print resource to actually do the work. That is sort of how I envisioned how it would be going. I thought, "Man these finding aids are going to be so much better; the computer is going to enable us to locate stuff so efficiently." But I thought we would still be elbow deep in paper. I do not think I foresaw the time when libraries would be just throwing huge collections in the dumpster and replacing it all with computer terminals.

## **II. THE GREAT LAW LIBRARY**

**BPS:** Your career began in the 1980s, but you knew many people who started even before-hand. I know you are quite a student of history and might even be able to help us with the early days. So if you go back to before there was even a law school, the primary resource for practicing lawyer—apart from whatever they would have in their own collection in their own office—would have been the Great Library downtown in the Law Courts.

**JE:** The Great Library would certainly have been it. The bigger firms would have certainly had the *Canadian Abridgement*, which would have been their case-finding, statute, and noting-up tool. Probably every firm that could

afford a collection would have had a *Canadian Abridgement*, but absolutely, the Great Library would have been it for the practicing bar; it would have been it for judges, and it would have been it for law students prior to the move to Robson Hall.

**BPS:** It would be very hard for people today, just as they cannot imagine what it was like working with typewriters and white-out and stuff. I actually remember seeing cases argued before I went to law school and the method there was actual physical books that the lawyer would have to bring in. Judges would have a large trolley of books rolled in. Arguing case law was quite a physically-demanding exercise.

**JE:** Well I would imagine even, if you go back far enough—prior to photocopying even, prior to computerization in preparing case books or *facta* for trial—counsel would identify cases and make photocopies of those cases to include in a case book for the judge. If you just go back a few more years, prior to the advent of Xeroxes and photocopies, they would have wheeled in copies of law reports with the specific cases identified, and judges would have had to pull them off the trolley and read them as they are deciding the case. Things have changed.

**BPS:** A typical person probably would not have had a codex collection because they are expensive. You would probably have something like the *Dominion Law Reports*, maybe the *Western Weekly Reports*, a few textbooks, and that was the very limited database that you had to work from. There could be other material but it seems to me that legal theory did not matter that much because you just simply did not have access to that in any convenient way. You would not study American or British cases that were not readily accessible.

**JE:** Other than those certain British cases that stand as the fundamental underpinning of certain areas of law. You would learn about *Donoghue v. Stevenson*,<sup>378</sup> *Hadley v. Baxendale*,<sup>379</sup> etc.

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<sup>378</sup> *Donoghue v Stevenson*, [1932] UKHL 100, [1932] SC (HL) 31 [*Donoghue*].

<sup>379</sup> *Hadley v. Baxendale*, [1854] EWHC J70, (1854) 156 ER 145 [*Hadley*].

**BPS:** When we did our research for the special issue, we discovered a memorandum from Cliff Edwards, who oversaw the transition from the downtown practice-oriented law school to the academic setting. He says in that material that the core of any law school is the law library. Is that a fair reflection of how you would have understood things in the 1960s?

**JE:** I would say it was the case up until quite recently. In fact, there is a similar quote—possibly from Christopher Columbus Langdell at Harvard—who said something like, “The library is to the law student what the laboratory is to the science student.”<sup>380</sup> The thinking was the science student attends lectures and then heads to the lab to put their knowledge to use; the law student has lectures and then puts their knowledge to use by heading to the law library, reading cases and all of that sort of stuff. The library has had, in law schools, a more valued position than libraries in most other disciplines. I do not know of any other discipline in which it is said that the library is at the core of what they do. It is always sort of peripheral to what students do in most other faculties.

**BPS:** I remember being told that Bill Lederman,<sup>381</sup> who was a celebrated constitutional lawyer from way back when I went to law school, saying once to a colleague, that “We are so lucky as lawyers because we are scientists and all the data we need is contained in our libraries; it is very compact, very convenient.”

**JE:** Just as an aside, I believe the law library at Queen’s is named after William Lederman.

**BPS:** I cannot remember if he was dean at one point, certainly not when I was there, but he was a celebrated constitutional academic at the time.

The law library would serve triple duty: it was a resource for the students; if you had to write a memo, you would be scrambling in there; it

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<sup>380</sup> C.C. Langdell, *The Centennial History of the Harvard Law School 1817-1917*, (Cambridge, MA: The Harvard Law School Association, 1918) at 97. The quote is as follows: “The library is to us what the laboratory is to the chemist or the physicist, and what a museum is to the naturalist.”

<sup>381</sup> William Ralph Lederman (January 6, 1916-July 26, 1992) was the first Dean of the Queen’s University Faculty of Law from 1958 to 1968, and a Canadian constitutional scholar.

would be a resource for the faculty to the extent that they were engaged in scholarship. To what extent was it a resource above and beyond what the Great Library had to offer? As a practicing lawyer in the 1960s to 1980s, is he coming up to the law school to get information he simply cannot access at the Great Library?

**JE:** In those particular years, I do not know that the academic law library had more material than the Great Library. The Great Library began to see its collection shrink in the late 1990s, early 2000s, until now. It is a shell of its former self. Now we have to make up the difference at the E.K. Williams Law Library. I do not know that there would have been a huge difference in, say, the 1960s and 1970s, into maybe the 1980s. Probably where we would have exceeded the collection of the Great Library would have been in British and American materials. I do not know that the core doctrinal Canadian material would have been much better at the E.K. Williams Library than it would have been downtown.

**BPS:** So let's go back to where we started, to the Cliff Edward's quote: "The Library is the core of the Law School."<sup>382</sup> When we started, there was basically an oligarchy of law schools. A small number of law schools in Canada controlled the market to the Canadian legal profession. That was an era when there was one law school for the whole province, a handful of law schools across the whole country. It has not changed that much in the last 20 years. We have started to see a big change. I think one of the biggest changes we have seen is the academicization there. Its location in the universities with all kinds of ideological and sociological implications but I think what we are trying to see is the oligopoly being broken. It turns out that you can have a Canadian law school that does not have to be in Canada.

**JE:** Yeah that is right. I believe there is Canadian Constitutional Law being taught at Bond [University] in Australia.

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<sup>382</sup> Memorandum on the Future Status and Location of the Manitoba Law School (1966), Winnipeg, University of Manitoba Archives (Box 14 folder 6) at para 7. The quote is as follows: "The fulcrum of any law school must be its library. In order that a law school may achieve any degree of success and recognition, its library must attain a high degree of excellence."

**BPS:** There is Bond; I believe Kent is another in England. It has significantly affected the market in Ontario. Foreign-trained lawyers are coming into the Canadian market and you are starting to see these joint American-Canadian programs where you will be able to go to law school. If you are starting a law school today and someone said, “Well the heart of this new law school is the library,” would that still be a credible proposition or would you say, “Well hey, we do not even need a library”?

**JE:** Yeah, I think it is a credible proposition if, by library, you mean information centre. I think now the perception of the modern academic library is that it will have some materials, but it will be more of a social place where students can meet and converse. This is another change that technology has brought about and I think it is rather a positive one. When we were just books—30 years ago or whatever—and you were in the library doing your work, you were sitting there with a book. It was just you and a book. There is no social aspect to that. It is a very lonely, solo pursuit. However, if everything is digital and everybody has a laptop—which everybody does—there is the possibility of four people being together and accessing the same material at exactly the same moment and ingesting it communally, together. This is what we see much more of: people working in groups. I would still say the heart of the law school is this centre where, first of all, the librarians have to deliver the right content and have to instruct them appropriately on how to use that content; but essentially, providing them with a workable, usable space to work together or alone on materials is really a mission of a modern law library.

**BPS:** But if four of us can work on this instantaneously, each of us in our own basement or cabana chair, why are we physically in the library?

**JE:** Because we have to be at law school.

**BPS:** Oh, it is something we do during the day, right? Between lectures? Oh, I see. So we are going to work; might as well have this physical space.

**JE:** Right, well, also your house is a pit or my house is being sprayed for fleas or some such thing. We have to meet communally somewhere else. What is the biggest communal space in most law schools? It is the library.

### III. LAW LIBRARIANS

**BPS:** If we go back to the old days, who would have been a law librarian? Law firms would not have had their own librarian, I would think.

**JE:** If they had their own collections, they usually had a clerk who did loose-leaf filing and someone who had the job of looking after collection and coming up with some sort of system where the lawyers signed out the books in the office. It would be an administrative person.

**BPS:** Selecting and culling collections in major firms could be a challenge in itself. Maybe law firms are going to be more electronic. So who would be a law librarian in those days? Could it be a lawyer who is doing library stuff, or could be a librarian who is doing law stuff?

**JE:** More likely the latter than the former: mostly librarians who had come into law and had learned it on the go. When I came into the field in 1990, I had a law degree and a library science degree; I was one of only a handful of people who had the dual designation. There was Shih Sheng Hu,<sup>383</sup> Denis Marshall,<sup>384</sup> Neil Campbell,<sup>385</sup> myself—all of whom spent portions of their careers at the U. of Manitoba, by the way—and just a handful of others. It is now fairly commonplace. We were the first wave of people with a law background who then went on to study library science. Invariably, it was in that order: law, and then library science. We were the first generation to hold that dual designation. Most others had been librarians who had been hired by a law school or a law firm or a law society or court house and asked to organize their materials and did some learning on the job.

**BPS:** In your assessment, how much learning is actually involved for a librarian? There are competing schools of thought on management: that a

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<sup>383</sup> Shih Sheng Hu, Robson Hall faculty, 1967-78.

<sup>384</sup> Denis Stanley Marshall (1949-June 23, 2000), Robson Hall faculty, 1978-89. He was the Law Librarian and Assistant Professor at the Faculty of Law at the University of Manitoba. After leaving, he was the Law Librarian and Associate Dean at Queens University Faculty of Law.

<sup>385</sup> Neil Campbell, Robson Hall faculty, 1989-98. After serving as the Law Librarian at the Faculty of Law at Robson Hall, he moved to B.C., where he served as the Law Librarian at University of Victoria until 2014.

good manager can manage anything versus you actually have to have knowledge of the discipline to be a good manager. Looking at the 1960s to 1980s: was it important to actually have a law background to be a law librarian or could an effective librarian pick up the law part?

**JE:** I think an effective librarian could pick up the law part. Testimony to that fact is that there were lots of very successful law librarians in that era and lots of good academic law libraries in that era. Their choices were not really as difficult as they became when material all got duplicated and became available in print and online. The challenge of law librarians later on became juggling the differing methods of research of your faculty. You had younger students coming in who were comfortable with digital material, and older students, who were moving out but had not left yet, who were completely uncomfortable in that environment and wanted print materials. At a time of shrinking budgets, you are duplicating your costs because you have to rent them online and buy them in print. Back in the 1960s and 1970s, it was a matter of identifying what the core doctrinal texts were and going out and buying them.

**BPS:** It was probably more consequential then who a law librarian was. In the following sense, we talked earlier in this conversation that the collection was physically in the library. So in those days, there was such a thing as an unreported case: a decision would happen but it would not show up in any report.

**JE:** Yes, unreported cases were like trees falling in the forest with no one to hear it. They existed but they left absolutely no trail.

**BPS:** Yes, if you had cases from another jurisdiction but you did not have their reports, they might as well not exist. Because the database was comprised of what was physically present—the ideological and doctrinal impact of what the law librarians were choosing—the specific data points were quite significant. Of course, that would have in turn been impacted by what the Bar was demanding, so some sort of dictatorial choice by non-lawyers; there was no way around the loop then. You could not say, “Oh, I am really interested in what is going on in those unreported cases from Manitoba, Nova Scotia, the United States” or even the reported cases from

the United States if it is not physically available. You are not going to look for it, not going to cite it; no one is going to pay attention to it.

#### IV. EPISTEMOLOGY AND PHYSICALITY OF INFORMATION

**BPS:** Taking a little bit of a different path, and then we will come back to this, but if I do not ask, it will probably be completely forgotten. It seems to me that it is interesting in terms of epistemology. We have gone from one type of library classification system to another. The original system was the Dewey Decimal.

**JE:** Well there have been a number of them. Dewey was never used very widely.

**BPS:** What was the system we used prior to going to the Library of Congress?

**JE:** In law or in general?

**BPS:** In general.

**JE:** In general, Dewey.

**BPS:** Did we use Dewey in law?

**JE:** What did they use in the Great Library? I have no idea. There were two other law classification schemes and I don't know which one was used. There was, believe it or not, Los Angeles County Law Library<sup>386</sup> classification system and there was one called Moys<sup>387</sup> developed in England. But to be quite honest, I do not know which was used. Lots of places, many smaller law libraries probably came up with classification systems of their own.

**BPS:** Numbers like KC...is that Library of Congress?

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<sup>386</sup> The Los Angeles County Law Library classification system was developed in 1958.

<sup>387</sup> The Moys Classification Scheme, which is a library classification system for legal materials, was designed by Betty Moys. It is used primarily in law libraries in common law jurisdictions such as Australia, New Zealand, UK, and Canada.

**JE:** It is. K is law, just generally, and you start adding other letters to get to the jurisdictions.

**BPS:** When did we switch from Dewey to Library of Congress?

**JE:** To my knowledge, at Robson Hall it has always been LC, Library of Congress. However, there is a Canadian exception; it is called KF Modified, which is kind of an interesting one. It was developed by Canadian law libraries. If you actually use Library of Congress, it is all arranged jurisdictionally, and that makes sense if you are American. If you are an American legal researcher and you want contract law, the first thing you want is American contract law, and you find that in a particular range. If you want to go further afield and you want to look at British contract law, Canadian contract law, Australian contract law; they are in completely different areas. KD is Britain, KE is Canada, etc., and you do not mind checking contracts in a whole other region of the library. For Canadians, it does not really work. When we want to look at contract law we want to look at everybody's. We want to look at ours, at American, British, and Australian together. The way that Canadians have adapted LC is to have everything lumped together by subject, and jurisdiction becomes somewhat irrelevant. There are more indicators other than the call number to show whether it is Canadian or not, but basically it means that all contract law is in one range. Back in the days when call numbers really mattered because people browsed the shelves, they would find the call number for a good book and then they would look all around it to find more. Canadians developed this system so that if you are looking for contract law, you are going to get everything in one area.

**BPS:** The reason that I was asking this was precisely for the sort of insight you are giving us, that the way people classify a thing will have something to do with the way people actually understand the substantive discipline. So law actually had its own letter under the Library of Congress system a century or two ago. Law was its own distinct profession; you would not think of it as a branch of the social sciences or humanities. It was taught as a profession like engineering or medicine; why wouldn't it have its own letter? Even now if you are in the physical law library looking at environmental law, what would be proximate would be environmental law? In the United

States, it would be American Environmental Law; here it would be environmental law in various jurisdictions. You would not be standing in the section next to environmental engineering, environmental science, ecology, and so on and so forth; it will be strictly law and you would have to go to a different physical location to actually get other aspects of the discipline.

I mention that because one of the controversies today in academic education is to what extent is law an autonomous discipline and to what extent should it be part of a larger exploration of humanity. When I am a law student in 1970s and I am looking for something, it is more useful for me to be there physically. I look for one book and then I see what is around it. When you are doing computer-based research, I suppose sometimes you find things quickly using the particular letter or particular name. Other times, you are going to be ingenious to find things that have different names or different authors. You do not have the physical locator for the intellectual material.

One of our themes here, implicitly, is physicality; I know the law firm collections are physical objects in a confined geographical location, which has serious implications in terms of the substance of the discipline because you do not have the books or the physical report. It basically does not exist as a data point. When you are doing research, the fact that things are physically lumped together expedites your research. It will constrain it in other ways: if your books are all about law, it is less likely to occur to you that you should look up books on environmental science or environmental history or whatever else might for more modern sensibilities be relevant. The way you accessed data was the physical book, the codex; nowadays, in practice a lot of the ways we access legal material, whether it is an article or a textbook, is a single screen. I do not have the actual physical case report as a distinct unit; I do not have that issue of the *Dominion Law Report* as a unit. I have got a screen in front of me. I can page up, page down, go to the proximate screen, but I do not have the physical object. My view tends to be that we might be looking and absorbing information differently because of the physical difference. Do you have any thoughts on that whole topic of physicality?

**JE:** What the computer has enabled us to do is to much more quickly locate and identify meaningful and relevant material. It used to be quite tedious. I mean, we are talking about going and finding a book on the shelf, but it

used to be this whole process of going through the card catalogue—which could be time consuming if you did not know the subject headings; and there were no computers to assist you with that yet; and you relied on your own knowledge of the law, your own brain, to find the right subject—flip through all of the cards to find out where it was located on the shelf. It was quite an undertaking.

Clearly with computers you can identify and locate materials much more quickly and then, of course, reading them online speeds up everything enormously, but here is where it has an effect, I think. What I notice is that students or people doing research—and I am as guilty of this as anybody—no longer read much of the case to get the general context, the flavour of the case. A computer enables you to search within a document for your search term. For example, you are looking for automobile negligence; you do a search and get a bunch of results; you are then able to whip through the results very quickly, finding occurrences of your search terms, which then takes you within that document to the particular point where your search term or topic is being talked about. It enables you to very quickly make a decision about whether you are going to pursue this case.

But I had an occasion a few years ago where a student was looking for a particular point of law and asked me if he had found a case that I thought was relevant. He showed me the case, and I said, “Yeah, this looks to be on point.” And he said, “Good, because this particular statement by the judge really helped my case.” But I kept looking at it, and then went back and looked a few screens ahead and a few screens back and discovered it was a dissenting opinion. In fact, when we investigated further, the actual decision was one that worked against this particular fellow but he had bounced through the case, sort of bunny-hopped through the case based on his search terms and found a quote that he liked but he was not reading the whole context; he was not reading holistically. That is one of the things we have lost with computers. It is human nature; you are going to take the easiest route and so we just bounce through cases, finding where our topic is discussed, and so we do not get the whole essence of the case.

**BPS:** I have always thought that one of the paradoxes of information is that too much is the same as nothing. Darkness and white noise are both not telling you anything. So now you have got access to a lot of information and you are responsible to check the cases but you only have so much time. In fact, clients are only paying for so much time and nothing else. So maybe I

am looking for twenty cases an hour rather than two cases in an hour; I have got more coverage, but my attentiveness to any of them is going to be much less. I am going to be looking for the magic word, the magic quote, and do not have the luxury of time to sit down and actually absorb any particular case. I have a little theory. I do not know if you have ever seen it substantiated in the literature. My theory is this—only a hypothesis (I have not really seen it substantiated anywhere)—that the physical books have an advantage that we have lost, and the advantage was that it provided a physical map of a line of argument. So if I am reading a novel, there is a beginning, middle, and end that were physically manifest, meaning that something in the beginning was actually physically earlier in the book.

**JE:** I can actually remember if something that I read was in the upper left corner of a page or bottom right.

**BPS:** So we tend to map information into the physical book, which sounds trivial, but is quite an important organizing tool. Everybody's brain works differently, but I think a lot of people are like you. I can remember beginning, middle, and end, left side of the page, right side of the page, so the flow of the argument would tend to go along with the book. Maybe there is a certain disciplining that goes along with that. You were encouraged to think in sort of a linear, logical unfolding form because you had an actual physical map to go with that. The physical end of the book is where I wrap it up; the beginning of the book is where I introduce the argument; the middle here is where I elaborate. My guess is that, when we are just looking at these little snippets, we are absorbing less because we are just getting these little isolated bits of information, which are harder to synthesize when you do not have the physical map of the codex. If you are not in an environment where you are used to the disciplined, linear unfolding of a narrative or an argument, you become, in some ways, less adept at it. Is there any literature you have come across with that?

**JE:** No, I am not aware of any substantive literature on that but I do tend to think that there is a certain logic there. I think it is sort of similar to what I was saying about people not being absorbed into the actual text; they are not sort of being actually sucked in and are not becoming participants in the text, which you are more of when you are reading the printed page. I do know that people are now talking about how younger students who have

essentially only learned in the digital environment. They presume that there are actual physiological brain mapping differences in these particular young people as opposed to people like ourselves, who have done all of our learning entirely in the print milieu. It is interesting. It certainly has implications. I do worry about the accuracy of research done entirely online.

The biggest problem for me as a person who is engaged and is expert in the organization of information, the thing that frustrates me more than anything else is the fact that while Google is an amazing human development, it has also caused significant number of problems for those of us who organize and retrieve information and teach the skills involved in organizing and retrieving information. This is something that I do not think we can do anything about. I think we just have to throw up our hands and acknowledge that Google has won and that the intelligent organization of information is basically a thing of the past.

I deal with my students and I say, "Look, imagine you are an articling student. Time is of the essence and you are told to find everything on this particular point of law. What would you prefer? Would you prefer to go into a database where all of these materials have been arranged, described, and organized, and it is easy to drill down to exactly what you want or would you rather use a Google-type search engine where you just throw terms into a basket and you see what you get and you get hundreds of thousands of results?" It is obviously a leading question, and what I am getting at is that you are better off using the organized services. The fact of the matter is, I do not know any students who do not prefer to just Google it. They do not seem to mind the fact that they are going to get thousands of irrelevant results. They are quite willing to sift through and find those pearls. Whereas there are entire armies of people who have organized the law for you and can take you straight to the cases you need to look at, but no one seems to want to employ those services.

**BPS:** Is that because some of them exist only in a physical format like a textbook?

**JE:** There are actually digital representations of those original textual formats. The *Canadian Encyclopedic Digest* online is still a fantastic tool for doing research and it is even faster and better online but I still have to drag people kicking and screaming to it. It is like trying to get them to eat their

vegetables, to get them to use actual organized databases rather than just seeing what they can find throwing terms into the ether.

**BPS:** Do you think as the use goes down, production will go down as well?

**JE:** I think productivity will go down.

**BPS:** Well, people used to spend their lives writing a textbook on contracts or conflicts of law, which are often very influential. It was not that easy to find stuff and locate stuff. Now you can cut out the middle person and go directly to it and what you are saying is a lot of students actually prefer to do that. Do you think we are going to see another generation of Dicey, Morris, and Waddams, or is that kind of writing going to disappear?

**JE:** I do not imagine that it is going to go on.

**BPS:** I think you are right and I think that is not only because of the consumption. I think that part of the integration of law schools into the academic world has been—you saw the Arthur's report tended to devalue what you are describing—to devalue the organizing of doctrine, explaining doctrine, clarifying doctrine, critiquing doctrine. It is more about taking a particular topic, maybe in an interdisciplinary way, and writing some sort of combined legal-sociological-philosophical critique of where the law should be moving rather than where the law is or has been. I am not sure we are going to see this kind of material. Some of it will continue because it is already started and will not be done by giants; it will be done by people at a more junior level. They will just keep grinding out future editions. The incentive to actually sit down and do a textbook—the interest in doing that, from both the consumption-production—I do not know if we are going to see the great textbooks that we saw in the past.

## V. TRANSITIONING FROM PAPER TO THE INTERNET

**BPS:** Go back to the beginning of the interview. You started at a time when we still had the codex paragon.

**JE:** Well, I started at a time when things were clearly going to transition. I went to law school in the mid-1980s. At U of T we had a mandatory moot

that everybody had to do and as part of the preparation for the moot there was—I think the library had gotten this added into the curriculum—there was a mandatory Quicklaw session. You had to take your moot team of four people, two respondents and the two appellants, and meet with the reference librarian and be introduced to Quicklaw, which was brand new then. Quicklaw got up and going in 1986, I believe, or at least came to market in a meaningful way in 1986, and this was right around that time. We met with the reference librarian and were taken into a room that was clearly a converted broom closet where there was a single computer terminal. The reference librarian would say, “Ok, what is your moot problem?” and ours was an evidence problem based on blood samples from an accident. She did a search and she came up with x number of cases. There really were not that many because, at that time, Quicklaw was not retrospective, it was only building its database going forward; it had just started, so there were not that many cases. So we sort of stood around; we watched her do this and we thought, “ho hum.” I guess this is going to be good one day but it meant absolutely nothing to us. So I was there at the very beginning of the computer revolution, if you will. After law school, I went to library school and we had to work with computers. It was all very primitive sort of stuff, but we had to learn both print and electronic resources. I really did straddle both eras: the card catalogue and the digital library system, as well.

**BPS:** When I went to law school there were a couple professors one was Hugh Lawford.<sup>388</sup>

**JE:** The founder of Quicklaw.

**BPS:** And I think Keith Latta<sup>389</sup> led his own rather interesting biographical path. I never actually took a class with Latta but I heard that he was very involved with Quicklaw.

**JE:** Professor Lawford started it in the 1960s because he was a computer buff. This was a time when the idea of a computer buff was almost

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<sup>388</sup> Hugh Lawford (September 8, 1933-August 17, 2009) was the founder of Quicklaw and a professor at Queen’s University.

<sup>389</sup> Keith Latta helped Hugh Lawford with the creation of Quicklaw and was a professor at Queen’s University from 1968-1971.

ridiculous. It is almost like saying, “Oh, so-and-so likes to make rockets in his backyard.” The notion of a regular guy liking to make computers was crazy. Computers were massive mainframes that took up half a city block and were owned by the military. In 1963, there were only mainframes.

**BPS:** This will seem very quaint. I do not know if you remember this era, but when I was in high school, I took a summer course in programming because we were told this new era was all about programming. I learned Fortran IV<sup>390</sup>. Turns out that almost nobody knows how to do programming; it is a small elite group of people that actually know how to do it.

**JE:** I believe Fortran as a language still exists though. Not that I know much about programming, I mean obviously there are other languages, but I do not think Fortran as a language has disappeared.

**BPS:** We learned about punch cards. What are those machines where you actually physically cut out holes and you take the deck put it through a mainframe and then two minutes later, you have to wait in line and it comes out on laborious printer? It had striped papers and there were holes in it so the spokes of the turning wheel would advance them. We actually thought the future was going to be that everyone was going to have to learn programming. Of course, the future has turned out to be a small number of people who have learned to do it and a lot of industries end up making it so user-friendly that you do not need to know how to program.

**JE:** It is a crude analogy and I do not know if it works that well but I liken the advent of the computer to the advent of the automobile. At the very beginning of the advent of the automobile, everyone realized this thing is really going to take off; this is going to revolutionize everything. We are going to get rid of horses; we are going to use automobiles for everything. I am sure there are people who said the future lies in auto mechanics. Become an auto mechanic. And they did not imagine the day would come when no one really knows how a car works; you just get in and drive it. They had the notion that you had to really get inside and learn about its workings. In the

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<sup>390</sup> FORTRAN was developed by IBM in the 1950s and is derived from “Formula Translating System.”

1980s, this is how everyone was approaching computer systems. Everyone was telling us, “You really have to understand how this stuff works; you have to understand what you are doing; you have to understand this because people are going to be using computers.” Exactly the same thing has happened as happened with cars. People are using computers without any clue, no interest at all in how they work. I am not saying this as a bad thing; it is just human nature. If you do not need to know how something works and it just does it for you then why learn how it works? Nobody is studying—well, some people are—but no one is pushing legions of people towards programming because there are not that many jobs and people do not need to know programming to run a computer.

**BPS:** You were aware that Lawford was doing this stuff? That some people at Queen’s were doing this stuff?

**JE:** As I said, they came to market around 1986 but he had been messing around and gotten funding to try it out around 1963. A lot of my information on this is anecdotal. I think that the way he started on this was converting the text of Canadian Treaties. I do not know if it would have been to tape or punch cards or what, but then demonstrated that one could search for occurrences of specific terms within that text and could therefore find the treaty that deals with matter x.

**BPS:** I was going to ask you about that. I mean, it is so obvious to me now that the algorithm we use now is a search algorithm. I do not think it was obvious at the time that that is where the technology will go, that it will be something as simple as I can pick any words and we will find it in the text. Was that received or an innovation on his part?

**JE:** I do not believe it was an innovation on his part. It employs what is known as Boolean logic, which was based on the math of Professor George Boole<sup>391</sup> from University College Cork in Ireland. That is just simply very elemental logic. It is the difference between “and” and “or.” To retrieve a document, it needs this word “and” that word meaning that you are going

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<sup>391</sup> Professor George Boole (November 2, 1815-December 8, 1864) was the first recognized professor of mathematics at Queen’s College, Cork (now University College Cork). He developed the basis for Boolean logic.

to get x documents, as opposed to this word “or” that word, from which you are going to get many more.

**BPS:** If you asked me about Boolean logic, and what I think about it, I would say, “Yes and no.”

**JE:** But while we are on that subject, one of the great things that is now lost in the “Googlization” of searching is the Boolean search.

When I became a reference librarian in 1990-91, Quicklaw was only four or five years old. Most lawyers knew of its existence, knew it could do the work for them, knew it could speed everything up, but they did not know how to use it and they did not really want to learn. So as reference librarian at Robson Hall, I used to do a tremendous amount of work for the practicing Bar, who would pay modestly for that. But I was really good at employing Quicklaw, which was complicated. It was not really difficult to understand but it had a Boolean operating system of “and,” “or,” “but,” “not,” and proximity searching that had specific rules. Once you had mastered the rules you could construct very exact searches that could drill down to exactly what you needed. Frankly, I—and I am not being immodest here—became very good at employing Boolean search strings. You can still do that but hardly anyone does so any more. All of the databases have realized that the whole Boolean thing is what is putting people off. Now they have to be more like Google. So now you sort of have two options: you can do a search where you chuck terms in a search bar and see what happens; or you can construct a Boolean search. I do not think many people are doing the latter. There is a real loss of control over the search when you are just relying on a Google-type search where you throw terms into a search bar. All you are doing is an “and” search. You are searching “this and this and this and this,” whereas with the Boolean search, you can be much more specific.

**BPS:** I guess there is a relationship between hardware capacity and software elegance by which I mean, if you had very little computer power and things took a long time, then you would use a front-end thinking thing. “How can I be laser precise in what I am asking?” If the computer can search a world of information and spit out an answer without thinking through the strategy, I would not have to go to all that time and effort. I can just toss it in and there is such machine power and fast turn-arounds that I do not have

to think hard. I understand that contemporary programmers complain about how “in the old days, people wrote very few lines of code, which was very efficient and elegant and concise” because they had only limited amount of computer power. Now, of course, brute force can make up for all of the inelegance so you do not need to be as concise and clear and compact in your programming any more. There was this larger thought that everyone was going to need to be adept and thoughtful and conversant with technology and computer science to be good at this stuff. Where it went was more computing power, and programs to go along with computing power that would do the work for you. You did not have to do a whole lot of thinking, and that is where we have ended up.

**JE:** But on that, I have always shocked my students by saying—and I do not think there is a single one that agrees with me—that while Google is ubiquitous—and hey, I am human, I use Google 400 times a day just like everybody else—but I shock them when I tell them Google is actually sort of dumb. Google is very brawny, enormously powerful, and can rapidly canvass a vast universe of information, but it is not very bright. Basically a computer search that brings you back 180,000 results is not a particularly good one, but I cannot seem to get that point across to students. You do not want 180,000 results; you want about six, and I can show you a way that we can get to six. There’s a way we can search and get just those six cases, but I get few takers.

**BPS:** I try to teach that, too. My theory is, try to find one recent article and then try to find an eccentric term. If you are searching cyberspace and security and law firms you are going to get 58,000 articles. Try to find something more eccentric and specific. Maybe there is a key author in the area and he or she is the authority that everyone is citing in the area, and I have reduced 58,000 to maybe 200 that are on point. Or there is a particular case name or statute, so I am not actually looking for the most encompassing terms. I am trying to look at eccentric terms, parochial terms that actually cut out most of the stuff and get me where I want to go.

**JE:** Right, and that is definitely one strategy that you can use to winnow out all of the stuff that does not really matter. I give them techniques to say, “Ok, let’s do a field search. Let’s just search a database like Westlaw or LexisNexis. We will do a Google-type search. Just throw in words with no

connectors, but let's do it in an appropriate field: the keywords field, or the summation field. So we know that our search terms are going to be actually talked about as what the case is about." I get some takers on that, but there is a bit of reluctance actually. They would still rather not have to think about that kind of stuff.

**BPS:** The habituation, to me, seems quite remarkable. I tell the story to my class over and over again; I do it in a light-hearted and comical way, but it actually represents a real phenomenon. In my research and writing courses, my seminar courses, where a major component is writing an essay. I tell them the same story at the beginning of the course, which is that it is never enough to do just a web-based search. You have to go in more specialized databases like LexisNexis and Westlaw. I have an integrated process of feedback and I get some papers which still have not looked into the specialized literature. Every year, in one of my courses, I will still have one who has still not got it by the end. They still think that all you do is web-based research and the only thing I can think is that it is just habituation. I am so used to this; this is the way that I do everything on my life. Everything is on the web and I have to dig deep, but taking the step to go to a specialized database, that is just not something I do. It is like having manual transmission rather than automatic transmission.

**JE:** It seems unnecessary. Why do I have to push in a clutch and change gears? That seems stupid.

**BPS:** Yeah, just go on one all-purpose Google and I find out what I find and I do not have to switch databases. With Google, everything is connected, so what is my problem here? It is actually a problem in terms of teaching people how to actually use the specialized databases and obviously a necessary exercise that it turns out we have to do because if we do not teach it here then they are not even going to be aware that this stuff exists. This is where we are headed.

Let me take you back. You lived through the transition, so sociologically, how does this transition occur? Is it that some people in the older generation are kind of the keeners and get into it, and the rest of you guys grudgingly go along but it is not what you signed up for; or a new generation that said, "What else would we do? We are not book people; we are information people." How do you get from a book world to cyber world?

Is it driven by personalities? Is it a generational split? Is it driven by economics?

**JE:** I think it is economics, and I think it is just human nature. I have always said that what everybody looks for in whatever they are consuming is fast, easy, and cheap. Everyone is looking for fast, easy, and cheap. Google and the Internet are fast, easy, and cheap. That is just human nature to seek that out.

**BPS:** Fast, easy, and cheap is actually FEC, and if you are into that, you are actually feckless, rather than “feckful.”

**JE:** But a guy like me comes along and says, “I want you to employ Boolean search terms. I want you to sit down and think about what are actually appropriate search terms and while you are in there, I want you to parse out that search. I want you to make sense of that search. I want you to search in these fields and in that field.” In other words I complicate the whole thing, so I turn fast, easy, and cheap into fairly slow, difficult, and...

**BPS:** Slow, tedious, and laborious.

**JE:** Exactly, but what I try to say to them is “Look, let's get to the cheap part here. You are practicing law; the currency you are working with is time, and sifting through hundreds of irrelevant documents in order to find those few pearls or nuggets as opposed to doing all of that work at the front end and coming up with a search that drills right down to the exact information you need to answer your client's question; maybe that is cheaper. Maybe it is not fast; maybe it is not easy; but it is certainly cheaper than wasting time playing with hundreds and hundreds of articles and cases that are not really going to help you.” So I try and teach in that vein.

Back to your question about why we have gone that way: essentially computers and digital information are faster, easier, and in some ways, cheaper than what it replaced, and I do not think humans are ever going to go back to slow, expensive, and difficult, when those are your two choices.

**BPS:** What about the human element? Tell me about people who grew up and got into librarianship rather than information technology. There are few fields that have been as revolutionized as that one.

**JE:** That is true. It is sort of interesting. Remember when we were young and we were kids in the 1960s, whenever we saw science fiction shows about the future, the big transformation was going to be in transportation, right? We were all going to be flying around in little hover cars; we were all going to be going to the moon and back for the weekend. Everybody predicted that where human development and human intelligence was going to take us was going to be improvements in transportation. We did not know that communications was going to be where the big revolution was going to occur. That is exactly where the big revolution has occurred and because librarianship is basically an information and communication discipline it has undergone huge changes.

To the credit of the discipline, most people adapted quite well. For many of us, there was an excitement, seeing what we used in the print world, repurposed for the digital world. What is lamentable though is that we have sort of moved past that point now where nobody seems to want, in the digital world, a representation of what the physical world did. The taxonomies, the organization of the information: all of that stuff that was done in the physical world is actually very easily replicated digitally and is actually still enormously valuable and extremely helpful. There was a great amount of excitement in making that transition. What is really sort of unfortunate is that, having made that transition and having been able to present that stuff in a digital world has been met with almost complete and total lack of interest. "No, sorry, we would rather that information just sort of exist, like the ether, not be organized and we will just use Google to pick out little bits here and there."

**BPS:** The book generation saw that technology as a means to an end. The uber-book, the faster book, the faster way to get to the book, the way to make the book more accessible; you do not have to get the papyrus in a library. Now this is all accessible to everyone instantly and what they did not anticipate is the technology would not only be a different means to the same end it would change people's sense of what the end is.

## **VI. PREDICTIONS FOR THE FUTURE OF INFORMATION**

**BPS:** What is going to happen? Legacy is a big issue in computer science generally. How do you constantly take old information, old programs?

When you get to the next generation, how do you upgrade? I have read an article once that some of the clunkiness of modern software is a legacy problem, that it is constantly built on top of old stuff and has to be able to integrate old stuff and that is why it is so clunky. What is going to happen to all of this material that was not created for the digital age? My guess is that it is all going to disappear. It is not like people are going to make a systematic effort to make sure that a textbook from 1880—no matter how important it was at the time—will not disappear from the scene, or am I being too pessimistic?

**JE:** I think you might be being a little bit pessimistic. Obviously, not everything that existed a number of years ago is going to be transitioned and reformatted to be available digitally, but lots of it will. What you have said about legacies, the whole older iterations just being built upon rather than being torn down and reinvented, is actually an analogy for the law itself. In our common-law, *stare decisis* world, that is essentially what we do. We take the existing law and we build on it. We do not very often completely eradicate it and start afresh. We just keep building on what has existed, and it is for that reason that I think there are problems in our particular discipline with just relying on digital materials. Not everything that we need to know was written in the last 10-15 years. There is obviously stuff that predates that that is very valuable. I do not see how you can be a complete legal researcher without occasionally having call to use a print collection, simply because of the nature of law itself. The old does not disappear; it just gets built upon. It becomes a foundation and gets built upon and built upon and built upon, meaning that there are going to be occasions when you are going to need to find primary resources in print; you are going to need to find other sources in print. In order to be the holistic legal researcher, I do not think you can completely and totally avoid law libraries and print.

The other thing that is really interesting, too, that I think that a lot of people do not realize, is that even though law is one of the very first disciplines to use computers, we are now way behind other disciplines in terms of things like eBooks. Quicklaw was a pretty early adopter of the computer model; the database from which LexisNexis grew was actually a project of the Ohio Bar Association, from a couple years before Hugh Lawford got the idea in 1963. As a discipline, law was one of the very first to recognize that we could computerize all of this text and search it. But we are slow to adopt the eBook.

EBooks are very commonplace in many disciplines. In Canadian law, however, they are practically non-existent. The only meaningful publisher of eBooks is Irwin Law who has a suite of their titles as eBooks. Carswell/Thomson are doing a little bit of it but we are way behind other disciplines. That, I think, is a matter of economics. Take medicine or science, for example: you can publish something and the whole world can use it. For Canadian law, what do Canadian lawyers need? Well they need books on Canadian law, and it is even more specialized than that. Someone working in Manitoba sometimes only needs Manitoba law and nothing else. There is not a lot of economic reward for publishers to be publishing eBooks on Manitoba law because there is such a small group of potential consumers out there. All of this digital legal information we are talking about is all primary sources, all cases and statutes, but the secondary literature—the textbooks and the treatises—all that kind of stuff is mostly in print still. So until this all gets solved, there is still a place for the knowledge of the print collection and the ability to use a print collection in order to be a good legal researcher in Canada.

**BPS:** My understanding of the economic model for major parts of law publishing in Canada is: small captive audience, very high price.

**JE:** That is the only way it works, really.

**BPS:** I guess the idea is, wouldn't there be a model for the eBook which is way cheaper and could be mass accessed? Why has that not been adopted?

**JE:** Basically because the people who are producing them are still essentially print publishers. Thomson is a print publisher, Irwin is a print publisher, and unfortunately they still see this as “I want to get \$35 per title for everybody who is willing to look at my book. That is the only way the economics work for me.” They do not want to say, “Ok, fine, this institution wants to buy it for \$100 and then everybody can use it.” They cannot make that model work for them economically but that is what people want. People do not want to pay for access to an eBook the same that they would pay for the print.

**BPS:** Just doing a cost-benefit analysis, while there are only a few who would buy a \$200 hardcopy textbook, I think that more people would be more willing to purchase a \$10 eBook.

**JE:** I would hope that the publishers have crunched the numbers and figured this out. I think they are fearful of digital rights management not being effective enough to stop people from downloading and sharing and essentially ripping them off, in their view.

**BPS:** Let's stay on this idea of eBook versus print copy. It is something that I have faced as Editor of the *Manitoba Law Journal*. My colleague Darcy McPherson<sup>392</sup> and I took it over about four years ago. One of the things that we have been asked is, "Why don't you just start doing it as an e-version?" My very impressionistic sense is that if we did an e-version, fewer people would look at it, would read it, and I think it would be a real deterrent to authorship. There is something for an author of holding a physical product in your hand.

**JE:** Yeah, I have authored a couple of books and bibliographies, which no one is doing those anymore. It is enormously rewarding, and there is huge satisfaction in holding the book and actually seeing what it looks like. I agree with that. However, I must add that digital publication will greatly expand the reach of one's publication and must be seriously contemplated.

**BPS:** Do you think that this love of print is just because we are from a certain generation? Do you think there could be a new generation that does not put a premium on having an end product anymore?

**JE:** I do not know. I try to anticipate what is in the mind of young people—and I feel so old and lame having to say that—but I just ask my son who is in his early twenties and goes to university and is pretty typical. He still loves books. He loves holding them and reading them, but to him, by his own admission, books are a recreational thing; they are something that are almost a hobby. He has lots and lots of books; he loves going to the bookstore; he loves buying books; but this is all for his personal enjoyment. For work, he cannot imagine not having access to digital materials accessible

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<sup>392</sup> Darcy MacPherson, Robson Hall faculty, 2002-present.

online. I think that is perhaps fairly common-place. Books are cool; books are ok. I like books. I like going to the bookstore and buying one now and again, but to actually spend my life working with information, I do not want to do it in book-form.

**BPS:** Fun to have a few but I am not going to have a big library. They are clunky. It is this thing about materiality we were talking about a little earlier in the conversation; I was saying I have this intuition that one of the ways that ideas go with books is the geography of the book. I had not thought about this before, but there is another physicality to books which is simply their physical disintegration. If I pick up a case report from 1920, the pages are yellow, it is cracking, and that is one of the things that map onto my intellectual understanding. If I pick up an old case in an old book, it kind of gives me a sense that, yeah, this is an old case, or this is a really old case.

**JE:** That is right; there is a certain landscape to materials in print, isn't there?

**BPS:** Yes, everything on the computer screen is exactly the same. If I am reading something from 1920, it looks exactly like something that is hot off the press today. Certainly you did not anticipate when you started this job all the revolution that was going to take place while you have been at it. Do you have any sense if someone was having this conversation 30 years from now, doing the same sort of exercise that I am doing now? Do you have any idea about what they will go through? Have we gone through a revolution which we are not going to see something like it again for a long time?

**JE:** Well I think it is a certain limitation of mine. I cannot imagine what the next revolution in information technology might be. I do feel that the revolution that we are currently going through is as profound and as transformational as the invention of the printing press, going from scribes writing out in hand to the printing press. At one time, like a lot of people, I was quite dubious of that. I thought, "No, no, it will be kind of a blend of both." I thought people were like me. Yes, I love the computer to find things but I want to actually hold the item in my hands. I want to read it; I want to take a bath with it. I want to be able to hold it. I thought everyone was sort of that way but now I realize we are not, and this was brought home to me by a sort of funny anecdote that I love to tell people.

I do a regular reference shift in the library every week (actually I should be there right now!) and one time, a young woman in first or second year, came up to me and she had been given a title of a book in one of her courses. She said, "Could you tell me where I could find this?" And I looked at it and it was certainly something we should have, so I looked up the call number and I said, "Here it is" and I wrote down the call number. She said, "Oh great! Thank you so much." And there was a certain vagueness about the way she was looking at me and I waited for her to head off into the stacks and go looking for it, but she was not doing that so I sort of said, "Just over there." And she did not seem to understand what I was getting at. She figured she should make sure so she asked, "Ok, so I just take this number and put it into Google and it will come up?" And I said, "Oh, no, no, no, that is the call number for the book and it is just over there." And I pointed over to where it would be in the stacks just a few feet away, and her response was, "It's a book!?" And I said, "Yes, it is a book." And she said, "Oh God, I do not need it *that* badly!" And she walked out. The hostility towards books, texts, materials, is actually a real thing and it was at that time that I realized, "Oh my God, if she is fairly typical, maybe we have crossed a divide here." It is as profound a transition as scribes writing out by hand to the printing press as the printed word on paper to the digital world.

**BPS:** My sense is history and changes do not occur in one smooth, straight line curve. The printing press was a revolution that changed the whole world.

**JE:** Yes, I am sure there were still people writing out by hand for decades and decades after the invention of the printing press.

**BPS:** Right, but the world was never the same. You could point to particularly direct access to the Bible, a key factor in the Protestant Reformation, which changed the whole world. It is hard to imagine; although you never know what will eventually happen. The change from the library world to the technological world, from the physical object to the computer screen: it is difficult to imagine that there is going to be a comparable revolution in the next 200 years.

**JE:** I am too limited of intellect to imagine what the change might be. Unless there is some sort of sci-fi movie-type thing of the direct implantation of

knowledge into people's brains by way of circuitry or something, I cannot imagine what it might be. Perhaps artificial intelligence is the next revolutionary step.

**BPS:** I cannot remember who said it but someone said, "Predictions are difficult, especially about the future." Who knew?

**JE:** Well I steadfastly agree with that.

## VII. THE DECLINE OF PREPARATORY EDUCATION

**BPS:** You teach Advanced Legal Research, and you get a lot of experience with students researching and writing. An oft heard complaint from practicing lawyers (which does not make it true, it is just oft heard; maybe it is just every generation blaming the next one), that these young folks do not know how to write properly.

**JE:** Unfortunately, I would have to say I agree. The quality of writing that I see is really low and I do not just mean quality in terms of how well they tell the story and how they develop, I mean spelling and grammar mistakes, even though computers ostensibly correct those for you. Everything I get from students is replete with lots and lots of grammatical mistakes. The impression I get is that they do not really think that it matters all that much. Perhaps for a half generation it will matter because they will be going up against judges and senior lawyers for whom it still matters, but one day they themselves will be the judges and senior lawyers and if they do not care, it is probably not going to matter in the long run.

**BPS:** I have a few guesses about that; I will just put them out there and you can tell me if you think there is any merit to any of them. I think part of it has to do with intake. To get into law school is still incredibly competitive. GPAs are actually higher than ever; if you look at LSATs, which can double as some sort of IQ test, people seem to be as smart as ever, but a lot of people complain that the writing skills are not there. A minor part of that is what has happened to undergraduate education. We have lived through an era of very big classes. Nobody is going to give you a 30-page essay to write if you have 200 and plus students. Students will tend not to choose courses with big essays. They're more likely to choose courses in subject matters, or

delivered in a manner that you are going to get good marks. It is easier to get an A on a multiple choice course than one that requires you to write a long essay. Maybe people are not coming here with the sort of preparation that they used to in terms of research and writing. Any thoughts on that?

**JE:** I tend to suspect that that is largely true. I also suspect that unfortunately the LSAT becomes increasingly more important because I think there has been increasingly significant grade inflation. So the fact that GPAs have remained constant or have gone up may not necessarily mean we are getting better students. Grade inflation may mean we are getting largely the same calibre or maybe marginally worse students. I think the inability to write predates undergraduate education, too. I am not so sure that high schools are trying particularly hard. I did ask my kids—my daughter is in high school, my son is a recent graduate—and they could not recall ever being taught any grammar at any point in their English studies.

**BPS:** Another way to learn good writing is to read good writing but I do not know to what extent students are still exposed to good writing. I have had a couple of experiences very recently in which I have used allusions to things like Shakespeare and been told, “Well, we do not read Shakespeare.” Then I had a class a number of months ago where I made a reference to A.E. Housman, and I was basically asked, “Who?”

**JE:** That does not surprise me at all.

**BPS:** I have been told I have to stop making these biblical allusions because no one has read the Bible. I am not saying it is a good thing to read the Bible because of a particular value system—there is religious freedom—I am just saying there is a lot of good writing in the English translations of the Bible.

**JE:** There was a time when the non-religious—and even the irreligious—at least knew a few quotes from the Bible. They could identify items and recognize things from the Bible, for sure. I am rather surprised that you would have had that response.

**BPS:** Maybe another thing is habituation through a particular form of communications that is instantaneous; effective, but not elegant. Emailing

back and forth; it is about fast responses, getting the message out. There is a premium on swiftness and not style. It's the same thing with Twitter. Who would have thought that a major form of communication would be...what is the character limit?

**JE:** 140.

**BPS:** 140 characters. Maybe this generation actually communicates effectively from their point of view. It does not have to be spelled right.

**JE:** In fact, 140 maximum characters incentivizes spelling incorrectly; truncating things and using acronyms and code words and buzzwords and stuff.

## VIII. CONCLUSION

**BPS:** Last question before we wrap it up. John Eaton III, your counterpart in this generation is 25 years old, has tried a couple things, has worked in a rap band or extreme sports, goes to law school, does not want to do the grind of actual practice is thinking that his career is going to be an information technologist to the profession or law school. Is this person wasting his time? Is there still a place for that person?

**JE:** Let's say one of my kids said, "I want to follow in your footsteps." I would do everything in my power to dissuade them from doing so. Maybe I am overly pessimistic. My view of what a law librarian is, or a legal information person is, maybe very much rooted in my particular time. While there may be a need for these people, I do not know that there is a market for them. The economics and the belief that everything can be delivered online and Google can find anything for you is so pervasive that I do not think that many people are looking for experts in legal information. I wholeheartedly believe that law librarians are necessary, but I do not think that many others recognize it. I do not think there is a market for them. I certainly would not encourage anyone to go into this discipline. It is rather depressing. I am about to retire. I am about to leave the profession and it makes me sad. I feel that I have ridden this profession pretty much to its end and it does not have much of a future, which is I guess is good timing for me but nonetheless is still quite sad and dispiriting.

**BPS:** Ok, that is a depressingly truthful way to end this conversation so that is a take.

**JE:** Alright, well, thank you; it was very enjoyable.