

# Interview with Alvin Esau\*

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B R Y A N   P .   S C H W A R T Z

## I. INTRODUCTION

**Bryan P. Schwartz (BPS):** To start, what is it that made you come to law school in the first place?

**Alvin Esau (AE):** Well, I grew up in a small town in Alberta that never had any lawyers at all. In fact, I had no relatives, friends, or anyone I knew who was a lawyer.

So when I went to the University of Alberta, I took political science and I ran into a person named Leslie Green,<sup>1</sup> who was a noted international lawyer at that time. I took two courses from him—one in international law and one on the politics of law—and that is what got me interested in going to law school. So I went to the law school at the University of Alberta, so anything I reflect as to my own law school experience would really be about Alberta at that point in the 1970s. Alberta had a full-time law school much earlier than we did here in Manitoba. We were the last province to make the transition to what became the academic full-time three-year study of law.

**BPS:** So you took political science; did you go to law school because you were intellectually interested in the discipline or because you actually wanted to be a practicing lawyer?

**AE:** When I went to law school, I had a large scholarship to do a Master's degree in Political Science because I was quite successful academically in

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\* Interview conducted by Bryan P. Schwartz. Alvin Esau, B.A. (Alberta.); J.D. (Alberta); LL.M. (Harvard); Grad. Dip. C.S. (Regent): is now Senior Scholar at the Faculty of Law, University of Manitoba after teaching law for more than 30 years. He currently lives in Victoria and in Vancouver, where he often takes Theology courses.

<sup>1</sup> Dr. Leslie Green (November 6, 1920-November 26, 2011) was a world-renowned international lawyer. He joined the University of Alberta in 1965, and was later named Distinguished Professor Emeritus at the University of Alberta.

political science. I had a choice between law school and a Master's in Political Science. I think I made that decision partly because I wasn't sure that political science as a discipline really interested me. So I went to law school without really much expectation as to what I would do, although I did expect I would end up being a lawyer. Only in law school—when I became involved with the Law Reform Commission and also when I became the Editor-in-Chief of the Law Review—did I think that maybe an academic career in law would be interesting. I eventually went on to Harvard, but I didn't go to law school initially thinking I would become an academic.

**BPS:** When exactly were you at the University of Alberta?

**AE:** This would be between 1973 and 1976. And if I could make just a few reflections on my own experience of law school at that time, I would say that in first year, it was quite an exciting time where you learned to think like a lawyer. All the fundamental casebook classes were Socratic and challenging. First year was engaging and transformative in many ways. But, second and third years were not a progression; it was adding on the same thing over and over. All you were doing was adding doctrinal courses that you hadn't taken in first year with the same methodology used. You had a case book, you read cases, and you wrote hundred percent exams. There was not a progression of skills, or even perspectives, as you went through the years. I found the last two years difficult; they were less engaging because there was no progression.

**BPS:** It sounds like at that point you were already in the modern model, which is the case model taught by professors who were primarily academics rather than practicing lawyers. There is not a lot of opportunity to think about the practical challenges rather than learning doctrine. What inspires you out of all of this to go get a Masters in Law at Harvard?

**AE:** I was the Editor-in-Chief of the Law Review and decided to apply. It was quite practical in that I got a scholarship from Harvard that paid my whole tuition from the University itself. It was an easy opportunity to take up. I couldn't really refuse any offer like that; I even had money left over in the end. It was a tremendous privilege.

At that time, PhDs were not the requirement to become a law professor. Our law schools at the time were expanding. Victoria had just added a law

school, and so there were offers coming from different schools. What I do regret is not having a number of years of practice before I became an academic. It is something that I think is useful. Subsequently, the only real practice that I have done is as the Chancellor of the Diocese of Keewatin, which is equivalent to being an in-house legal counsel for an organization. I very much enjoyed that role. My career has basically been one of an academic.

**BPS:** At Harvard, was it an intellectual culture shock coming from Alberta? I would guess it was not, given the level of instruction and academics in Alberta at the time.

**AE:** I went to Harvard at the time when the Critical Legal Studies Movement with Duncan Kennedy<sup>2</sup> and Roberto Unger<sup>3</sup> was in full swing and therefore it was quite a challenging time. It was a tremendous time of reflection and I appreciated being exposed to a higher level of critical theory. When I was in law school in Alberta, a lot of the courses were taught by sessional professors, and even some of the full-time faculty members were running a law office from their offices at the University of Alberta. You would go to their office and there would be clients lined up outside the hall; there would be a waiting period to get into the professor's office.

Some of the practitioner academics didn't bring much experiential learning to what they taught. As teachers, some of them were not as good as full-time academics; they were practical and busy, but that didn't mean they had the communicative or pedagogical skills to integrate their experiences into teaching. Sometimes it would just be war stories. My experience would be that the full-time faculty members were better in terms of teaching the core courses.

**BPS:** At Harvard you were taking courses from Roberto Unger and Duncan Kennedy.

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<sup>2</sup> Duncan Kennedy was a founding member of the Critical Legal Studies Movement. He became a professor at Harvard Law School in the Law Faculty in 1971, after clerking with U.S. Supreme Court Justice Potter Stewart. He is currently Professor Emeritus at Harvard.

<sup>3</sup> Roberto Mangabeira Unger was a founding member of the Critical Legal Studies Movement. He is currently the Brazilian Minister of Strategic Affairs.

**AE:** Yes, there was a standard course taught for all of the students in the LL.M. program which exposed them to these people who did guest lectures. I would also add that I took a course from Ronald Dworkin,<sup>4</sup> who happened to be at Harvard during my time there. His book, *Taking Rights Seriously*,<sup>5</sup> had just been published and I recall that much of the class time was spent on working on “the right answer” theory to judicial decisions within a liberal constitutional framework. I am not trying to tell you that I adopted critical legal studies as the jurisprudential perspective that I bring to bear on my courses. I am just saying that it is important that a university law school has a more macro critical theory about the law. We don’t just teach you how to be a lawyer, we teach you to think critically about law and society, about the effects of what you are doing as a professional. You not only learn how to do something, but why you are doing something and how it can be improved. I think it is very important to have a balance between the experiential learning and the academic critical thinking.

**BPS:** It was certainly a remarkable time in teaching and scholarship. You had all of these books and articles that were being written that were quasi-theological—we are going to change the whole world, we have this comprehensive world view—and I felt some disconnect between being a law professor and having insight into how to change the universe. I want to ask, were you in a position to be critical about the so-called Critical Legal Studies Movement? You came from a very different background in many ways, both traditional and culturally, so did you find you were able to critically assess some of the limits and flaws of this way of thinking?

**AE:** I think I was too inexperienced at that time to make those types of reflections; I think I just took it in and put it alongside other ways of thinking about the law. You have to remember: law and economics was big back then and something we were often exposed to. And there was still quite a sense of post-formalism that was in place. A lot of the people who were

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<sup>4</sup> Ronald Dworkin (December 11, 1931-February 14, 2013) was United States constitutional law scholar. He was also the Frank Henry Sommer Professor of Law and Philosophy at New York University, and Professor of Jurisprudence at University College London at the time of his death.

<sup>5</sup> Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977).

quite critical in their thinking would still teach doctrinal classes, and try to parse cases and legislation and understand their limits. You had to put that all together. There is a lot to be said about the “rule of the law” as opposed to the “luck of the draw” in terms of the ideology of the court that is hearing your case. Even at that time, there were situations where judges would—through the course of arguments with each other and counsel—come to results that they had not initially assumed they would come to, or even like to, in terms of their policy predilections, but were compelled by the logic of the law to come to a different conclusion. So I am not someone you would call a formalist or a positivist *per se*, but I think there is a lot to be said about the law as a logical construct of past cases, and legislation frequently is clear enough to determine cases. On the other hand, especially post-*Charter*,<sup>6</sup> much of judicial decision-making, especially at the appellate level, involves discretionary choices.

**BPS:** Looking back on the great sweep, whether it is true or not, our received wisdom was that there was this perceived formalism in which the law is the law is the law, and then new deal progressivism was not ideological as much as it was pragmatic; you should not be bound by formalism. Judges get to common-sense decisions: it was not substituting a whole comprehensive worldview. Rather, judges are hunch-oriented and should be less ideological, not more. Then in the late 60s, early 70s, you got that generation of 60s peoples coming into teaching positions. I don’t know if they were anti-formalist but they were not pragmatic; they actually had alternate worldviews about social progressivism or feminism. They had grand theories and the law would be an arena for realizing these grand visions. A lot of this stuff has become mainstream. The Supreme Court of Canada (SCC) became anti-formalist itself; it is always talking about the policy goals and referring to theory. Some of what we are talking about would not be part of the mental furniture that today’s law student would think about. I think law students from the start read SCC decisions and read policy right from the start; therefore it would not be a great shock to them, as it was to ours.

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<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.

## **II. CHOOSING TEACHING OVER PRACTICE**

**BPS:** You were at Harvard. It never occurred to me when I was at Yale that I could go to Wall Street and make a fortune; no one ever told me this was something I might want to do. Did it ever occur to you, as a young man at Harvard—you have all this opportunity and your great grades and your experience with the law review—that you could be a great lawyer in a major market? If it did occur to you, what made you decide not to pursue that?

**AE:** I was interested in the profession and ethics, as a field, and as you know, I have spent a considerable amount of my academic career teaching Legal Profession and Professional Responsibility. Even back then, before being exposed to the practice of law, I read quite a bit about lifestyle issues and ethical issues—regarding the kinds of clients you might be serving—and I had some critical issues about possible conflicts between my own values and the practice of law and if I even wanted to be a legal professional. I actually made quite an intentional choice to say—without knowing too much about what it takes to be a professor—that I wanted to become an academic. I knew it would offer a great deal of autonomy of thinking and action. I saw it as being one that was decent in lifestyle: it would be secure enough, and it would be satisfying, I saw it as a meaningful career and had skepticism about big law practice and what would be demanded of my time in exchange for the “golden handcuffs.” I wasn’t attracted by the material side of legal practice. I wasn’t tempted by it and I was somewhat certain that I did not want to serve corporate interests. I am talking about what I was like back then. I don’t think public interest law was at the stage where I saw that as being a viable career. I might have gone that route though, had I been given that opportunity.

**BPS:** Was there a particular professor that you had that led you to want to have that sort of life or was it more of a general desire to live that life?

**AE:** I don’t think I had a mentor in that sort of sense, someone who I looked up to. It was more the academic life: to be able to take time to reflect on something, to write about things, to have a class to teach. I enjoyed the academic life. Being somebody who takes an area and studies that area, someone who communicates that area to students and writes critically about the area: that all attracted me to the teaching profession.

**BPS:** One of the appeals of being in the so-called real world is effectualness. I don't think academics always appreciate it, but there is an opportunity to concretely help people. As an academic, where does effectualness fit in? You have the freedom, you can explore the life of your own mind, you can come to your own truths. Is effectualness irrelevant or is it "I helped educate these students?" Or is it the writing of scholarship that had an influence on policy?

**AE:** I think those are all really difficult issues to come to grips with because sometimes at the end of your career—and I am at the end of my career—you ask yourself, "What have you done with your life?" You look back and ask if it made any difference at all. Aside from the fact that I made a living, raised a family...did it make any difference? My own experience is that law students have not written you letters to say, "I took your class back in 1977 and it actually made some difference to me", which makes you wonder if it did make any difference. Maybe five years into practice, anything you said in the classroom didn't matter. And so I don't know the answer to that; I don't know the effectiveness of my teaching. It is very difficult to judge in general terms whether or not I was an effective teacher. I don't know. It is equally as difficult to assess your scholarship. You look to see if you have been cited somewhere. You work hard and, in fact, very rarely are you actually cited. And you think to yourself, "No one has laboured so hard for so little." The feedback issues are important. In the end, you have to have a sense that what you are doing is important and it did make a difference, that a legal education is a transformative experience, and that you had some role to play in it. I don't have regrets about spending my career devoted to academics.

**BPS:** It begs the question that whatever it is you are doing, practicing lawyer or professor: can you take enough satisfaction from that pursuit? I mean gaining satisfaction almost in a platonic sense, because maybe nobody read my paper, but at least I got the theory right. I want to know that my article is well written, that I worked through these problems, that I expressed them well. I should feel a satisfaction in the art and craft quite apart from whether it is effectual. I think to write law review articles well, you have to believe that to some extent.

**AE:** As you know Bryan, I am from an Anabaptist background and for many years, I was thinking I would like to make some contribution to the wider Anabaptist literature. I wrote a book called *The Courts and the Colonies*,<sup>7</sup> which deals with Hutterite disputes here in Manitoba and their history as they wound their way through the courts. The book also details the great schism that happened within that community. I feel fairly comfortable with the reception of that book, in that there were at least a dozen reviews, done by anthropologists, sociologists, theologians, and educational historians rather than law professors. The reviews were—and I don't mean to sound egotistical—very positive and the book is in libraries all around the world as one of the little bricks of the larger Anabaptist literature. So I can say I did contribute something which no one else could have done in terms of putting law together with illiberal groups and their norms. I am proud of that book and I think it was very well received.

I am currently working on a serial killer book, dealing with part of legal history in Manitoba. I have put it aside for a number of years but it is on the Nelson strangler case.<sup>8</sup> He probably killed over twenty women in the United States and two women here in Manitoba. I have traveled to every city involved in the cases, looking up all the police files; I've gone to the sites of the murders, trying to completely reconstruct this little part of Manitoba history. By now I have a huge transcript of material, but for many years, I have not been able to finish it because I have been sidetracked by going to theology schools and many other things. Eventually when I finish that book, hopefully I will be proud of it as well. So there is a sense that you do want to be effective: to have an audience and have some impact in the larger academic world.

### III. PROFESSORS AS TEACHERS VS. SCHOLARS

**BPS:** We are talking about the big shift, from fifty years ago to now—and this is just my perception by the way—around the time you and I started, a law professor thought of himself as a teacher. We wanted feedback from the

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<sup>7</sup> Alvin Esau, *The Courts and the Colonies: The Litigation of Hutterite Church Disputes*, (Vancouver: UBC Press, 2004). This book was awarded the Margaret McWilliams Prize for "Best Scholarly Book on Manitoba History" in 2006.

<sup>8</sup> Earle Leonard Nelson (a.k.a. "The Gorilla Killer" and "The Dark Strangler") was considered Winnipeg's first serial killer and was hanged at the Vaughan Street Jail on January 13, 1928.



classroom; we liked the audience. Whatever it is we do, it was oriented towards teaching students law. A lot of professors back then felt that scholarship was a quaint chore added on top of the central mission. Today, someone starting probably has a PhD, and thinks of themselves as a scholar first and that teaching first-year students is a bit of a chore compared to scholarship. Do you think that's fair?

**AE:** I think that's fair. When I started at the University of Manitoba, I put my emphasis on teaching for many, many years. I think that we were given the correct impression that we would be judged (in relation to tenure and promotion) primarily on doing satisfactory teaching. I would say 90% of my time was taken up in class preparation and very little time was spent on scholarship. And over the period that I was here, I may have had some hand in making the school more scholarly. I was the head of the Legal Research Institute (LRI)<sup>9</sup> for many years. Part of the Institute's mission was to stimulate and support larger amounts of scholarship from faculty. At that time, we had some excellent professors who probably never published anything in their lives. At the LRI, we felt that it was important to have more scholarship. However, my sense—and I haven't been here for many years—is that I think that we are losing something if we don't continue to focus on teaching as something fundamental. In other words, I think you can swing too far in one direction, just as I think you can go too far towards the other way, with the idea that you are practice-ready. In my career, I was trying to pull the school towards more of an academic position. I feel now that I am older and more conservative, that we may be at a place where it is too academic with an insufficient focus on experiential learning. If we do swing too far academically, then I think that is a danger to a professional program. One of my sons is in medical school and I see the way that he does medical school with rotations and practical mentoring in hospitals, almost from the very beginning and the transformative effect of that for skill building and professionalism.

We have to think about law schools without forgetting we are not simply here to train plumbers. Having said that, we don't want to lose touch with what the profession needs to train competencies. Given the articling

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<sup>9</sup> The Legal Research Institute was created in 1968 through the joint action of the Law Faculty Council, the University Senate and Board of Governors. The LRI supports various scholarly projects by engaging in research projects, holding conferences and seminars, and supporting various publications through grants.

structure in Canada, and the fact that Canadian law schools don't do all the training, it is easy for us to say that it is someone else's job, that it is the Law Society's job, etc...

**BPS:** There is a happy synthesis between the practical and academic and I don't think they are as far apart as they often seem. Really, to be a good practicing lawyer, you need to ask several questions. With something as simple as drafting a contract, do I use plain language, or do I use the laboured but tested language of the past? What about comprehensibility and detail? How much do I need to familiarize myself with case law? How much do I over-prepare? There are a lot of ways to approach these very basic sorts of questions. If we do not do it at university, when do people think about these sorts of questions? My own view is when learning is too academic, it is not good academics anymore. When practical training does not get you to think critically, it is not very practical. There is a sweet spot and I think we are of the same view that we have swung too far one way after being too far over to the other side.

#### **IV. MANITOBAN MEMORIES**

**BPS:** The common reason why people come to the University of Manitoba is that they received an offer; why did you come to this law school?

**AE:** I came to this law school, not because I didn't have offers from other schools but because I had family who lived here. One of the largest Mennonite communities in an urban setting is here in Winnipeg. I chose the University of Manitoba over other offers for that reason. There was nothing I knew about the university before coming, and I'm happy to say that I miss Manitoba now that I don't live here. Not necessarily the winters, but the whole place.

**BPS:** Funny how that happens, people pining for Winnipeg. We've had colleagues from other places leave and want to come back for some of Winnipeg's more distinctive features. Give me your impression of what the colleagues were like when you first came here.

**AE:** That's a hard question to answer in some senses. I think what I appreciated was that I felt welcomed by those around me. The faculty was

fairly secure at that stage and had been together for quite some time. I was a newcomer. A lot of schools were riven with intense ideological debates, but my sense in Manitoba was that we got along together even if we disagreed in a fairly pleasant way; I appreciated that. You could say things, come to different positions, but we would not have a war over this. It would result in a collegial distance between us, which can be both good and bad. For many years, from hearing stories from other law schools, I would prefer to be at a law school where there was a sense of calmness in the water rather than there being a great ideological disturbance that often turned personal and nasty.

**BPS:** If you are doing professional ethics, maybe one other person is also doing it. But it is not like you are fighting with a whole group of people in the field over how things should be done.

I think what also struck me in retrospect was the calibre of the people at the time we arrived. I don't know if we fully appreciated it at the time. We had eight or ten absolutely first rate top teachers. We had Jack London<sup>10</sup>, Phil Osborne<sup>11</sup>, John Irvine<sup>12</sup>, Linda Vincent<sup>13</sup>, and others. It was remarkable that a school of maybe ten to twenty teachers would have that many outstanding classroom teachers; I think the odds of having that proportion of talent anywhere are very small.

**AE:** I think that part of that success would have to do with our dean, Cliff Edwards<sup>14</sup>, and how he had a good eye for classroom success. He had a way of encouraging people, who hadn't reached a certain standard, to perhaps look elsewhere and do it in a nice way, to his credit.

**BPS:** One of my great regrets, Alvin, has been that I always wanted to interview Cliff Edwards and we never did get the chance. If you had to name

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<sup>10</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>11</sup> Phil Osborne, Robson Hall faculty, 1971-2012.

<sup>12</sup> John Irvine, Robson Hall faculty, 1970-present.

<sup>13</sup> Linda Vincent, Robson Hall faculty, 1973-2005.

<sup>14</sup> Cliff Edwards, Dean of Robson Hall, 1964-79.

one figure in the history of the law school that stood out above everyone else, it had to be Cliff.

**AE:** I think that is true but there may be something in the *Manitoba Bar News* by the way, from many years ago. I think there is an interview<sup>15</sup> of him done by Justice Carr<sup>16</sup>.

**BPS:** Cliff was remarkable and certainly shows the perils of stereotyping people. He was an evangelical, fundamentalist Christian and had the received English pronunciation and people thought of him being quite narrow and parochial. But this was a person who had quite a broad background. He was born in British India, became a missionary in West Africa, taught as a law lecturer in Kumasi College, Ghana,<sup>17</sup> and he was the one who advanced the vision of our becoming an academic law school and he hired all kinds of people. He hired a whole bunch of Jewish professors, the first women professors: people from all sorts of backgrounds that people figured someone of his background wouldn't hire. I asked him once about how he did it and why he hired so many people that worked out. He said it was very hard in those days to find anyone with an LL.M. So he was scouring the world for those who wanted to come to Manitoba with a Masters and so I asked him, "How did you finesse the people who didn't work out?" He said that first of all, everyone was hired on contract so no one lost tenure track, and secondly, he would find them another job somewhere else in the legal profession. So people didn't even know that they had been fired; they figured he had just gone out and found them this great position. One of my next projects will be to interview this great generation of Aboriginal leaders like Phil Fontaine<sup>18</sup> and Ovide Mercredi<sup>19</sup> because their oral histories could be lost and you never think of doing it until it is too late.

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<sup>15</sup> Robert Carr, "An Interview with Dean C.H.C. Edwards of the Manitoba Law School" (1973) 39:1 Man Bar News 33-47.

<sup>16</sup> Justice Robert Carr was appointed to the Queen's Bench on October 13, 1983. He graduated from Robson Hall in 1971 with an LL.B.

<sup>17</sup> *Supra* note 15 at 33.

<sup>18</sup> Phil Fontaine is an Aboriginal Canadian leader and served as the National Chief of the Assembly of First Nations for three terms.

<sup>19</sup> Ovide Mercredi is a Canadian politician, and graduated from the University of Manitoba in 1977 with a LL.B. He also served as the National Chief of the Assembly of

**AE:** To get back a minute about Cliff, I wanted to add that in Alberta there was a dean called Wilbur Bowker<sup>20</sup> and I worked with him at the Law Reform Commission in Alberta for a summer and he was the old school academic who read voraciously. In those days you could keep up with precedent. He would have the U. S. Supreme Court reports and dozens of other law report loose parts on his desk, and he would be reading everything. You don't see this today; it is just out of hand. But he also did a lot of publishing, and when I came to Manitoba, it struck me that we had fabulous teachers who had never published anything. And to some extent, Cliff—bless his soul—who was such a nice man, and so equitable, and in fact shares my religion—had a whole side that no one knew. I would sometimes go listen to him preach; he was a very good preacher. He was a very accomplished man, but when you looked up in the law reports to see if he published, there was very little, if anything at all. This was a very different era where you could get away with that; today you would never be able to get away with that. It is important to remember, however, that when I came to Manitoba, there were some scholars with a healthy track record of publications; most notably, of course, was Dale Gibson,<sup>21</sup> who was incredibly prolific and frequently cited, and also Cameron Harvey,<sup>22</sup> who had published several books and articles.

**BPS:** Well, today most of the hiring would come from the groups of new PhDs. They are extremely research-focused individuals and one of the consequences of this is that the ethos of scholarship has changed as a result and switched to more research. Today, the prestige and the incentives are towards publishing and being a good classroom teacher can take away from a university ranking.

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First Nations. He is the past president of the New Democratic Party of Manitoba.

<sup>20</sup> Wilbur Fee Bowker (February 18, 1910-March 30, 1999) served as Acting Dean from 1947, and Dean from 1948-68. He later became the first Director of the Alberta Law Reform Institute in 1968.

<sup>21</sup> Dale Gibson, Robson Hall faculty, 1959-88, 1990-91, and is Distinguished Professor Emeritus. For his interview, please see page 25 of this issue.

<sup>22</sup> Cameron Harvey, Robson Hall faculty, 1966-present, and has been Professor Emeritus since 2006. For his interview, please see page 97 of this issue.

**AE:** In my entire career, the one thing I did not do is put research before teaching. I am not saying I was a great teacher but I always did my research in the margins of my time. It was always teaching that came first and foremost. I showed up prepared in the classroom.

**BPS:** Everyone who knows me knows I love paradoxes and one of them is “There are books that you would love to read, except if they put them on assigned readings.” It becomes a chore. One of the things that made scholarship attractive is that there wasn’t so much pressure to write and publish. They were happy when you did but it wasn’t a chore; you only wrote when you were motivated to do so.

**AE:** One of the things that I found that came up—and this would be common amongst those of us without a PhD—is that without the PhD, and being busy teaching classes, you didn’t know what you should be writing. There are all sorts of potential areas that I could write on but which one should it be? I wasn’t sure. Here is where Trevor Anderson<sup>23</sup> was important and fundamental in my career in regard to publishing. He would come to me and say, “We are meeting at the Federation of Law Societies<sup>24</sup> (or the equivalent body at the time) and we are looking at competence issues. I was wondering if you would write an article on specialization in the legal profession.” So he would open the door to say, “Now you do this,” and I would do it and it would be at the conference and published. From that point, you would be asked back to do an updated piece by adding another aspect. So in a way, Trevor was the one who kind of led me on a path to have a number of articles commissioned, rather than inspired by my own reflections on an area. That was an example of mentoring a junior scholar by a senior scholar and providing opportunities for them. It would be remiss of me not to mention that Trevor Anderson not only opened doors to scholarship, he also continuously provided materials and references for other people’s scholarship. I think Trevor read more law and scholarship about law than anybody else on the faculty. He was amazingly familiar with vast portions of jurisprudential developments.

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<sup>23</sup> Trevor Anderson, Robson Hall faculty, 1971-2007. He is a Senior Scholar.

<sup>24</sup> The Federation of Law Societies of Canada strives to strengthen Canada’s governance of the legal profession.

One of the things that worries me is that during my career, I went half-time after a certain period and I never mentored anyone the way that Trevor did and that is one of the things I appreciated about him. Perhaps today, with so many young scholars coming out at once, there is a sense that we are not providing the resources of mentoring to the young scholars the way we would if there was a gradual turnover. At the University of Manitoba—including you, Bryan, where we were the same faculty for maybe fifteen years—nobody came in, nobody new joined, and then all of a sudden we underwent a massive transformation. And since I am not here [in Winnipeg] I don't know if those people are being mentored and being provided with enough help pedagogically or in terms of scholarship opportunities. I may be completely wrong about it but I appreciated it as a young scholar to have someone who cared about my career and what happened in my future.

**BPS:** I think what has happened demographically is the following: you and I were—even though it was a long time ago—among the last people hired for a very long time, which is quite remarkable. There were the 60s generation that was hired and they made their careers and there were huge opportunities and then it stopped. Then the baby boomers at the law schools retired and so it is a very radical transformation with a variety of consequences. Our generation, I think, hit the sweet spot because it was largely only LL.Ms and there was a good mix between practical experience and academic. Today, scholarship is the path to success and it is, in many ways, disconnected from the real world, as many have little practice experience. I think you are right that there is a large generation gap.

## V. CURRICULUM REFORM

**BPS:** This leads to the next thing I wanted to touch upon which is the Osborne Report.<sup>25</sup> You and I were on the committee that created it. I find there is a sense that people look back at it and think the mandatory tax and all these mandatory courses must have been the idea of some old dinosaurs

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<sup>25</sup> The Osborne-Esau report can be found here: 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]. Note also that a summary and rationale for the report can be found in: Phil Osborne & Alvin Esau, "Curriculum Reform at Robson Hall", (2016) 39:2 Man LJ 179.

who felt we were training form-fillers and had this unnecessarily practical bias. I think that is very far from the spirit and context of what we *actually* did. Let me ask you, how is it that there would be a comprehensive curriculum reform and how is it even remotely possible to do it by consensus?

**AE:** I don't recall, without going through the archives, the details of how this came about. But as I do recall, there was controversy over the final form of what the new curriculum would be. One controversy was that the original vision would have this balance between perspective, doctrine, and skills every single year and there would be progression throughout the years. In third year, we recommended that every single student should have an intensive family, criminal, or administrative law clinical course. You may remember that law faculty council voted us down. Consequently, the Osborne Report was not fully implemented.

That is the first thing; the second thing is that there was controversy over the doctrinal courses. It's inevitable that when you try to identify which core courses every student should take that there will be disagreement about which are important and which are not, especially when you start to think about the law changing. Back when we did this, Intellectual Property was hardly a core course, but today the amount of intellectual property has exploded across the firmament. You could argue Intellectual Property could be a core course just as much as Tax. Although I understand that a lot of people argue that tax has implications everywhere—that lawyers can't do family law without knowing some tax law—so it is a core course, but we did have arguments about which should be the core courses. It wasn't unambiguous, and it wasn't easy to get a consensus.

The more important consensus is the idea that we have these skills courses and that we have these doctrinal courses. From what I recall, by achieving a faculty vote that accepted it, especially the skills part, this new curriculum would influence law firms that were looking at our law grads. Knowing what they have taken, especially before the Bar exam courses, put us in a competitive advantage over other law schools. So now, when you are talking about getting rid of this Osborne-Esau model, I think you have to be very careful about what you are doing. I think it is absolutely imperative that all courses should have some perspective aspects to them. The most important part though is the idea of progression from year to year. Maybe we haven't achieved that the way we wanted. It's important that we look at



competencies and critical skills in drafting, interviewing, counseling, advocacy, negotiation. These have to be done at the law school level in a critical way. Not just teaching *how* to do things, but *why* are we doing them and to be critical of the *way* we are doing them.

When it comes to the issue of student choice, I don't have a particular ideological perspective that says you have to take Tax or Family or Wills. I am more open now at this stage in my life to say that maybe we don't need to have the full package of what I consider to be required doctrinal courses. But when it comes to the idea of balance: that needs to be protected. We did a study that looked at how many students actually did a paper, and we found that there were students who never wrote a paper and brought their critical analysis to bear. They had just taken courses that they were encouraged to take to pass the Bar exam. So the curriculum was driven by the Law Society, and not student learning. As an old curmudgeon, my opinion is that changing things to make yourself look like other schools means you might be losing something distinctive and positive about your school. Just because you have a student who doesn't want to be a lawyer, doesn't mean they shouldn't take negotiation or advocacy. It is critical for you to know that lawyers do this kind of thing and you need to know how it is done.

**BPS:** I think we were one of the first schools that required you to take perspective courses and we had this unique idea of balance. When we said you should take Tax Law, it wasn't because we wanted you to become tax lawyers; rather we thought that there was something of value there for you. It is important that students know even the basic difference between a deduction and a credit. We are trying to give you a critical perspective because when else are you going to get it? And I agree with you that I think our students did have an advantage. I think the paradox now is that the rest of the world has pushed towards more mandatory courses and we are moving away from it here when our students are concerned about their relative competitive position. With the generation that produced this document gone, I don't know if we really appreciated how progressive and enlightened this document really was.

**AE:** That could be, but I am biased (laughs). On the issue of student choice, I just graduated from seminary, and just like any other school, there are courses that you need to take. So why is it so terrible to be told in a

professional school that this is the path you are on and you have to take certain steps along the way? However, as I have said before, if all you are doing is adding doctrinal courses over others in a way that does not progress but simply adds another doctrine, then you are denying the idea of self-learning. If I look back at the Family Law course that I took at law school, there is probably nothing I took back then that would be relevant or even still good law. I don't think that is true in contracts or torts or criminal law. There have been some changes but the core skeleton is still relevant today. So, sometimes when we look at the issue of doctrine, we have to ask ourselves, are there core concepts that are predictably going to be there in the future? There are areas of the law that you can learn on your own. What is important is to learn how to learn about the law and think about it, rather than memorize what doctrines and rules you are fed. I think that in my generation, the memorization of rules that were currently in existence and the ability to manipulate them was the core of legal education. Of course, the problem with that is that rules change. So if we have too much of a rules-based education, then it is problematic. Instead, that should be only one part of it.

**BPS:** I think you put your finger on something in the discussion between optional and mandatory and relates to what you can learn on your own and what you can't. I think there are a lot of subject areas you can learn on your own. I am sure we all have our own list, things that are too hard to pick up in practice. I think Conflict of Laws is hard to pick up in practice. It is not as conceptually difficult than you might think but there is an intimidating vocabulary. Tax is hard to pick up your own. There are areas where if you didn't pick them up in law school, you can't just pick up a textbook and decide to be a tax lawyer.

**AE:** This is just off the top of my head but it seems to me that if I was a curriculum czar, I might actually try to divide the curriculum firmament in terms of doctrine into broad areas of law instead of particular subject matters. So you would study public law, international law, private law, and then find out within that, whether we have a balance of requirements. We talk a lot about globalization and internationalization and I fear we may not have enough exposure to comparative law or trans-national law. I don't know that for a fact but I know that it was something that was weak in our original construct of areas of law. Public law has changed so much; I can't

imagine being a lawyer today and not doing admin law post-*Charter*. These are all issues that I no longer have to worry about anymore since I am long retired. But having said that, rather than looking at what are core courses, purely from the basis of practice, we should be looking at core areas to fit together a pattern.

**BPS:** I don't think you would even need to say that the Public International course is required but maybe you need to take one international law course, could be Trade Law or whatever. Just so the student knows some of the basic structures that are the foundation of these areas.

Thanks for your time, Alvin.

