CREEPING CAPITALISM AND ACADEMIC CULTURE AT A CANADIAN LAW SCHOOL¹

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This paper considers the influence of academic restructuring associated with neo-liberal postsecondary policies on the culture of law schools and legal scholarship in Canada. It offers empirical data from a case study of the Faculty of Law at the University of British Columbia. This paper examines the impact of the changing Canadian political economy on the scholarship and culture at the law school and explores the implications for professional autonomy and academic freedom. The findings suggest that, at the time of data collection (2002-2004), the changing political economy had not (yet) affected the law school at the University of British Columbia in the same manner as other jurisdictions and disciplines described in the literature. The data shows that law professors who participated in the study experienced increasing pressures associated with corporatization, commodification and marketization in the larger university, however they consistently described high levels of academic freedom and professional autonomy over their work and scholarship. While there is some evidence of the transformation of academic culture associated with economic restructuring there is also evidence that law professors at this school have maintained control over the direction of their intellectual scholarship.

Cet article se penche sur l'influence de la restructuration académique associée aux politiques postsecondaires néo-libérales sur la culture au sein des écoles de droit et sur les études juridiques au Canada. Il présente des données empiriques à partir d'une étude de cas de la Faculté de droit à l'Université de Colombie-Britannique. L'article examine l'impact de l'économie politique canadienne changeante sur l'érudition et la culture à l'école de

1 The author would like to thank the reviewers of an earlier draft of this paper for their constructive and helpful comments to develop this paper. The paper emanates from one component of a program of research that considers the political economy of legal scholarship in Canadian law schools. It focuses on findings from the case study of the Faculty of Law at the University of British Columbia. The first component of the study focused on the six law schools in Ontario (See Theresa Shanahan, "Legal scholarship in Ontario's English-speaking common law schools." (2006) 21(2) C.J.L.S. 25-50 [Shanahan, "Legal scholarship in Ontario's English-speaking law schools"]); Theresa Shanahan, *Legal scholarship: An analysis of law professors' research activities in Ontario's English-speaking common law schools*, (Doctoral thesis, University of Toronto 2002) [unpublished]). The second component, currently underway, focuses on law schools in Western Canada. This program of research has been supported by a SSHRC Doctoral Fellowship and a SSHRC Postdoctoral Fellowship.

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droit et explore ce que cela implique pour l'autonomie professionnelle et la liberté de l'enseignement. Les résultats suggèrent qu'au moment de la collecte des données (2002-2004), l'économie politique changeante n'avait pas (encore) eut d'effet sur l'école de droit à l'Université de Colombie-Britannique de la même façon que dans d'autres secteurs et d'autres disciplines décrites dans la littérature. Les données indiquent que les professeurs de droit qui ont participé à l'étude sentaient des pressions croissantes associées à la corporatisation, la commercialisation et la marchandisation à l'université dans son ensemble, toutefois ils ont décrit régulièrement de hauts niveaux de liberté de l'enseignement et d'autonomie professionnelle par rapport à leur travail et leurs études. Quoiqu'il existe de l'évidence de la transformation de la culture académique associée à la restructuration économique, il y a aussi de l'évidence que les professeurs de droit de cette école ont maintenu le contrôle de l'orientation de leur travail intellectuel.

I. INTRODUCTION

In 1999 and 2000 a group of Canadian legal educators at the Legal Research Institute at the University of Manitoba hosted the "Workshop on the Future of Canadian Legal Education: Excellence, Competition and Hierarchy" (May, 1999), and the follow up "Conference on the Future of Legal Education" held in Ottawa, Canada, (Sept. 2000). The initiatives sought to identify the main factors provoking change in Canadian legal education. On behalf of the group, Connie Backhouse summarized fifteen transformative factors in Canadian legal education including: reductions in university budgets; government demands for accountability; privatization of funding; marketing and competitiveness; internationalization; technological change; demographic change; inclusion in the university academy; increased pace of academic work; tension between law faculty members; leadership; tensions between law schools and university administrators; and local factors unique to each law school.²

The factors identified by Backhouse clearly mirror trends in a larger university and have been associated with economic restructuring, neo-liberal policies, globalization and corporatization. These trends have far reaching implications on many dimensions of university life: curriculum, governance, the student experience, the work environment, fiscal policies and tuition, student-teacher relationships, faculty scholarship and academic culture. There is a developing body

2 See Connie Backhouse, "The Changing Landscape of Canadian Legal Education" article presented at the Workshop on the Future of Canadian Legal Education, May 1999 online: University of Manitoba. <http://www.umanitoba.ca/faculties/law/LRI/Legal_education.htm>. See also Connie Backhouse, "The Changing Landscape of Canadian Legal Education" (2001) 20 Windsor Y.B. Access Just. at 25-34. Note that the Windsor Yearbook Access to Justice, Twentieth Anniversary Volume, 2002: "Legal education, Knowledge and Access" contains several papers from the Ottawa conference on legal education as well as a number of articles, cited in this work on the political economy of legal education.

of literature documenting these overall trends in legal education.³ However, there is very little empirical research on the impact of these trends specifically on faculty scholarship and academic culture in law schools.

This paper addresses that gap by raising the questions: has the changing political economy, and in particular the rise of neo-liberalism in social and education policy, had an impact on scholarship and the academic culture in law schools? And, what are the implications for professional autonomy and academic freedom? The paper offers some empirical data from a case study of one Canadian law school, the Faculty of Law at the University of British Columbia [UBC], captured in one moment in time, (data collection occurred between 2002-2004), on the eve of a changing political economy and in the midst of a Decanal search and ultimately changing Deanship. The data here provides a benchmark upon which to capture change within this law school. It is the first of a two-part program of research. The sequel to this paper will investigate UBC law school five years into the new landscape, documenting changes that have occurred against this benchmark, documenting if, and how the phenomenon described in this paper is unfolding over time at UBC's Faculty of law. Further, although the neo-liberal thesis emerges from analyses of curriculum, the student experience, tuition, the construction of student-teacher relationships, and fiscal issues among other areas of university life, these areas have been fairly well documented in the literature. My paper focuses exclusively on law professors' scholarship and by extension the academic culture within which law professors' work.

3 See Harry Arthurs, "Poor Canadian Legal Education: So Near to Wall St., So Far from God" (2001) 38 (3) *Osgoode Hall L.J.* at 381-408 [Arthurs, "Poor Canadian Legal Education"]; Harry Arthurs, "The State We're In: Legal Education in Canada's New Political Economy" (2001) 20 *Windsor Y.B. Access Just.* at 35-54 [Arthurs, "The State We're In"]; Harry Arthurs, "Globalization of the mind: Canadian elites and the restructuring of legal fields" (1997) 12(2) *C.J.L.S.* at 219-246 [Arthurs, "Globalization of the mind"]; Harry Arthurs, "The political economy of Canadian legal education" (1998) 25(1) *J.L. & Soc'y* at 14-32 [Arthurs, "The political economy of Canadian legal education"]; Susan Boyd, "Corporatism and Legal Education in Canada" (2005) 14 *Soc. & Leg. Stud.* at 287; Richard Collier, "The Law school, the Academy and the 'Global Knowledge Economy' - Reflections on a Growing Debate: Introduction" (2005) 14 *Soc. & Leg. Stud.* at 259 [Collier, "The Law school"]; Richard Collier "We're all Socio-legal Now? Legal Education, Scholarship and the Global Knowledge Economy-Reflections on the UK Experience" (2004) 26(4) *Sydney L. Rev.* at 503 [Collier "We're all Socio-legal Now?"]; Richard Collier, "The Changing University and the (Legal) Academic Career-Rethinking the Relationship between Women, Men and the Private Life of the Law School" (2002) 22 *L.S.* at 1 [Collier, "The Changing University"]; Fiona Cownie, and Anthony Bradney, "Gothic Horror? A Response to Margaret Thornton" (2005) 14 *Soc. & Leg. Stud.* at 277; Margaret Thornton "The Dissolution of the Social in the Legal Academy" (2006) 25 *Australian Feminist Law Journal* at 1-18 [Thornton "The Dissolution of the Social in the Legal Academy"]; Margaret Thornton, "Neo-liberal Melancholia: The Case of Feminist Legal Scholarship" (2004) 20 *Australian Feminist Law Journal* at 8-22 [Thornton, "Neo-liberal Melancholia"]; Margaret Thornton, "Among the ruins: Law in the neo-liberal academy." (2001) 20 *Windsor Y.B. Access Just.* at 3-25 [Thornton, "Among the ruins"]; Margaret Thornton, "The demise of diversity in legal education: Globalization and the new knowledge economy" (2001) 8(1) *International Journal of the Legal Profession*, 237-57 [Thornton, "The demise of diversity in legal education"]; Margaret Thornton, "Gothic Horror in the Legal Academy" (2005). 14 *Soc. & Leg. Stud.* at 267 [Thornton, "Gothic Horror"]. See also the "Special Issue: Transformative Visions of Legal Education", 24 (1) 1998 *J.L. & Soc'y*, for a collection of work from a number of international jurisdictions (for example, the UK, Canada, New Zealand, Australia, Wales) considering these trends on various aspects of the legal education.

Less attention has been devoted to these aspects of the neo-liberal thesis in regard to law professors perhaps, in part, because law professors are not known as prolific scholars and the research tradition is still young in Canadian law schools,⁴ consequently the prominent trends in university research manifest more subtly in legal research. This paper delves into this area presenting interview data from the professors themselves regarding the influences on their scholarship and the changing culture of legal education.

II. Context

A. The Canadian Political Economy: From Keynesian Welfare State to Global Capitalism

The welfare state in Canada emerged and expanded between 1940 and the late 1970s. Based in part on Keynesian economic policies the Canadian welfare state links social policy with the economy and advocates social spending to stabilize the economy and promote growth. Within this economic approach the state intervenes and varies market forces. In Canada these interventions were seen in the form of social programs that protected people from the volatility of the market, asserting social welfare and public values over private sector or economic values. The expansion of the welfare state came to an end in Canada by the mid-1970s as government policy shifted from a Keynesian economic approach to a monetaristic economic approach.⁵ It was replaced first by a period

4 Tony Becher, *Academic Tribes and Territories, Intellectual Enquiry and the Cultures of Discipline* (Buckingham, UK: Open University Press, 1989) In this work on academic culture Becher found that 'The predominant notion of academic lawyers is that they are not really academic... [they are] an appendage to the university world' at p.30. Arthurs also documents the emergence of scholarship in Canadian law schools in Consultative Group on Research and Education in Law (1983) *Law and Learning Report to the Social Sciences and Humanities Research Council of Canada*. Ottawa: SSHRCC, 1983 ['Arthurs Report']; See also Shanahan "Legal scholarship in Ontario's English-speaking law schools", *supra* note 1 for a discussion of the relatively young tradition of research in Canadian law schools. A special edition commemorating twenty years after the Arthurs Report in 2003 (18) 1, Canadian Journal of Law and Society contains a collection of essays relevant to the issues raised in this paper. In particular Constance Backhouse, "Dossier: Revisiting the Arthurs Report Twenty Years Later" 2003(18)1 C.J.L.S. at 33-45 and Roderick Macdonald, "Dossier: Still 'Law' and Still 'Learning'?" at 5-31. Macdonald concludes very little has changed in crucial areas of legal research (and education) twenty years after the Arthurs Report. His overall assessment of the contemporary state of legal scholarship is grim.

5 The Keynesian economic approach of linking social and economic policies is distinguished from a monetaristic or minimalist economic approach, which involves the separation of social and economic policies. Monetarism became an official policy of the Bank of Canada in 1975. James Rice and Michael Prince, *Changing Politics of Canadian Social Policy* (Toronto: University of Toronto Press, 2000) at 138 describe monetarism as follows:

In monetarism the money supply is the dominant determinant of the level of economic activity. Government spending and taxation activities by themselves have little fundamental impact on macro-economic conditions. Monetarists also tend to favour minimal government intervention in the labour force and in other markets. As we have seen, this shift leads to less government involvement in the management of the economy - a more hands-off approach - and less ability for governments to use the economy to solve social problems.

of criticism known as “the crisis of the welfare state”⁶ and then followed by a period of restraint and retrenchment. The criticisms challenged the effectiveness, fairness, and desirability of a system where the state was responsible for social care and social intervention. The debates at this stage were not centered on the question of *whether* the state should intervene but rather *how* and *how much* the state should intervene.

As the debates raged federal and provincial governments began making changes to social policy that affected welfare programs in Canada. There is widespread agreement that at approximately the same time (around the 1980s) the world economy began to change. Although there is a range of differing analyses that attempt to make sense of the changes, there is consensus that fundamental economic global restructuring began to occur. It was characterized by increased global mobility of capital, rationalization of production, and economic interdependence of nation-states spurred on by advances in information technology in a process referred to as globalization. Governments around the world responded in various ways to the changing economic environment which brought with it pressure to compete internationally in a global economic market. In Canada the federal government’s response was to free the market by adopting policies that reflected the influence of neo-liberalism. This approach affected the direction ultimately taken by Canadian social policy and resulted in a restructuring of the Keynesian welfare state within a neo-liberal paradigm.⁷

By the 1990’s social programs were altered, benefits reduced and, in general, a shift in responsibilities was apparent; away from federal and provincial governments to community, voluntary and informal sectors of society. The Canadian Government’s approach has been described by some as a selective restructuring of social welfare.⁸ Others go further and characterize the federal government’s activities during this period as dismantling or displacing the Keynesian welfare state.⁹ However one views the government’s activities, at this time what is clear is that the social policy debate had now changed and state intervention was no longer a question of degree but whether the state should intervene at all. This

6 *Ibid.* at 83.

7 See Arthurs, “Poor Canadian Legal Education: So Near to Wall St., So Far from God”, *supra* note 3; Arthurs, “The State We’re In”, *supra* note 3; Arthurs, “Globalization of the Mind”, *supra* note 3; Arthurs “The Political Economy of Canadian Legal Education”, *supra* note 3; Howard Buchbinder, “The Market Oriented University and the Changing Role of Knowledge” (1993) 26 *Higher Education* at 331-347; Jan Currie, “Globalization Practices and the Professoriate in Anglo-Pacific and North American Universities” (1998) 42 (1) *Comparative Education Review* at 15-29 [Currie, “Globalization Practices”]; Don Fisher and Kjell Rubenson, “The Changing Political Economy: The Public and Private Lives of Canadian Universities” in Currie, J. and Newson, J., eds., *Universities and Globalization: Critical Perspectives* (Thousand Oaks: Sage, 1998) at 77-98; James Rice and Michael Prince, *supra* note 5.

8 Don Fisher and Kjell Rubenson, *supra* note 7; James Rice and Michael Prince, *supra* note 5.

9 Isa Bakker, I. “Introduction: Engendering Macro-economic Policy Reform in the Era of Global Restructuring and Adjustment.” in I. Bakker ed., *The Strategic Silence: Gender and Economic Policy* (London: ZED Books, 1994) at 1-30 [Bakker, *The Strategic Silence*]; Jan Brodie, *Politics on the Margins: Restructuring and the Canadian Women’s Movement* (Halifax: Fernwood Publishing, 1995) [Brodie, *Politics on the Margins*]; Gary Teeple, *Globalization and the Decline of Social Reform* (Toronto: Garamond Press, 1995).

point marked the shift away from the Keynesian economic approach to a monetaristic economic approach that is consistent with neo-liberalism.¹⁰

B. Neo-liberalism

Underpinning the approach emerging from the social policy agenda of the Canadian federal government in the 1980s and 1990s was the view that competitive market forces strengthened the economy. State withdrawal from social policy and programs was advocated. State intervention was viewed as a hindrance to the functioning of the free market. Referred to as both, a set of economic doctrines, as well as an ideology, neo-liberalism is characterized variously as including a number of different economic principles such as monetarism, supply-side economics, and public choice theory all of which emphasize classical economic theory. Neo-liberalism advances: the promotion of private property rights; the primacy of the market; free economic zones where there is free trade and a global economy; privatization of public entities; deregulation of the economy; tax structure transformation in favour of business corporations and upper income levels; reduction of the national debt; downsizing government; shrinking the size of government; shifting government responsibilities for social and economic welfare of society; restructuring of local government; dismantling the welfare state; and the promotion of charities and other social agencies to assume responsibility for social welfare. Curiously, although within this perspective state activism is considered inappropriate,¹¹ the desire to 'free' the market actually involves an activist state. State activism, although condemned in principle, is actually necessary to accomplish the required economic end.¹²

10 James Rice and Michael Prince, *supra* note 5 at 235.

11 See Arthurs "The State We're In", *supra* note 3.

12 For a full discussion on the characteristics of neoliberal restructuring and the decline of the welfare state see Arthurs, "Poor Canadian Legal Education..." and "The State We're In", *supra* note 3; Harry Arthurs, and Robert Kreklewich, "Law, Legal Institutions, and the Legal Profession in the New Economy" (1996) 34 (1) Osgoode Hall L.J. at 1-60; S. Amin, *Capitalism in the Age of Globalization* (London: Zed Books, 1997); Buchbinder, *supra* note 7; Fisher and Rubenson, *supra* note 7; A. Johnson, S. McBride, and P. Smith, *Continuities and Discontinuities: The Political Economy of Social Welfare and Labour Market Policy in Canada* (Toronto: University of Toronto Press, 1994); Jane Kelsey, "Privatizing the Universities" (1998) 25 (1) J.L. & Soc'y at 51-70; Jamie-Lynn Magnusson, "Canadian Higher Education and Citizenship in the Context of State Restructuring and Globalization" (2001) Encounters at 107-123 [Magnusson, "Canadian Higher Education and Citizenship"]; Jamie-Lynn Magnusson, "Examining Higher Education and Citizenship in a Global Context of Neo-liberal Restructuring" (2000) 31(1) Canadian Journal of Ethnic Studies at 72-88 [Magnusson, "Examining Higher Education"]; Teeple, *supra* note 9.

C. Globalization¹³

Trends in Canadian social policy have occurred within the larger context of a neo-liberal policy response to globalization. That is, the welfare state was being challenged, the economy was becoming globalized and governments were responding by implementing a neo-liberal agenda which allowed them to re-structure the welfare state in a way that was in line with the imperatives of the new global economy. Thus, the shrinking Keynesian welfare state is connected, in part, to governments' adoption of neo-liberal policies in response to, and because of economic globalization. Globalization is seen by some scholars as both a precursor to the implementation of neo-liberal policies and a reinforcement of neo-liberal policies. It both shapes and reflects a neo-liberal agenda. Or as Harry Arthurs suggests, neo-liberalism and globalization are intertwined.¹⁴ While not an entirely new phenomenon the contemporary manifestation of globalization has changed in kind and degree: that is, in the increasing international mobility of capital and information.¹⁵

There is a wide ranging literature on globalization reflecting various analyses, diverse approaches to globalization and multiple definitions and understandings of the term and its manifestations including economic, political, technological and cultural dimensions.¹⁶ This paper focuses on the political economic dis-

13 The literature on globalization is vast and too numerous to mention here. However, for a wide ranging discussion of globalization and legal education from across jurisdictions and the associated spread of neo-liberal values and market-oriented economies see the Special Issue of the International Journal of the Legal Profession "Globalisation and Legal Education" Volume 8, Number 1, March 2001. In particular see Harry Arthurs, "The world turned upside down: are changes in political economy and legal practice transforming legal education and scholarship, or visa versa?" (2001) 8(1) International Journal of the Legal Profession at 11-23 [Arthurs, "The world turned upside down"]; Wes Pue, "Globalisation and legal education: views from the outside-in" (2001) International Journal of the Legal Profession, 8(1) at 87-102; Margaret Thornton "The Demise of Diversity in legal Education: Globalisation in the new knowledge economy" (2001) International Journal of the Legal Profession, 8(1) at 37-57 [Thornton "The Demise of Diversity in legal Education"]; William Twining, "A cosmopolitan discipline? Some implications of 'globalization' for legal education" (2001) International Journal of the Legal Profession, 8(1) at 23-37; Ian Duncanson "The centre may not hold" (2001) International Journal of the Legal Profession, 8(1) at 69-87. For European and UK examples see "Symposium on the Globalisation and Legal Education" (1996) 46 J. Legal Educ. at 311. See also Fiona Cownie, ed., *The Law School: Global Issues, Local Questions* (Aldershot: Dartmouth Publishing, 1999) for a wide ranging discussion on the impact of globalization and neo-liberalism on many aspects of legal education from a variety of jurisdictions (eg. Europe, UK, Australia, New Zealand).

14 See Arthurs, "Poor Canadian Legal Education..." and "The State We're In", *supra* note 3 at 36-37; Buchbinder, *supra* note 3; Currie and Newson, *supra* note 7; Fisher and Rubenson, *supra* note 7; Magnusson, "Canadian Higher Education and Citizenship" and "Examining Higher Education", *supra* note 12; Rice and Prince, *supra* note 5.

15 See e.g. Arthurs, "Poor Canadian Legal Education..." and "The State We're In", *supra* note 3; Buchbinder, *supra* note 3; Kelsey, *supra* note 12; Teeple, *supra* note 9. Arthurs suggests that earlier forms of globalization embraced by Western democracies were some version of social democracy promoting a more secure, equitable, enriched life for their citizens while more recent versions of a globalization (from the 1970s to the present) are a neo-liberal version which has displaced the social democratic version. See Arthurs, "The State We're In" *supra* note 3 at 36.

16 Anthony Giddens, *Beyond Left and Right: The Future of Radical Politics* (Cambridge: Polity Press, 1994); M. Waters, *Globalization* (London and New York: Routledge, 1995); See also

cussions of social policy, and in this sense globalization refers to the increasing organization of economies on a global scale, expanding markets across the globe, increasing market relationships across various goods and service sectors as well as across financial relationships, and cementing global market relationships through increasing international instruments, institutions and agreements which promote and regulate free trade. Within this context globalization is often analyzed in terms of what is the appropriate role of the state in a global economy.¹⁷ Economic globalization within a neo-liberal paradigm privileges private enterprise and the adoption of business sector criteria to make social policy decisions. Priority is given to job training and to meeting labour market needs in order to be economically competitive. Economic productivity, efficiency, and accountability are introduced as imperatives, fiscal restraint and budget balancing is emphasized, at the same time social policy is reframed as the handmaiden to the economy.¹⁸

A second body of critical literature analyzes globalization as a pluralizing force. Strictly economic considerations of globalization are recast in broader terms. Globalization is described in terms of its cultural aspects such as the diffusion of values, norms and cultural beliefs. It is also understood and analyzed in terms of power relationships particularly between the public and private spheres. Scholars employing this conceptual framework analyze globalization from the perspective of a multiplicity of groups within society, not only in terms of their rights and responsibilities, but importantly in terms of the impact upon them of societal changes associated with globalization. These writings assume, and argue for, the sovereignty of the state to exercise authority over societal interactions. Within this body of literature the development of social policy is connected to the politics of nation building, human rights, citizenship, identity, gender, age, social movements, equity and cultural forms. These writings critique the influence of globalization on the political economy and focus on issues of democratization, that is to say, "making institutions, professions, laws and social programs more representative, culturally sensitive, and respectful of differences – in other words the state needs to be further democratized."¹⁹

Julian Webb, "Post-Fordism and the Reformation of Liberal Legal Education" in Cownie, *supra* note 3 at 220-260 for a sociological analysis of this phenomenon using the Fordist/Postfordist metaphor to explain changes in industrial organization under late capitalism.

17 Rice and Prince, *supra* note 5; Sheila Slaughter, "National Higher Education Policies in a Global Economy" in Currie and Newson, *supra* note 7 at 45-70.

18 Buchbinder, *supra* note 7; Magnusson, "Canadian Higher Education and Citizenship" and "Examining Higher Education", *supra* note 12; Janice Newson, "The Decline of Faculty Influence: Confronting the effects of the Corporate Agenda" in Williams Carroll, Linda Christianson Ruffman, Raymond Currie & Deborah Harrison, eds., *Fragile Truths: Twenty-Five Years of Sociology and Anthropology in Canada* (Ottawa: Carleton University Press, 1992) 227-246.

19 Rice and Prince, *supra* note 5 at 4. For examples of this critical literature see Amin, *supra* note 12; Bakker, *supra* note 9; Brodie, *supra* note 9; P. Brown, and H. Lauder, "Education, globalization and economic development" (1996) 11(1) *Journal of Educational Policy*, 1-25; J. Dudley, "Globalization and Education Policy in Australia", in Currie and Newson, *supra* note 7 at 21-77; Vandana Shiva, *Biopiracy: The Plunder of Nature and Knowledge* (Boston: South End Press, 1997); Magnusson, "Canadian Higher Education and Citizenship" and "Examining Higher Education", *supra* note 12; Claire Polster, and Janice Newson, "Don't Count Your Blessings:

In general there are three political responses to globalization, variously characterized in the literature as: “champions, competitors and challengers”, or “globalists, sceptics of globalization and anti globalists”,²⁰ or “radicals, sceptics and moderates.”²¹ (Notably even within each of these positions, differences and controversies exist.). The champions of globalization are committed to enhancing global power of corporations and reducing legal and political regulatory power of nation states. They favour economic integration with the rest of the world and maintain that the sovereignty of the nation state has already been diminished with the increased pressure for harmonization of social policies to complement the global economy. This understanding of globalization views the process as a natural and inevitable process whereby nation-states are powerless to resist global economic forces. This position fully embraces neo-liberal ideology.²²

The “competitors” or “sceptics of globalization” are sceptical of the pro-globalist’s position and full global economic integration but accept trade liberalization and focus on maximizing the competitiveness of national regional economies. They favour policies designed to reduce costs (including layoffs, early retirements, wage reductions and deregulating labour markets) and advocate policies that seek to improve productivity through technological innovation, training, production processes, marketing and distribution. Trade unions and social democratic parties in industrial countries often embrace variations of this position in order to limit job loss and maintain employment standards and benefits while entering into trade agreements and encouraging export competitiveness.²³ Dudley explains “The dilemma of globalization for social democrats is that the imperative of globalization and its economic, political, and social policy prescriptives of small government, a minimalist state and deregulated capital and labour markets undercut their traditional policies of social amelioration.”²⁴ She contends that the response of social democrats to economic globalization is to attempt to secure “a participation in the competitive international economy that minimizes the negative social impacts of global competition and economic restructuring.”²⁵

The Social Accomplishments of Performance Indicators” in Currie and Newson, *supra* note 7 at 173-192; John Ralston Saul, *The Unconscious Civilization*, CBC Massey Lecture Series, (Concord, ON: Anansi Press, 1995); Teeple, *supra* note 9.

20 Rice and Prince, *supra* note 5.

21 Trevor Farrow. “Globalization or Polarization? Embracing Debate in Global Discourse” (Paper presented to the Canadian Law and Society Association Annual Conference, Quebec City, May 28 2001).

22 Farrow, *ibid.*; A. Johnson, S. McBride & P. Smith. *Continuities and Discontinuities: The Political Economy of Social Welfare and Labour Market Policy in Canada* (Toronto: University of Toronto Press, 1994); Rice and Prince, *supra* note 5.

23 See Arthurs, “Poor Canadian Legal Education...” and “The State We’re In” and “Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields”, *supra* note 3; Harry Arthurs and Robert Kreklewich, “Law, Legal Institutions, and the Legal Profession in the New Economy”, *supra* note 12; Brown and Lauder, *supra* note 19; Dudley, *supra* note 19; Farrow, *supra* note 21; G. Brown, “The Politics of Potential: A New Agenda for Labour” in D. Miliband ed., *Reinventing the Left* (Cambridge: Polity, 1994); R. Reich, *The Work of Nations* (London: Simon and Schuster, 1991); Rice and Prince, *supra* note 5.

24 Dudley, *supra* note 19 at 39.

25 *Ibid.* at 39.

Challengers of globalization, or anti-globalists, contest the basic assumptions of economic globalization and seek to find alternative courses of action. They argue that increased economic integration through trade agreements is detrimental to labour markets and diminishes social equality and social justice. Challengers of globalization seek democratizing political, financial and legal alternatives to the power of, and displacement caused by, economic globalization and transnational capital. Globalization is critiqued more broadly in terms of social justice, civil society, human rights, gender, citizenship, environmental and developmental sustainability and community relationships, among other issues.²⁶

Over the last two decades the dominant view of the Canadian corporate sector and governments (allowing for some differences among provincial administrations) has championed a neo-liberal form of globalization. At the same time many Canadians and (legal) academics, groups outside government and in the social policy community who value social security, equality and collective rights have challenged neo-liberal globalization. Universities, and certainly the legal academy, have been notable sites of resistance.

D. Social Policy Discourse

A neo-liberal approach to globalization exacerbates the tension between social and economic policies as the imperative of the economy takes precedence over social welfare. While social policies have always been made in a budgetary context, a change has occurred over the last two decades whereby financial and monetaristic values have become the central guiding principles in Canadian social policy. This tension is apparent in the discourse surrounding social policy that denigrates public sector programs and institutions characterizing them as inefficient, unresponsive, cumbersome and unaccountable, needing 'market discipline', in order to lay the groundwork for reorganization along private sector lines. Social policies are defined in terms of market logic, often depicted as a burden and a 'drain' on economic policy which sets up the justification for cuts in programs. Within this context, political and social concerns are dealt with as matters of economic policy rather than social issues, narrowing the conception of social policy and turning the discussion into a fiscal debate rather than one about the fundamental nature of society.²⁷

Legal and policy discourse reflects and is reinforced by the underlying neo-liberal ideology of government. As Arthurs observes "Law — many would argue

26 See Amin, *supra* note 12; generally Arthurs, "The State We're in..." and "Globalization of the Mind...", *supra* note 3; Bakker, *supra* note 9; Brodie, *supra* note 9; Brown and Lauder, *supra* note 19; Magnusson, "Canadian Higher Education and Citizenship" and "Examining Higher Education", *supra* note 12; Shiva, *supra* note 19; Slaughter, *supra* note 17; Rice and Prince, *supra* note 5; and Teeple, *supra* note 9.

27 See Bakker, *supra* note 9; Brodie, *supra* note 8; Buchbinder, *supra* note 7; David Cameron, "Beyond the market and the state: how can we do better?" in Drache and Gertler ed., *The New Era of Global Competition: State Policy and Market Power* (London, ON: McGill-Queen's University Press 1991); Dudley, *supra* note 19; Fisher and Rubenson, *supra* note 7; Kelsey, *supra* note 12; Magnusson, "Canadian Higher Education and Citizenship" and "Examining Higher Education", *supra* note 12; Slaughter, *supra* note 17; Rice and Prince, *supra* note 5.

– expresses and advances the hegemonic power of the state”²⁸ and further “State law, in fact, is being deployed to facilitate globalization and neo-liberalism.”²⁹ Official state discourse appropriates legal discourse in the formation of new policy and structures. Policy changes are justified portraying governments as powerless to the larger gravitational force of economic globalization. Such discourse hides the multiple, intersecting, societal impact of economic restructuring on race, gender and socio-economic situations. So that while decision-making moves away from democratized structures the appropriated legal discourse gives the semblance of democracy.

Here is where legal discourse is implicated. Legal discourse informs and empowers policy and state discourse.³⁰ Conklin has described how totalizing, official discourse, such as legal discourse, ousts a heterology of voices, silencing or rendering invisible the experiences of many, whereby ‘the official discourse violently displaces the lived meaning of others.’³¹ His analysis is relevant here in this environment where political decision-makers marginalize social advocates and others voicing criticism depicting them as ‘special interest’ groups which allows for their concerns to be dismissed as self-interested lobbyists. Held with suspicion, if not pathologized, they are politically and economically isolated, as challengers to the neo-liberal globalization agenda, fighting the discourse and reforms proposed by governments and business. The most vulnerable are advocates for the poor, labour, and women along with critics from the Left who traditionally defend social programs. Methods of attack include dismantling government agencies which traditionally allow for consultative policy-making shrinking the policy-making process to a tight group close to the center of power, funding cuts, restricting access to government decision-makers, and challenging group’s expertise on issues. Other actions include weakening employment equity programs and affirmative action, rendering minorities invisible from social policy reports and targeting programs based on selective criteria.³²

Postmodernists roundly challenge claims of universal “Truths”. From this perspective Dudley suggests this neo-liberal version of economic globalization is a “discursively constructed myth, or a grand narrative, rather than a neutral

28 Arthurs, “The State We’re In”, *supra* note 3 at 35.

29 *Ibid.* at 40.

30 Arthurs characterizes the relationship between the state and legal education as follows: “... legal education is *about, in, for and against* the state in so far as law is a distinctive normative system generated by the state, it is not autonomous, license to practice belongs to the state, it expresses and advances the power of the state and it subverts, restrains and transforms the state through criticism.” See Arthurs, “The State We’re In”, *supra* note 3 at 35.

31 The violence of monologic legal language and its ability to conceal, neutralize and sanitize pain and suffering and the lived, indigenous, experience is central to William Conklin’s thesis in *The Phenomenology of Modern Legal Discourse* (Aldershot: Dartmouth Pub. Co, 1998) [Conklin, *Phenomenology*] See also William Conklin, “The Trap” (2002) 13 *Law and Critique* at 20-21 for a dramatization of similar themes in legal education [Conklin, “The Trap”]. Further see Jane Sutton and Nkanyiso Mpfu “Figuring Reconciliation: Dancing with the Enemy” (2007) Windsor Y.B. Access Just. 291-311, who rely on Conklin’s analysis in their article.

32 Brodie, *supra* note 9; Margaret Thornton “Neoliberal Melancholia: The Case of Feminist Legal Scholarship”, *supra* note 3.

imperative to which governments and public policy can only respond or react.”³³ Likewise, Slaughter comments “The neo-liberal school sees market forces as impersonal, disembodied, and inexorable, as supplanting national economies with a global market.”³⁴ Further neo-liberal discourse reshapes the relationship of citizen to the state so that citizens are presented as consumers with choices and responsibilities rather than beneficiaries with rights and entitlements.³⁵ Teeple similarly argues that neo-liberal policies have dramatically reorganized the manner in which all society functions including: the professions, universities, corporations, community groups and individuals. The ramifications are that the public sector is contracted and the private sector expanded within society. Social responsibilities are downloaded from governments to the voluntary sector.³⁶ Feminists take up this analysis from the point of view of the division of labour and argue this shift puts additional burden on the domestic realm. Moreover they argue the restructuring of work is gendered and disproportionately impacts on women in all locations in society.³⁷

E. The Political Economy of Higher Education

Trends in Canadian social policy are reflected in higher education policy. Postsecondary education in Canada has shifted from primarily state-centred and publicly-funded towards the market. In the early 1990’s this trend was heightened in Canada as the political economy dramatically shifted with the effects of an economic recession. The fiscal crisis was compounded for the provinces when, in 1995, the federal government severely reduced transfer payments to the provinces for health, welfare and education as part of a strategy to reduce the federal deficit. The provinces lost billions of dollars in revenue. The federal government followed up this course of action by fundamentally altering the transfer arrangements which further reduced funding to the provinces and ultimately to postsecondary education. The provincial governments responded to compensate for the federal cuts in various ways depending on the ideology

33 Dudley, *supra* note 19 at 23.

34 Slaughter, *supra* note 17 at 52.

35 See Magnusson, “Canadian Higher Education and Citizenship”, *supra* note 12 at 117; Rice and Prince, *supra* note 5. See also Kelsey, *supra* note 12 at 59, who also describes the dynamic:

The ideological impact of market forces is complemented by more subtle influences- in particular, new discourses of governance. The terms ‘restructuring’ or ‘structural adjustment’ imply a neutral corrective. Fundamental changes to social regulation are portrayed as mere shifts of technique, which are devoid of culture, context or power. Citizens are reduced to customers who buy from competing providers those services, which were once, their entitlements. In the process, responsibility for social well-being becomes individualized, privatized, neutralized. In much official discourse, the concepts of a society whose members have reciprocal obligations and of communities with contending histories, cultures, identities, and relations of power all but disappear.

36 Teeple, *supra* note 9.

37 See Bakker, *supra* note 9; Brodie, *supra* note 9; M.P. Connelley and M. MacDonald, “The Labour Market, the State and the Reorganization of work: Policy Impacts” in I. Bakker ed., *Rethinking Restructuring: Gender and Change in Canada* (Toronto: University of Toronto Press, 1996).

of the government in place. Neo-liberal policies prevailed in Ontario, British Columbia and Alberta. These included opening up of the private sector and expanding of degree granting thereby increasing competition in postsecondary education. Governments employed market mechanisms in allocating resources and generating revenue using tied, targeted and matching private sector funding schemes. A greater emphasis has been placed on meeting labour market needs through skills-oriented postsecondary programs and curricula as well as market-relevant research. Governments are increasing the involvement of industry and the private sector in public postsecondary education. Student tuition and assistance policies have shifted in some Canadian provinces downloading the cost of postsecondary education on to the student and the private sector, away from government. Tuition has been deregulated or partially deregulated and increased in some provinces (Ontario, B.C. and Nova Scotia) while other provinces have held fast to freezes or reductions (Manitoba, Quebec, Newfoundland and Labrador). Provincial operating grants to postsecondary institutions were decreased, key performance indicators were introduced and attached to institutional funding in some provinces, and system and institutional rationalization and strategic planning came to the forefront.³⁸

E. Commodification, Marketization and Corporatization in Higher Education: Whither our scholarship?

A related consequence of the government's neo-liberal approach to globalization is the marketization and commercialization of social programs.³⁹ Although the traditional description of the Keynesian welfare state involved a link between the market and social policy, the contemporary difference is the nature and extent of the influence of economic values on social policy. In the contemporary context social policy is realigned to serve domestic and global capital. Consequently, under a market model, social services such as public education become commoditised and privatized. In Canada we see this trend in the increasing presence of for-profit institutions in a historically publicly-funded and non-profit education system. Further in the contemporary landscape students are viewed as 'consumers' who have choices but not rights, and the public are viewed as 'investors' in but not stewards of the system. At the same time the goal of education shifts and emphasizes the preparation of a skilled and competitive labour force as opposed to the emphasis on the development of critically aware citizens ready to take their place in a democratic society. (Curiously in the market model of education students are prepared to become future minions for the

38 Don Fisher, Kjell Rubenson, Rob Clift, Madeleine MacIvor, John Meredith, Theresa Shanahan, Glen Jones, Claude Trottier, Jean Bernatchez, *Canadian Federal Policy and Postsecondary Education*. (Vancouver: University of British Columbia. Centre for policy Studies in Higher Education and Training, 2006); Theresa Shanahan, and Glen Jones, "Shifting Roles and Approaches: Government Coordination of Postsecondary Education in Canada from 1995-2006" (2007) 26(1) *Journal of Higher Education Research and Development* 31-43.

39 Marketization is defined as combining market principles of private property, competition, and profit with state interests of authority, public interest and citizenship. Commercialization and marketization are the process or result of bringing (new) goods, products and services to market. See Rice and Prince, *supra* note 5.

benefit of the labour market all the while they are told that since they will enjoy the 'returns' on their 'investment', they must shoulder the cost in the form of increasing tuition fees.) Contemporary forms of internationalization in higher education are another guise of commercialization within the university. Selling education as a commodity to overseas students is a valuable source of revenue for universities in times of restraint and cutbacks.⁴⁰

Within this education paradigm the cult of accountability flourishes in the form of audits, measuring exercises, school rankings on 'performance', and standardized testing and accreditation. Kelsey describes the reconstruction that takes place:

Tertiary education must be redefined as primarily a private good, a commodity to be bought and sold in an artificially constructed education market driven by the forces of supply and demand. Greater dependence on private sector financing and competition are expected to stimulate efficiency, innovation, and responsiveness. Education is reduced to training and information transfer, and measured through accreditation of standardized outputs.⁴¹

Fisher and Rubenson anticipated almost a decade ago increasing differentiation, specialization and ultimately competition in higher education, resulting in a hierarchy emerging between institutions and increased competition for research funding and for students:

⁴⁰ Internationalization has many manifestations within the university. Some are traditional and humanistic whereas others connect it to the market. In terms of research and scholarship it may include the incorporation of international dimensions of knowledge, new skills and approaches that are seen to contribute to the universities' competitiveness in the global market. The goal of internationalization is envisaged in Canadian higher education policy by the emphasis on certain objectives: training for employment by preparing individuals with skills that will allow Canadians to compete internationally; the representation of the university as a global forum for discussing ideas; increasing the diversity of the student and faculty population; developing curriculum that integrates an international component; fostering co-operation through scholarly exchanges, co-operation, and increased student mobility; encouraging international development projects. For more on the connection between internationalization, neo-liberalism and globalization see Jan Currie, "Globalization as an analytical concept and local policy responses" in Currie and Newson, *supra* note 7 at 15–20 [Currie, "Globalization as an analytical concept"]; Kelsey, *supra* note 12 also takes up this connection. For a discussion of 'corporate managerialism' and how it unfolded in Australian universities see Simon Marginson, *Education and Public policy in Australia* (Cambridge: Cambridge University Press, 1993).

⁴¹ Kelsey, *supra* note 12 at 52. See also Anthony Goldsmith, "Standing at the crossroads: Law Schools, Universities, Markets and the Future of legal Scholarship" in Cowrie, *supra* note 3 at 62–101; C. MacInnis and S. Marginson, "Australian Law Schools after the 1987 Pearce Report", (Department of Employment, Education and Training, Canberra, 1994) show how this played out at Monash law school through the intensification of work especially teaching at the law school. Student growth was not matched by increasing faculty at the law school between 1975–1992. This obviously has implications for the quality of teaching and the quality and productivity of research.

Our universities are becoming more corporate, more technocratic, more utilitarian and far more concerned with selling products than with education.... Jointly designing curricular with private donors, the differentiation between teaching and research internally, and the reliance on non-tenure track sessional or part-time labor are already established trends. Full cost recovery is a major theme. The marketing of programs at profit-making rates to foreign elites will become the norm. In short, the very essence of the university in Canada will change in ways that undermine some of the best part of the tradition that emphasized national norms and public service.⁴²

In a neo-liberal paradigm, knowledge is viewed as a commodity, a product to be brought to market. Universities as producers of knowledge (through our research and scholarship) are viewed as critical to 'knowledge mobilization' or 'knowledge transfer' to users of knowledge (i.e. labour market, industry, private sector). Market-relevant knowledge, that which is vocational, technical, skills-oriented is privileged over humanistic, critical and reflective knowledge.⁴³ Our scholarship must be made relevant to the market and must be brought, moved or transferred to the market for it to be recognized and resourced. Susan Boyd reminds us that lawyers are implicated because they 'have always played a role in facilitating the market processes that receive the pride of place in neo-liberal discourses.' She observes that the commodification of knowledge is exacerbated in the applied disciplines and 'lawyers are well suited to produce' this knowledge. Finally, she points out that the consumers of our knowledge (and those increasingly invited to finance it) are less likely to be the working class, poor, marginalized, single parents and more likely to be business or government interests, thus giving the already powerful and privileged in society 'leverage to influence the shape of legal education.'⁴⁴

This paradigm blossomed in Canada in the environment of fiscal restraint during the 1990s described previously in this paper. Neo-liberalism combined with recession set the scene for increasing university-industry partnerships, corporate sponsorship, institutional fund raising and (institutional and professorial) profit-producing activities encouraged by government funding policies that have introduced tied and matching funding schemes requiring universities to bring in external funds or partner with external agencies. Thus, there was both a push and a pull for the academy to engage the private sector – they needed the money and they were encouraged to seek out external, private sector funds through funding policy schemes. The result has been the increased engagement at the institutional and professorial level in entrepreneurial, commercial, revenue-generating and competitive grant winning activities and partnerships.

42 Fisher and Rubenson, *supra* note 7 at 96.

43 Thornton, "Gothic Horror", *supra* note 3.

44 Boyd, *supra* note 3. Arthurs has also given us a 'He who pays the piper calls the tune' analysis of research funding. See Arthurs, "The world turned upside down", *supra* note 13; Arthurs, "The State We're In", *supra* note 3; Arthurs, "The Political Economy", *supra* note 3.

Another expression of these trends found in higher education research is in research productivity, which is emphasized and measured by outputs and cast in the framework of an accountability movement. Consequently overall emphasis in higher education on research increases at the institutional level for grant-winning purposes but also at the national level because higher education research is seen as an integral part of an internationally competitive national economy. Research performativity has become an indicator of our national well-being; our well-being as defined in terms of our contribution to the global economy.

Some scholars have argued that in this environment winning grant money for a research project is now more important than the substance of the research project itself. At the individual, professorial level this is especially so for the purposes of tenure and promotion. Embedded in and disguised as simply 'traditional tenure and promotion requirements,' market driven pressures on junior untenured faculty go unnamed and therefore unanalyzed. A scholar's 'track record' of winning grants emerges as one of the most important criterion for successful further funding from granting councils in a cyclical self fulfilling prophecy. Scholars and institutions who historically have won more grants, receive more grants, and scholars and institutions that historically have won fewer grants will received less funding, exacerbating differences in research production and stratifying the high education system based on research 'output'.⁴⁵ In fact we now have a group of universities in Canada that claim special status as research intensive institutions that meet regularly to strategize about lobbying for resources to support their status. Although research intensive universities are a major beneficiary of recent government policies, all higher education institutions have begun to focus on strengthening research capacity.⁴⁶ Similarly within Faculties and departments, individuals who are research 'stars' are rewarded with release time and other benefits so that those who research will research more and those that teach will teach more widening the gap and increasing the tension between teaching and research within the university.⁴⁷

There are implications for the substantive nature of our scholarship because as the higher education in Canada moves closer to the market, academic scholarship and research shifts accordingly. As research becomes increasingly competitively funded, less dependent on public grant support and more dependent on private commercial support, market-friendly projects are supported and thrive whereas non-commercial research withers.⁴⁸ Kelsey describes this trend:

45 Buchbinder, *supra* note 7; Simon Marginson and Mark Considine, *The Enterprise University: Power, Governance and Reinvention in Australia* (Cambridge: Cambridge University Press, 2000); for a fuller discussion and critique of Canada's national Granting Council's approach see Claire Polster, "Dismantling the liberal university: the state's new approach to academic research" in R. Brecher, Q. Fleischmann, & J. Halliday, eds., *The University in a liberal state* (Aldershot, England: Avebury, 1996) at 106–122.

46 Shanahan and Jones, *supra* note 38.

47 This trend was predicted by Sheila Slaughter and Larry Leslie, *Academic Capitalism: Politics, Policies and the Entrepreneurial University* (Baltimore: Johns Hopkins, 1997)

48 Arthurs, "The Political Economy", *supra* note 3; Buchbinder, *supra* note 7; Kelsey, *supra* note 12; Polster, *supra* note 45.

Likewise, research funding dependent on private commercial sources, or grants from competitive public pools where government designates the priorities, are likely to support market-friendly projects and hypotheses and unlikely to favour critique. The resulting ideological closure will foster and protect the “consensus”, and limit the range of ideas in circulation on which the ‘evolution of public opinion’ largely depends.⁴⁹

Buchbinder suggests that research funding in universities in Canada has been altered in a manner that affects “democratic process and equal access”.⁵⁰ He also describes targeted funding activities of funding councils as compromising the independence of academics by channelling them into research areas if they wish to receive funding. Jan Currie also expresses concern regarding effects that closer links with industry and the university will have on academic research. She suggests this has led to the commercialization of research, and as a consequence, “a move to applied agendas with the accompanying loss in curiosity-driven research and serendipitous discoveries. The privatization of universities has packaged research endeavours and led to the commodification of knowledge.”⁵¹

The manner in which the Canadian Federal Government is ceding control over academic research to industry by increasing industry’s opportunity to define the ways in which federal support for university research is used raises similar concerns. Claire Polster gives as an example Canada’s three national research granting councils, which have created various partnership programs allowing industry to shape the topic and form of academic research projects in return for funding. The growing emphasis on industrial oriented research is evident, according to Polster, in increasing use of funding for targeted research themes and the reduction in support for open, curiosity-driven research. She also notes that access to resources and state of the art equipment is available to those work-

49 Kelsey, *supra* note 12 at 59. See also Magnusson, “Examining Higher Education”, *supra* note 12 at 83-85, who also argues that in the restructured academic environment intellectual work has shifted in such a way which ultimately undermines its public interest: ‘Academic knowledge [is] constructed primarily within an unregulated terrain of unfettered corporate interests, creating a situation within which intellectual work predominantly supports neo-liberal capitalist ideology.’ Conceptions of quality and excellence in scholarship emerging from the university in this environment are linked to economic notions of development and progress (as opposed to humanistic, democratic notions). Taking Polster’s and Newson’s analysis of the effects of performance indicators on intellectual activity further, Magnusson maintains that the reallocation of resources based on market priorities results in “the explicit ordering of knowledges according to market relations.” She argues that in the restructured higher education research environment intellectual work aligned with the market will receive more external and internal institutional funding whereas “work that challenges the capitalist agenda is marginalised”. Critical scholarship such as equity studies are ultimately compromised under the circumstances. Her prognosis for universities as future sites of critical scholarship and alternative social movements is grim as she describes universities as products of higher education policy shaped historically by the needs of the capitalist state framed in an interventionist Keynesian paradigm or more currently framed in neo-liberal discourse and serving the needs of transnational corporations.

50 Buchbinder, *supra* note 7 at 336.

51 Jan Currie, “Introduction”, Currie and Newson, *supra* note 7 at 4-5 [Currie “Introduction”].

ing in federally supported research networks or centres that engage in industry oriented research. Similarly, she notes that perks such as research leaves and reductions in teaching loads are available for academics working in these centres. She maintains that it is not that other types of research are being discouraged but rather that academics that engage in industrial oriented research receive support, resources, rewards, visibility and prestige internally and externally to the institutions. She comments,

One of the most significant implications of federal activities in the area of academic research is that they are contributing directly to the dismantling of the liberal university. The transformation is evident in a number of the university's functions, such as producing knowledge, which is becoming both increasingly narrow and oriented to serving the needs of industry.⁵²

F. Managerialism in Higher Education: Whither academic culture?

There is a vast literature emerging from a wide range of disciplines that suggests that universities are becoming increasingly competitive, bureaucratized environments, adopting corporate and market-oriented organization models. Academic work is accordingly intensified. Professional autonomy, participation in decision-making and academic freedom are diminished as academic culture becomes skewed towards the market.⁵³ Thus, this shift towards the market in Canadian public postsecondary education raises concerns for academic freedom and autonomy.

Some scholars describe the changing organizational environment in universities in terms of increasing managerialism. They argue academics are becoming increasingly managed and consequently they are becoming less autonomous. Buchbinder maintains that although Canadian universities have been organized along corporate lines for decades the new intensive market orientation is erod-

⁵² Polster, *supra* note 45 at 109.

⁵³ Paul Axelrod, *Values in Conflict: The University, the Marketplace and the Trials of Liberal Education* (Montreal: McGill-Queens University Press, 2002); Backhouse, *supra* note 2; Bill Bruneau and Donald Savage, *Counting out the scholars: The case against performance indicators in higher education* (Toronto: Lorimer 2002); Buchbinder, *supra* note 7; Newson, *supra* note 18; Kelsey, *supra* note 12; Currie and Newson, *supra* note 7; Fisher and Rubenson, *supra* note 7; Claire Polster, "Dismantling the liberal university: the state's new approach to academic research" in R. Brecher, Q. Fleischmann, & J. Halliday, eds., *The University in a liberal state* (Aldershot, England: Avebury, 1996) at 106-122; Sandra Rodgers, "Legal Education: Is it in Crisis?" (Paper presented at the Conference on the Future of Canadian Legal Education: Critical Appraisals, Faculty of Law, University of Ottawa, 21-24 September 2000); Slaughter, *supra* note 17; Sheila Slaughter and Larry Leslie, *Academic Capitalism: Politics, Policies and the Entrepreneurial University* (Baltimore: Johns Hopkins, 1997); Shanahan, "Legal scholarship in Ontario's English-speaking law schools", *supra* note 3 at 25-50; Shanahan and Jones, *supra* note 38; Thornton "The Dissolution of the Social in the Legal Academy", "Neo-liberal Melancholia: The Case of Feminist Legal Scholarship", "Gothic Horror in the Legal Academy" and "Among the ruins: Law in the neo-liberal academy", *supra* note 3 and "The demise of diversity in legal education: Globalization and the new knowledge economy", *supra* note 13.

ing collegial decision-making and is being replaced by “managerial hegemony” whereby market strategies dominate and student and faculty groups are marginalized. Arguing that the market-oriented university focuses on efficiency, cost-cutting, and centralization and reflects a stronger managerial focus, he suggests that this environment compromises academic autonomy and collegial decision-making. He raises concerns for the production and transmission of knowledge in this environment observing:

The move to the ‘free market’ produces a more rigid, top heavy institution in which control has been taken away from the academic workers. Thus, free is not free, nor is it democratic. Perhaps the most critical development in this process is what happens to the production and transmission of knowledge in the market-oriented university. It is an issue since it is the major *raison d’être* of the university.⁵⁴

Currie notes the increasing workloads and intensification of work which she connects with “the globalization practice of increased accountability, coming in the particular form of bureaucratic and financial accountability.” She suggests this “ever increasing amount of petty bureaucracy and form-filling” is supposed to make universities more accountable to external stakeholders but is simply just changing the labour process of academics and increasing administrative demands of faculty. This impinges on their ability to engage in meaningful intellectual work.⁵⁵ Polster and Janice Newson, also critique the use of business style performance indicators in universities. Using Dorothy Smith’s framework of the social construction of knowledge these scholars argue that these business measurement protocols “intrinsically reorder the social relations of academic work.”⁵⁶ They contend these practices change how academics engage in their intellectual activities, their relationships, and their judgments. They maintain that introducing business criteria of evaluation and business interpretations and consequences of evaluation fundamentally alter the nature of knowledge.

G. Harmonization of Higher Education

Economic globalization in a neo-liberal context is a homogenizing force at an international level.⁵⁷ Within a market context, harmonization is designed to facilitate the movement of capital investment so that capital is treated the same way at the international level. In a legal context this means the harmonization of law and the accommodation of a new transnational legal order to facilitate busi-

⁵⁴ Buchbinder, *supra* note 7 at p. 340-341.

⁵⁵ Jan Currie, “Introduction” *supra* note 51 at 3.

⁵⁶ Polster and Newson, *supra* note 19. Dorothy Smith’s framework can be found in Dorothy Smith, *The Conceptual Practices of Power: A Feminist Sociology of Knowledge* (Toronto: University of Toronto Press, 1990).

⁵⁷ Arthurs, “Poor Canadian Legal Education”, *supra* note 3; Fisher and Rubenson, *supra* note 7; Magnusson, “Canadian Higher Education and Citizenship” and “Examining Higher Education”, *supra* note 12; Jan Newson, “Transnational and Supranational Institutions and Mechanisms” in Currie and Newson, *supra* note 7 at 235-241.

ness across international boundaries.⁵⁸ In a higher education context harmonization can be seen in the pressure for mutual recognition and standardization of qualifications in order to enhance the portability of credentials and allow for movement of potential workers minimizing barriers to selling education abroad. While opportunities for collaboration and exchange increase in a global context, the concern for some critics is that local institutional autonomy and academic freedom to control the form and substance of higher education diminishes. Both institutions of higher learning and professions lose local content and control under pressure to bring their organizations into line with international trends in order to be competitive in an international environment. (Obvious local examples of this are the Faculties of Law at the University of Toronto and more recently at Queen's University changing the name of their law degrees from an LL.B. to a J.D. in order for their graduates to be able to compete in the American market thereby facilitating the seamless transfer of the credential across borders).⁵⁹ In this context local norms, customs, laws, and regulations that are different, inconsistent or hindering this goal are characterized at best as backwards and unprogressive, and at worst as illegal and violating corporate property rights. In any case they must be "corrected" by the "discipline" of the market which has a levelling impact at the local level. Local customs, local culture and indigenous knowledge are flattened.⁶⁰

H. The Role of the University in Society

1. Intellectual Freedom and Academic Knowledge

Relevant to this discussion is the concern for the critical function of the university in society. Underpinning government's neo-liberal response to globalization is the ideological belief in the virtue and infallibility of global markets. In this environment where there is only one value – i.e., the market – all other values fall away. This market value infuses the university and the intellectual work being carried out in terms of what kind of work is being done, by whom, how and for whom.⁶¹ Jane Kelsey and others⁶² comment on the high degree of ideological hegemony required for the long-term survival of global neo-liberalism while Currie observes "The frightening aspect of globalization is the subtle way the process infiltrates institutions so that resistance to its agenda is weakened", suggesting that it takes a marathon effort to even question these practi-

58 Arthurs, "The State We're In", *supra* note 3 at 40-41.

59 The proposal to change the name of Queen's law degree to a JD was approved by the university Senate on February 28, 2008. To date Toronto and Queens are the only two law schools in the country to have made this change however three law schools offer joint LL.B./J.D.: Windsor, Ottawa, and Osgoode. Windsor's joint LL.B./J.D. degree is the oldest, some twenty years.

60 Arthurs, "The Political Economy of Canadian Legal Education", *supra* note 3; Kelsey, *supra* note 12; Magnusson, "Canadian Higher Education and Citizenship" and "Examining Higher Education", *supra* note 12; Shiva, *supra* note 19.

61 Axelrod, *supra* note 53; Buchbinder, *supra* note 7; Kelsey, *supra* note 12.

62 Kelsey, *supra* note 12; Buchbinder, *supra* note 7; Currie, *supra* note 51; Fisher and Rubenson, *supra* note 7.

ces.⁶³ Universities, as traditional sites of resistance, necessarily become targets for “restructuring”, thereby eliminating obstacles and critique of the movement.

Universities provide a repository of historical knowledge, a source of critique, and a breeding ground for competing ideas, which challenge the portrayal of neo-liberalism as an immutable and indisputable orthodoxy. As such they present an obvious target for radical market-oriented restructuring.⁶⁴

A particularly pernicious manifestation of this trend can be found in the discrediting of critical scholars and their professional expertise as well as the suspicion directed at progressive faculty who advocate for social change and do not embrace the dogma. Kelsey describes how this manifests in legal education:

Theories, intellectuals, and institutions that promote social engineering through law are inherently discredited and present logical targets for restructuring. This strikes, in particular, at the project of socio-legal scholars to analyze law in its social, economic, cultural and political context.⁶⁵

Margaret Thornton's gives us a recent example of the discrediting of socio-legal scholars or as she characterizes it as “the dissolution of the social in the legal academy.” She tells us the story of the application of ‘exit packages’ to six tenured La Trobe socio-legal academics who were ‘excised’ from the law school because their scholarship was not sufficiently ‘professionally-oriented’. They were subsequently replaced by practitioners as adjuncts in the areas of applied commercial knowledge (i.e. trade, competition, intellectual property and tax law). Five out of the six who were targeted were women, and the majority were feminist scholars.⁶⁶

In this environment ideological and intellectual debate and diversity is stifled in the university. The university's public role as an active and independent critic in society is compromised. The ability of universities, and by extension professional schools within them, to act in the public interest (broadly and inclusively conceived) is compromised. In this environment market principles are replacing educational values, private interest is supplanting public interest and the academic culture of the university is being shaped in accordance with the priorities of the private sector.

I. Law Schools and the Academy

Arthurs raises concerns regarding the transformation of attitudes, values and understandings which he attributes to neo-liberalism and which he refers to as

⁶³ Currie, “Introduction”, *supra* note 51 at 6.

⁶⁴ Kelsey, *supra* note 12 at 58.

⁶⁵ Kelsey, *ibid.* at 62. Also Arthurs, “Poor Canadian Legal Education”, *supra* note 3 also takes up this theme.

⁶⁶ Margaret Thornton, “The Dissolution of the Social in the Legal Academy”, *supra* note 2.

'globalization of the mind'.⁶⁷ He maintains that neo-liberalism can reconstitute areas of scholarship so that they become interpreted and understood in terms of market principles, norms and values – accordingly, the very nature and substance of that knowledge changes. Kelsey describes this dynamic:

Alongside the closure of the economic debate and the strictures of managerialism comes the neo-liberal variant on legal liberalism known as law-and-economic. Centred on the revival of classical contract law and property rights, the familiar, but damaged, fiction of law as inherently objective, rational, private, individualized, and value-free must be restored. This truth value then excludes any other legitimate source or form of law, and precludes any analysis of its historical and contextual role. The exception is the relationship of law to the deregulated economy. That nexus is treated as natural and symbiotic.⁶⁸

Arthurs captures the significance of the trends in social and higher education policy to legal scholarship and the culture of the law school. He observes:

...neo-liberalism is a pervasive influence in Canada's political economy; our political economy in turn defines the structure and belief systems of our corporations, legal professions and universities; and those social institutions are vastly influential in determining the future of legal research and education in the country. Law schools are not autonomous; they do not exist in a vacuum; they cannot promulgate a particular intellectual, social or moral agenda. On the contrary they are deeply implicated in the political economy in which they are located, from which they draw their students, into which they send their graduates, and about which their scholars ruminate and fulminate.⁶⁹

While this presents concerns for all disciplines in the academy, it is compounded for professional disciplines, such as law, already externally regulated by professional governing bodies and with strong ties to the State and market. The law is vulnerable, as Arthurs maintains: the law penetrates and is penetrated by neo-liberalism. Neo-liberal discourse employs and appropriates the power of legal discourse to displace and exclude other discourses.⁷⁰ William Conklin describes the workings of legal discourse – it sanitizes and conceals suffering, assimilating all primary discourses, hiding this violence all the while purporting natural,

67 Arthurs, "Globalization of the Mind", *supra* note 3.

68 Kelsey, *supra* note 12 at p. 61.

69 Arthurs, "Poor Canadian Legal Education...", *supra* note 3 at 7.

70 See Conklin, *Phenomenology* and Conklin "The Trap", *supra* note 31 and following for how discourse especially legal discourse can usurp and violate another in an act of 'discursive displacement' and 'discursive violence'.

apolitical and objective analyses. He goes so far as to say that the modern professional law school aids in the production of such concealment through the assimilation of the language of living subjects into the legal language of the modern state.⁷¹ Thus the law school becomes complicit in the silencing, the violence, and the damage done.

So what might we expect to see in the legal academy within a neo-liberal political economy? First, the areas of legal education that are close to the market or that are profitable would likely be prioritized and resourced in the law school. This may result in the emphasis of research, or teaching, or certain areas of research and teaching, depending on which is the most lucrative for the law school. One may expect to see the priorities of the law school influencing the intellectual activities of the law professors because this is the environment in which they must work. In terms of subject matter, and theoretical and methodological orientation, one might expect to see an increase of research activity in, and/or funding of, areas of law and analyses in law that are close to the market, or prioritized by a neo-liberal economic policy approach. These would include, but are not limited to, private property rights, intellectual property rights, technology, bio-medical legal issues, corporate law, tax, not-for-profit and charity law, international aspects of all areas of law as well as international corporate governance. In addition, one might expect to see a decrease of activity in, or funding of critical legal research.

The organization and funding of legal research might also be influenced. The adoption of business values into higher education described by scholars in this paper may result in the marketing of law programs, and curriculum with full cost recovery that make a profit for the school. A related consequence may be observed in the increasing emphasis on making programs and scholarships international in focus. Some scholars have commented that this leads to a loss of local content and knowledge in research and a pressure to harmonize academic customs, credentials and ultimately scholarship. This may manifest in a law professor's research, in the pressure to write for international audiences or journals, shaping Canadian content in our scholarship to meet an international audience.

Additionally, one might expect to see law professor's research become more competitively funded and less reliant upon public grant support. That which is supported by public grant may increasingly rely upon the track record of grant winning by the researcher. The adoption of business values, it is argued by some scholars, also emphasizes notions of productivity, efficiency and accountability, which we could expect to see become part of the law professor's research context. This may result in increased administrative work to meet accountability mechanisms, increased pressure to produce research and teach more students to meet performance expectations and a decrease in administrative support to cut costs and promote efficiency. Along with increased administrative pressures law professors may experience increasing managerialism in their research context, increased pressure to bring in private sector funding especially through corporate or professional partnerships and the development of research projects or curricu-

71 See William Conklin, "Teaching Critically within a Modern Legal Genre" (1993) 8 C.J.L.S. at 33, 52.

lum tailored for the private sector. All of these factors may be seen to impact on a law professor's research activity.

In summary, the literature reviewed suggests that the academic environment is being restructured in such a way that it will affect academic culture and the intellectual activities of professors. In law this could manifest in what is researched, how it is researched, by whom it is researched, if, how and by whom it is funded, as well as in the shape and content of the end product. One might expect to see changes in the participation in academic decision-making of law professors – decisions that influence the context and course of their research activities at the law school and affect law professor's academic freedom. Therefore one might expect to hear law professor's expressing concerns about their autonomy especially in terms of their intellectual activities.

III. METHOD, DATA SOURCES AND DATA ANALYSIS

The purpose of the larger study upon which this paper is based was to determine the factors that shape the scholarship, employment environment and the culture of law schools in Western Canada.⁷² This project utilized survey, interview and case study methodologies as well as the collection and analysis of public domain and archival documents.⁷³ The researcher spent one year physically at the University of British Columbia [UBC] campus collecting data. Primary data collection for the UBC case study took place between January 2002 and June 2003, with follow-up in May 2004.

The research project involved two phases. The first phase included the pilot testing of the survey instrument by a small sample of law professors to determine the reliability and validity of the questions. This was followed by a mailed questionnaire sent to all full-time faculty at the Western Canadian law schools. The questionnaire not only included demographic questions (i.e. age, gender, educational background, academic experience, rank, and appointment information) but also asked faculty questions about their teaching, research and practical work activities. In addition the questionnaire included questions about the factors that are shaping law professor's scholarship, employment environment and the culture of their law school. Finally, the questionnaire included a question asking participants to indicate their willingness to be interviewed for the study and to provide contact information if they agree. The overall response rate to the survey across the six Western Canadian law schools was 41%. The response rate from the University of British Columbia law school was 45%. The demographic data from the survey was analyzed using simple descriptive statistics including frequencies and cross-tabulations. The open-ended questions were coded and analyzed across themes developed from the literature.

Following the survey, case studies of the law schools commenced. Case studies were chosen on the basis of provincial representation, size and age of the

72 These included Faculties of Law at the University of British Columbia, the University of Manitoba, and the University of Alberta.

73 Sharon Merriam. *Qualitative research and case study applications in education*. (San Francisco: Jossey-Bass, 1998); Robert Yin, *Case study research: Design and methods*. (London: Sage, 1984).

law school and university, presence of the law school in a research intensive university and the extent of the law school's research profile. This second phase of the project involved interviews of faculty, administrators and staff, and also included archival searches and document collection and analysis. The interviews focused on the culture of scholarship and work environment at each law school and the factors that influence them. Fifteen interviews were done at UBC law school between November 2002 and January 2003. They included tenured and untenured full time faculty, senior and junior faculty, and faculty that had administrative experience at the law school. This number represented 50% of the full time faculty physically present at the law school during data collection. The interviews were semi-structured and lasted between sixty and ninety minutes. Criterion was developed which included age, rank, disciplinary background, and gender, upon which to base selection of the interview participants in order to achieve a representative sample. Faculty in senior administrative positions within the law schools were also selected for interviews. Interview data was transcribed, coded and analyzed against the themes in the literature review on the political economy of Canadian higher education. Participants were given anonymity. Therefore any interviews quotations are identified simply by a number.

In addition searches were conducted of university, law school and government reports and the university archives. Documents examined included: annual reports of the law school; academic plans of the law school and university; the law school's calendars over the last two decades; curriculum and program information; the law school mission statements; Charter legislation of the university; university and Social Sciences and Humanities Research Council of Canada [SSHRC] research funding information; archival documents on the history of the university and the law school, and histories of professional legal education in the province. Document and content analysis were used to develop descriptive profiles of the law school and the university within the context of the legal profession's history in the province.⁷⁴ This following section presents findings from the UBC interviews and document analysis related to the impact of the political economy on academic culture at the law school.

IV. SCHOLARSHIP AND ACADEMIC CULTURE AT THE FACULTY OF LAW, UNIVERSITY OF BRITISH COLUMBIA

A. Profile

The Faculty of Law at the University of British Columbia sits on the edge of a park-like campus of 1000 acres on a forested peninsula overlooking the Pacific Ocean and the Coastal Mountain Range of British Columbia. The beauty of the natural surroundings of UBC is breathtaking. The Faculty of Law was established in September of 1945 as large numbers of veterans returning from World

⁷⁴ The findings of the case study of the Faculty of Law at the University of British Columbia relate to the time period during which the data was collected. Shortly after the data was collected the administration of the law school changed. Follow-up communication with faculty confirmed that aspects of the research culture changed at the law school with the new administration. I have endeavoured to make a note of this where relevant in presenting the data.

War II flooded the university. Until then admission to the Bar of the province was by way of articles of clerkship in a law office supplemented by a program of lectures organized by the professional Bar. In 1914, this program of lectures formalized into the Vancouver School of Law.⁷⁵ The law school was established at the university in 1945 at the urgent request of the practicing Bar. Four previous attempts to start the university-based law school had failed. Funding of the law school was one, but not the only, difficulty. The University of British Columbia was severely underfunded and the Law Society of British Columbia was experiencing financial woes. Neither could raise and commit sufficient funds to ensure the ongoing operation of the school until 1945 at which time the Province of British Columbia also finally agreed to provide the university with additional funds for the new law school.⁷⁶

Initial lodgings for the law school at the university were modest. Surplus army huts were brought back into commission to house the fledgling Faculty. A permanent structure was built in 1951 and remodelled in 1971 with generous donations from the profession and named after the first Dean George F. Curtis.⁷⁷ The historical role of the practicing profession in the Faculty of Law at the University of British Columbia has been constant and notable. Unlike the history of law schools in other Canadian provinces (such as in Ontario and Manitoba) the leaders of law profession in British Columbia initiated efforts to establish the university-based law school. The practicing profession has demonstrated continued involvement and support by way of generous donations and providing teaching services in the Faculty from its inception. This is not to suggest that the professional Bar was without divisions or dissent regarding the appropriateness of formal post-secondary education for lawyers, but rather that they did not let that division interfere with their supportive relationship with the Faculty.⁷⁸

UBC is currently categorized as a medical-doctoral university having a broad range of Ph.D. programs and research as well as a medical school. It houses twelve Faculties including commerce and business administration; law; medicine; dentistry; and arts and science. UBC researchers are members of twenty-one Canadian Networks of Centres of Excellence. The university is characterized by its commitment to research, and interdisciplinary studies.⁷⁹ At the same time

75 The Vancouver School of law opened in 1914, closed in 1915 due to World War I, opened in 1919 until 1943 when World War II forced its closure. After World War II, the Faculty of Law at the university took over the academic instruction of lawyers for the province. See Wes Pue, *Law School: The Story of Legal Education in British Columbia* (Vancouver: UBC Press, 1995) [Pue, *Law School*]; UBC Calendar, (2001); Craig Neelands (1990), Faculty of Law, 1945-1985, Fonds Description. University of British Columbia Archives [henceforth UBC archives].

76 For a detailed history of the Faculty of Law at the University of British Columbia please see Wes Pue, *ibid.*

77 This was the building at the time of interviews, over 25 years old and in need of repair.

78 See Pue, *Law School*, *supra* note 74; UBC Calendar, (2001); Neelands *supra* note 69.

79 The Macleans *Guide to Canadian Universities* (2003) reports that UBC has the highest percentage of full-time faculty with Ph.D. s, of the 15 medical-doctoral Canadian universities (p.38). UBC ranks second after the University of Toronto for the highest average size and number of peer-reviewed research grants for both the Social Sciences and Humanities Research Council and the Canada Council (p.39). It ranks third after U of T and McGill in the size and number of peer-reviewed research grants from both the National Sciences and Engineering Research

it has recently committed itself to a millennium vision that includes nurturing close connections with the off-campus community.⁸⁰

At the time of data collection (2002–2003/04) the Faculty of Law had a complement of forty full-time faculty.⁸¹ Nine of the forty faculty members (or 23%) held a Ph.D. as their highest degree. Twenty-nine of the forty faculty members (or 73%) held a LL.M. as their highest degree. 110 adjunct faculty from the practicing profession taught courses in the Faculty. The law school offers the LL.B. program. This degree is the educational requirement for admission to the Bar of the province and provides the point of regulation by the Law Society of British Columbia. The law school also offered graduate degrees: a LL.M. and a Ph.D. in law. There was also a joint LL.B./M.B.A. program offered with the business school at the university. In 2000–2001 the school enrolment in the LL.B. program totalled 617 full and part time students not including additional exchange students. The incoming class enrolment was 213. Enrolment in the graduate programs for the 2000–2001 year stood at sixty-eight in the LL.M. program and sixteen in the Ph.D. program.⁸² Tuition at the university had recently been deregulated after a six-year freeze. Tuition figures were under adjustment at the time of data collection.⁸³

The Faculty of Law at the University of British Columbia houses The Centre for Asian Legal Studies and the Centre for Feminist Legal Studies. It is annexed to the International Centre for Criminal Law Reform and Criminal Justice Policy, an independent, non-profit institute affiliated with the United Nations. The law school offers unique programs such as: First Nations Legal Studies; Environment, Sustainable Development and Law; and the Alternate Dispute Resolution program. Its teaching program includes a Clinical Teaching Program and a Legal Research and Writing Program. There are a number of Chairs at the Faculty of Law. It has recently been awarded one junior level Canada Research Chair [CRC] starting July 1, 2002. This is the first CRC for the law school. In addition there are two Visiting Chairs established from private endowments to the Faculty. There are also two Permanent Chairs: the Chair in 'Feminist Legal Studies' (the first of its kind in Canada) and the 'Nemetz Chair in Legal History'. Both were made possible from private and public donations from the legal and wider community and the Province of British Columbia as part of the 'World of Opportunity Cam-

Council and the Canadian Institutes of Health Research (p. 39).

80 See UBC (2000), *TREK 2000: UBC's Vision*. (University of British Columbia); also UBC (2002), *The University of British Columbia Strategic Plan-Summary* (University of British Columbia).

81 This number included faculty on sabbatical and other leaves as well as faculty who had been seconded to other parts of the university. The actual number of full time faculty physically present at the law school during data collection was 30.

82 *Dean's Report* (2000–2001), The University of British Columbia, Faculty of Law, p.4-5 [*Dean's Report*].

83 The *Dean's Report* did not provide tuition figures. The law school web site updated March 2001 cited (now out-of-date figures) of \$5000 for first year and \$4042 for second and third year for the LL.B. Non-Canadian citizens and non-Permanent Residents pay \$461/credit. The average year consists of 30-32 credits. Additionally, all students pay \$2300 in various fees. Subsequently the law school website updated to 2004 listed tuition for Canadian and landed immigrant students at \$9000 for 1st year. International student's tuition was listed at \$16,928 for 1st year.

paign'. The Faculty of Law also publishes two student-run legal journals: The *UBC Law Review* and the *Canadian Journal of Family Law*. In addition a number of faculty members co-edit the *Canadian Journal of Women and the Law*.⁸⁴

B. Scholarship at the Faculty of Law

The data from this component of the study suggests that legal scholarship has flourished over the past twenty years and legal knowledge has exploded in terms of subject areas and specializations. The nature of academic legal scholarship has changed increasing in its conceptual difficulty, complexity, and interdisciplinary character. This growth in legal scholarship in general is reflected in the law school in particular. While doctrinal scholarship still has a presence in the law school there has been a proliferation of theoretical and critical scholarship over the past two decades.

There is still a strong core of basic doctrinal analysis in the legal academy. We haven't abandoned doctrinal scholarship because [that is] basic legal analysis especially regarding new areas. Law is highly mobile because decisions are made all the time, so just understanding and grappling with the effects and meanings of new laws is a major job in itself. We have just combined critical [components] with it.⁸⁵

Doctoral studies began at UBC in 1993 and have grown steadily from a few students to nineteen continuing in September 2003.⁸⁶ New faculty, (hired in the last decade), were described as having greater academic credentials coming into positions at the Faculty of Law than in the past. Whereas in the past LL.M.'s (Master of Law) were typical highest degrees for starting law faculty and publications were rare, today doctorates in hand or in progress are common place for starting faculty as are publications. This ratcheting up of credentials and publications records in the Faculty was attributed in part to the tight and competitive market for positions at law schools across Canada in the 1990's. As a consequence new faculty are entering law schools with greater research training and a research agenda heightening the research mission of the law school which was once almost predominantly focussed on teaching. Additionally, with advanced graduate degrees new faculty typically have had exposure to various academic research traditions and disciplines and thus they have an understanding and appreciation of scholarship from other disciplines that may influence their own work. In part a consequence of law professors increased research training and in part a response to heightened publication expectations for tenure and promotion, law professors were described as more productive in their scholarship than in the past.

⁸⁴ *Dean's Report*, *supra* note 81 at 1–12.

⁸⁵ In order to protect confidentiality each participant in the interviews was assigned a number. References from interview transcripts are indicated with the notation 'UBC' followed by the number corresponding to the participant. This particular quote came from UBC Interview #2.

⁸⁶ Faculty of Law, UBC (2004) Report of the Graduate Committee for the Academic Year, 2003–2004, p.2

Interdisciplinary scholarship by law professors at the Faculty, while on the rise, was described as a “minority trend”.⁸⁷ Multi-disciplinary work was described as difficult to engage in successfully. Few law professors worked across disciplines but they were more likely to cite scholarship in other disciplines in their work than in the past, revealing an increasing awareness of trends outside their discipline. Similarly, while collaborative research is increasing, especially for younger law faculty and for law faculty engaged in social science type research, the predominant mode of research was individual and solitary for most law professors. The trend toward collaborative research centres was noted to be increasing at the law school not just between full time academics but within the international community of scholars, government and practicing lawyers.⁸⁸ However, this trend was not considered a systemic change by the professors; rather the data suggests research centres are established on an ad hoc basis by faculty and there is little external pressure from either, the university, government or funders of research to organize scholarship along these lines.

A generational divide emerged as a distinct pattern in faculty scholarship. Older faculty were more likely to engage in doctrinal work whereas new, younger faculty hired in the last decade were more likely to engage in critical theory, empirical or social science research often with an interdisciplinary element. The generational divide extended to funding with older faculty less likely to seek funding for their research while younger faculty were more likely to seek funding. This pattern was explained in terms of the type of research being undertaken. Doctrinal work requires little or no funding whereas empirical and social science type research costs more to undertake. There were exceptions to this finding however, found primarily in experienced faculty that had worked in other disciplines or in the social sciences and who carried this interdisciplinary experience into their scholarship and who were familiar with the process and expectation of obtaining research grants. Of this exceptional group it was said that they had been “immersed in a funding culture for some time”.⁸⁹

The law professors in this study suggested that most academic legal research requires little if any funding and, thus typically is unfunded or funded internally by the law school with small amounts of money. Moreover, by their own account, law professors are well resourced for their research as compared to other faculty in other parts of the university. Consequently they tended not to look outside the law school or university for research funds. Funds internal to the law school are readily available for research assistance for faculty who wish to apply for them and, at the time of data collection, there was more internal money within the law school for research than there were applications for assistance by law faculty.⁹⁰

87 UBC Interview # 7

88 UBC Interview # 1

89 UBC interview # 2

90 Support of research internal to the law school comes primarily from a “law endowment fund” created by a fundraiser in past years through donations from the practicing legal profession. To this is added other “soft money” from sabbatical leaves, unfilled positions and other donations from individual or classes. The money has few ties but must be used to benefit students. It allows law professors money for research assistance in the form of graduate students salaries but

Professors suggested that typically there was little or no large funding of research in law, no industry funding and no direct funding from the private sector and very little indirect funding for research from the profession through endowment funds or endowed chairs at the law school.⁹¹ The absence of private foundations that support legal research in Canada was also noted (in contrast to legal education in the United States). Funds supporting faculty research came primarily from the public sector – the Law Commission of Canada or government justice departments or SSHRC. SSHRC grants, held by a few faculty at UBC's law school, were considered uncommon in law, cumbersome to apply for, and unnecessary for most research projects conducted by law faculty. The lack of SSHRC funds was attributed in part to the lack of applications by law professors and in part to the constitution of the SSHRC adjudication committees which some faculty believed did not appreciate the nature of legal research, its methods, theory and analysis.⁹²

Information from SSHRC's awards database confirmed these findings. Between 1998–2003, UBC received 1269 SSHRC awards⁹³ (grouped across SSHRC programs including doctoral fellowships, Standard Research Grants [SRG], Major Collaborative Research Initiatives [MCRI] and Community-University Research Alliances [CURA]). In the same time period the law school at UBC received 22 of these awards representing 1.7% of the university's total SSHRC award base. These included two doctoral fellowships, a Canada Research Chair, two multi-year MCRI, and two CURA's as well as SRGs. The Canada Research Chair at the law school is one of twenty-five awarded to the university since 2001. At the time of data collection there were no faculty involved in Networks of Centres of Excellence at the law school although twenty-one faculty across the university are connected with NCE's.⁹⁴ Table 1 shows that the majority of SSHRC funded money awarded to UBC law school in the last four years have come from the MCRI and the CURA granting programs. Standard research grants awarded to individual faculty represent a very small percentage (6.75%) of the total money awarded to the law school. At the time of data collection five faculty held SRG's. These findings reflect the lack of individual grant

does not allow for other research expenses such as travel expenses associated with research or attending conferences. At the time of this interview it was reported that \$50,000 was available in the last round of applications for assistance by law faculty and only half of that was actually allocated (UBC Interview # 4).

91 This does not include consulting done by professors. Also professors noted the tremendous support of the profession by way of human and financial resources for areas other than faculty research (i.e. adjunct professors and money for scholarships and bursaries for students, major donors to fundraising campaigns in the past and contributions to build the law school in the 1970's). However, it was noted that the profession does not directly fund faculty research but indirectly some of their contributions support the scholarship of faculty such as in the case of the above-noted endowment fund.

92 UBC Interviews # 7, 10, and 12.

93 Each year of the award appeared to be counted in the database separately. Therefore the actual number of multi-year awards received is lower than the database would suggest.

94 See SSHRC Awards Engine under 'Detailed Lists of Projects'. Search parameters: Institution- UBC, Discipline- Law, Fiscal Year- 1998/1999-2001/2002 at Observatory of Science and Technology online: <<http://www.ost.uqam.a/CRSH/Resultat.aspx>> retrieved 5/28/03.

Table 1**SSHRC AWARDS****Institution: UBC****Discipline: Law****Years: 1998-2002 (4 yrs.)**

PROGRAM	AMOUNT	AVE. AWARD
Research Base:	145,000.00	72,5000.00
Major Collaborative Research Initiatives Program	(31.79%)	
Standard Research Grants	30,787.00	30,787.00
	(6.75%)	
Strategics:	280,250.00	140,125.00
Community-University Research Alliance (CURA)	(61.45%)	
TOTAL	456,047.00	91,209.40

Source: SSHRC Program Statistics

<http://www.ost.uqam/CRSH/Resultat.aspx>

funding received by law faculty from SSHRC through standard research grants but also suggest a promising trend toward funding of interdisciplinary scholarship through MCRI and CURAs. Table 1 also shows that the total amount of SSHRC funding across funding programs to the Faculty of Law (1998–2002) is surprisingly low, amounting to less than \$500,000 over four years.

Professors expressed ambivalence in their accounts of pressure to attract research funds to the law faculty. Some felt little or no pressure to obtain research grants and no pressure to establish a track record of obtaining grants.⁹⁵ While some tenure-stream faculty felt pressures for productivity that in some cases included the necessity to obtain funds, faculty did not connect these pressures with the market but rather connected them to the tenure and promotion structure at the university. However, it was acknowledged that funded research was perceived as valued by the university administration even for graduate students, as evidenced by the university's decision to link funding for graduate students in the law school to the number of SSHRC awards they obtained.⁹⁶

For another professor seeking research funds as part of the job description and an expectation commenting, "We are expected to seek funds outside the university because we are linked to a very influential and rich community and our graduates, like medicine will make big money".⁹⁷ Another faculty understood the necessity of bringing in research dollars as a response to the changing context

95 This finding changed with the new administration. Follow up in May 2004 faculty revealed increased encouragement to attract research funds to the law school.

96 The absurdity of this action taken by the university administration was noted by faculty who pointed out that most of their graduate students were enrolled in one-year LL.M. programs and would finish their studies by the time SSHRC sent them the results of their application.

97 UBC Interview # 8

within law professor work:

Other colleagues who have operated for many years in an unfunded context now feel pressure [to obtain research funding]. As an academic that is one of the things you do: you get support for research. Now there is pressure to get external funding especially from SSHRC. A lot of faculty feel their research doesn't appeal to SSHRC committees and a lot of them feel aggrieved by that expectation.⁹⁸

Some believed this revenue-generating priority had crept into the criterion for the search for a new Dean that was underway when the interviews were being conducted. Some faculty suggested that evidence of an ability to generate revenue for the law school would be sought in the new Dean.⁹⁹

B. The Commercialization of Knowledge

The literature critically analyzing the impact of economic restructuring on universities suggests a trend toward entrepreneurialism on the part of individual faculty.¹⁰⁰ This is reflected in efforts to commercialize knowledge, technology transfer, and university partnerships with industry. In the legal world this trend looks different than it does in the sciences and other professions because law professors have a 'marketable skill but not a marketable product'.¹⁰¹

From the point of view of the faculty member at no point do you create something that you can turn into a commercial thing. What you have got is a skill that you can exercise commercially for yourself- and some do a certain amount of practice or you can exercise it in a *pro bono* capacity. Or you can spend time doing teaching and research. Law is not like engineering and science where you can develop something you can commercialize. Law doesn't have new discoveries or inventions or processes. You become a skilled expert at some area of law that allows you to practice if you want. There is an entrepreneurial temptation like Doctors or Dentists who practice on the side. Not that you are developing something commercially that you created at UBC. You are just exploiting your knowledge and professional capacities.¹⁰²

Commercialization of knowledge can occur in the sale of services by law professors. Many law professors are licensed to practice law, and the law profession has been

98 UBC Interview # 7

99 UBC Interviews # 1, 5, 7 and 10.

100 See Slaughter and Leslie, *supra* note 47.

101 UBC Interview # 6

102 UBC Interview # 6

traditionally an entrepreneurial profession.¹⁰³ This kind of extra curricular activity is not new or exceptional and was understood by study participants as engaging in professional practice rather than as the commercialization of knowledge.

Often law professor's sale of services would take the form of consulting for law firms on cases. There was a difference in opinion in the accounts as to the extent of it at the Faculty because, one professor suggested, people were quite secretive about it.¹⁰⁴ A tension between faculty members appeared in the various accounts as to the appropriateness of law professors engaging in this kind of activity because it took them away from their work at the law school with students. Given the already heavy work demands and expectations for publishing, some professors wondered aloud how time could be found for such extra curricular activities.

At every law school some full time faculty have been entrepreneurs, running a part time law practice out of their office...to the extent that people are entrepreneurs here its more their private practice activities. We could have a debate as to whether that's appropriate in academic studies but it does happen and it's a sale of services as opposed to developing a product.¹⁰⁵

Perceptions of the pervasiveness and the remuneration received from consulting and private practice activities also varied. Some suggested much of professional practice work by law professors was limited and had a large public service orientation such as working on cutting edge cases before the Supreme Court. In this respect this work was viewed as informing their teaching, benefiting the law school and larger community and not inconsistent with their vocation as a law professor – not to mention raising the profile of the university which “would be viewed as a good thing for the university”.¹⁰⁶ The findings indicate that some professors were “making equal to their salary” through this work. They were spending parts of the week at their law firm office or working out of their law school office doing work on retainers as consultants for law firms.¹⁰⁷

103 See E.J. Rice, and L. Richlin, “Broadening the concept of scholarship in the professions” in L. Curry & J. Wergin, eds., *Educating professionals: Responding to new expectations for competence and accountability* (San Francisco: Jossey-Bass, 1993) at 279– 315. The entrepreneurial professions are: business, journalism, and law. The “helping professions are: dentistry, medicine, ministry, nursing, pharmacy, social work and teaching. The “technical professions” are: architecture, engineering and the military. This classification is based on Stark, Lowther, and Hagerty's work on the primary missions of each field. See J.S. Stark, M.A. Lowther and B.M.K. Hagerty, *Responsive Professional Education: Balancing Outcomes and Opportunities*, ASHE-ERIC Higher Education Report, no.3 (Washington, D.C.: Association for the Study of Higher Education, 1986).

104 UBC Interview # 7

105 UBC Interview # 7

106 UBC Interview # 7

107 UBC has guidelines that address integrity and ethical considerations of consulting and private practice activities: Conflict of interest and conflict of commitment (Policy 97). Activities outside the university must not conflict with commitments within the university or adversely affect

C. The Culture of the Law School

A recurring theme throughout the accounts of the faculty regarding the culture of the law school related to its dual mission. There is a tension in the law school (and in the broader legal world) between its training and education mission. It must train for employment (because the LL.B. is the educational prerequisite for admission to the Bar) and it must provide a broader academic, intellectual, post-secondary education. One professor summed up the tensions:

There are those that think law schools should provide more training and there are those that think law school should do what universities do best, [that is] bombard students with interesting ideas, engage them, teach them to think critically, teach them core legal concepts within this, as part of a larger critical engagement the larger intellectual enterprise which is the university.¹⁰⁸

The tension is historical in Canadian law schools and was connected by one professor to the tension between theory and practice in professional schools and the debate as to whether professional schools should be technical schools or should provide a more academic intellectual education.¹⁰⁹

The dual mission of the law school also emerged in the professors' comments regarding the teaching and research agenda of the law school. Professors agreed that historically the teaching mission drives the law school. They suggested that teaching and student demands would become more prominent in the law school with the recent tuition increases. However, some professors argued that research was becoming increasingly important in the law school, while others said that teaching and research were mutually supported in the law school. The importance of research was reflected in the criterion of strong research agendas for new hires and in the number of faculty that had strong reputation for scholarship. One professor observed that the law school was known for its 'amazing scholars' but it did not have the same reputation as an excellent teaching school.¹¹⁰ The research culture as reflected in the graduate program at UBC Faculty of Law was described by professors as strong, innovative and an important part of the law school. The recent growth in the graduate program to include a doctoral program had enhanced the research agenda of the law school. It had also increased the international and interdisciplinary character dimension.¹¹¹

the individual's ability to remain responsible to his or her work within the university. University faculty and staff are expected to disclose any activities that might be a potential conflict of interest or commitment.

108 UBC Interview # 5

109 UBC Interview # 11. See also, for example, Pierre Bourdieu, *Homo academicus*. (Stanford: Stanford University Press, 1988); Donald Schon, "Educating the reflective legal practitioner." (1995) *Clinical L. Rev.* 231-250; Thorstein Veblen, *Higher learning in America*. (New York: Hill and Wang, 1957).

110 UBC Interview # 10

111 UBC Interview # 11

The culture of the school was described as being progressive, as noted through the commitment to issues of social justice and social policy. According to faculty this priority was reflected in the scholarship of recently hired professors. One Professor suggested the law school was known for its “left law” and went so far as to say that junior faculty held “contempt” for professional, corporate, doctrinal scholarship.¹¹² As an institution, the Faculty was not perceived to be overwhelmingly focussed on the practice of law and the concerns of the private practicing profession. In fact, some worried that concerns of the profession had become irrelevant to most faculty.

Although underfunding was an issue from years of budget cuts to universities in the province, the data suggests that the law school had not turned to the private sector to make up the shortfall. However, they did enjoy the support of the practicing law profession. Significantly not a single faculty member interviewed for this study felt that the school was moving towards privatization that they perceived as happening in the Ontario law schools. There was a clear theme from faculty accounts that trends associated with neo-liberal restructuring that had manifested in other jurisdictions such as Australia, the United Kingdom, and the United States had not (yet) reached the law school at UBC.

We are massively underfunded here. We don't have resources, we don't have time, we don't have staff, and we don't have all the things you need to manage big research projects. But we have not moved down the privatization route like Ontario.¹¹³

At the same time there was awareness by faculty of the dramatic changes taking place in legal education across Canada but they commented that it was too soon to tell if these changes would make their way into their law school. Moreover, when asked about the influences on the academic culture of the school one professor described the pervasive role of the market in shaping the academic culture of the school:

More than political it [the culture of the law school] is market-driven and there is no collegiality because it's a profession. You are competing for funds all the time. You are competing in [tenure and promotion] review, that [review] process is a sort of competition as well. Students are evaluating you, that's a sort of competition as well. You are competing to publish... If you are working in an area of international law you are competing internationally with people from other parts of the world to publish in the Harvard Law Review.¹¹⁴

While some professors felt the law school culture was becoming more competi-

112 UBC Interview # 4

113 UBC Interview # 1

114 UBC Interview # 8

tive and market-oriented several noted that students, not professors, were the most vulnerable to the economic changes. They observed that the vicissitudes of the market play out rather virulently in the students, commenting that competition among students was “fierce”.¹¹⁵

D. Autonomy and Academic Freedom

The faculty described high levels of institutional and individual autonomy for the law school and the professors. The law school was described as “an anomalous creature” curiously independent from both the university and the profession.¹¹⁶ Institutional autonomy has been historically strong at the law school notwithstanding recent incursions and potential challenges from the various constituencies having vested interests in the law school such as the law profession, the university and the students.¹¹⁷ The Law Society of British Columbia’s limited regulatory relationship of the school was described and accepted as one of the few “constraints” on the law school. Faculty noted that any discussion of autonomy must be seen within the context of the Law Society’s mandatory requirements on the curriculum.¹¹⁸ Ironically, the law school’s relationship with the practicing profession was described as an integral part of their history and essential to their autonomy within the university. The law school has had a history of professional support. Faculty described the relationship with the profession as “important” “good” and “close”.¹¹⁹

The relationship between the law school and the profession has always been very supportive. That’s partly because this law school started because of the profession demanded it and backed it and has always seen itself as part of the law school. Their crest is over our entrance to the library since the early days of the law school. The Law Society sees itself as a stakeholder in the Law Faculty and we respect that.¹²⁰

The law school has enjoyed generous support from the legal profession within the province. This support includes financial and human resources. The profession provides numerous scholarships, bursaries and awards for law students. They have contributed to an endowment fund that directly supports students and indirectly supports faculty research through the provision of research assistant jobs given to students. In the past they have contributed capital towards the build-

115 UBC Interviews # 1, 7, 8 and 10.

116 UBC Interviews # 6, 11 and 12.

117 The Law Society’s recent unsuccessful attempts to shape the curriculum of the law school by introducing Bar Admission Entrance Exams were seen by most faculty as an unacceptable incursion on the law school’s autonomy. Although this effort by the profession was perceived by faculty as an “intrusion” into the law school (UBC Interview # 7), professors explained that the law school was perceived by the practicing profession as “unresponsive” and increasingly “irrelevant” to the professions’ curricular needs (UBC Interviews # 3 and 8).

118 UBC Interviews # 8 and 12

119 UBC Interviews 1, 2, 3 and 6.

120 UBC Interview # 6.

ing of the law school. They have extensive involvement in the school through adjunct professors. The adjuncts are much needed because the law school does not have adequate full time faculty to teach all the students. Adjuncts' salary is minimal and many contribute their salary back to the law school.¹²¹ However, there was concern over the law school's increasing reliance on adjunct professors from the practicing profession required because of cutbacks that had affected faculty hiring.¹²² Faculty suggested that the law school's dependence on the profession for money and support compromised their ability to make independent decisions. Even adjuncts that were poor teachers could not be turned away for concern over offending the law firms from whence they came.¹²³

The law's school relationship with the university was also canvassed and faculty commented that the law school was "self-contained" even "isolated" and enjoyed a high level of independence within the university especially regarding the setting of standards. They attributed this to the regulatory relationship with the practicing legal profession.¹²⁴ One professor suggested that the law school demonstrated 'very little accountability' to the university.¹²⁵

There is a tradition of treating us independently and with quite a lot of respect because we are a professional school. And we have clout with the profession and government. And I would say the university doesn't realize a lot of that has disappeared. And we don't have as much influence and connection with those people we once did. We are protected by our history.¹²⁶

While the individual professors are becoming increasingly integrated into the university, the law school is less connected. There was a sense the law school was on the margins of the university compared to other disciplines.

Traditionally there has been the view that the university has been gentle with the law school because we are a professional school with connections to downtown. We can pretty much do as we like, set our own standards and the university is not going to interfere as they would in the Arts [Faculty] and maybe even the Sciences.¹²⁷

Others suggested that the central administration of the university left the law school alone because it did not make too many demands on its resources.¹²⁸ At the same time faculty acknowledged that the law school had strong links to the

121 UBC Interviews # 1,7 and 9

122 UBC Interview # 7

123 UBC interviews # 7 and 8.

124 UBC Interviews # 4, 6 and 12.

125 UBC Interview # 4

126 UBC Interview # 4

127 UBC Interview # 4

128 UBC Interview # 7 and 12

central university governance and decision-making as many law faculty were often called upon to serve on university governance committees.¹²⁹

The law professors in this study consistently described high levels of academic freedom in their scholarship. Funding of research, where it did take place, was largely untied. Scholarship was overwhelming described as directed by 'faculty's research interests'¹³⁰ or 'faculty curiosity'¹³¹ and was 'unconstrained'.¹³² Faculty were described as having "a lot of control" over their scholarship.¹³³ One professor summed it up: "I've had a lot of control over what I do. I'll often say to people 'will you look at this?' before it goes out. But I've never had anyone try to steer it".¹³⁴ Influences on the direction of scholarship were described as "opportunity" to do certain work, available financing for costly research,¹³⁵ and 'judgement of peers'.¹³⁶

While faculty are aware of various pressures and changes in the higher education environment there was a consensus that law faculty experience high levels of individual autonomy and there are few if any constraints on their research.

There is an incredible amount of freedom to pursue one's own research agenda within the university and within this corner of the university. And by and large faculty still set their own research projects. It is the incredible luxury of an academic job. It also raises an important function of the university setting-space to allow people to pursue things that are important to them but also socially, culturally and politically ... There is a large measure of academic freedom. I don't feel constrained in my research agenda.¹³⁷

V. CONCLUSION

The findings illustrate a number of contradictions. On the one hand the data suggests that at the time of data collection the changing political economy had not [yet] affected the law school at the University of British Columbia in the same way, or to the same extent, as other jurisdictions and disciplines as described in the literature. The law professors in this study of the UBC Faculty of Law did experience challenges associated with increased workloads accompanied by a serious scarcity of basic human and financial resources. They described changing expectations for research production and grant winning (especially for young untenured professors who participated in the study). Some, but not all, noted pressure on their intellectual scholarship and an increasing emphasis on

129 UBC Interviews # 6 and 12

130 UBC Interviews # 1,5 and 11

131 UBC Interviews # 4, 2 and 3

132 UBC Interviews # 2 and 5

133 UBC Interviews # 3 and 12

134 UBC Interview # 3

135 UBC Interview # 3

136 UBC Interviews # 4 and 7

137 UBC Interview # 5

research and revenue generation. Some faculty described an increasingly competitive and market-driven work environment that affected the school culture. However, participants in the study also described high levels of academic freedom and professional autonomy. They insisted they were largely immune to the imperatives of the market, private sector values, funder's agendas and the university's ties to industry in their scholarship. This was explained in part because faculty had more money than was needed to conduct their research and because the school was not solely dependent on scarce public, university funds to carry out their tasks. The school can turn for support to a wealthy, traditionally supportive, practicing arm of the profession with whom they have a good relationship. Therefore, the law school is well resourced compared to other parts of the university and they have a history of looking outside the university for money (for teaching and research) to the practicing profession. These findings are not entirely inconsistent with the literature. McInnis and Marginson noted the same in their study of Australian law schools commenting "law has been less visibly touched by the culture of corporate managerialism than have some other parts of higher education – the culture of the legal profession and of academic law are both relatively strong."¹³⁸

The data suggests that the daily work environment at the law school is driven by the teaching mission of the law school. Through teaching, law schools are connected to a powerful and wealthy profession because the LL.B. is part of the educational component of the Bar Admission Course. The data suggests that the law school's proximity to the practicing legal profession serves to buffer them from the impact of changes in higher education. Through the connection to the profession they are able to generate funds and raise the profile of the university within the community. More recently the deregulation of professional tuition fees has added to their revenue-generating ability for the university and increases the schools focus on teaching the students who bring in the tuition dollars. The law school's relationship with the private practicing profession secures, if not strengthens the law school's position within the university. It is a relationship that is encouraged by the university as it provides a source of capital for the law schools and minimizes the law schools drain on the university's scarce resources.

Furthermore, the dual mission of the law school, both academic and vocational, produces a tension that has historically existed in law schools in Canada. Applied, practical education and scholarship is not a new trend in the school, nor is it attributed by faculty to shifts in higher education policies emphasizing labour market priorities. For example, participants in this study did not equate the sale of legal services (undertaken by some professors in the form of consulting) with the commodification or commercialization of their academic research and knowledge. Rather they understood it as either engaging in the private practice of law or as public service, consistent with the dual (academic/vocational) orientation of the legal academy. As Goldsmith reminds us, vocationalism has always been a strong trend in law schools because many students intend to enter the practice of law and law graduates are highly employable compared to other

138 McInnis and Marginson, *supra* note 41 at 31 as quoted in Goldsmith, *supra* note 41 at 71.

university graduates.¹³⁹ The concern then becomes the extent to which practical vocational priorities of the profession have overwhelmed the law school's dual mission.

The faculty at UBC law school did not see neo-liberal restructuring resulting in managerialism playing out across their law school as is had in other Canadian provinces (such as Ontario). Notwithstanding concerns about transparency in decision-making, faculty felt they were able to participate in decision-making and the law school was becoming more democratic in its governance processes. Professors distinguished their academic context from trends occurring in the United States, the United Kingdom and Australia. One faculty insisted that British Columbia was not a comparable political environment and that there had never been anything like that [neo-liberal] micro management of curriculum and scholarship in the law schools in British Columbia, stating "It just hasn't happened here."¹⁴⁰ However, economic priorities, market principles and increasing competition were acknowledged to be influencing students and, by extension the curriculum through students' choices. One professor suggested that the corporatization of the law school would occur through the students' choices as 'consumers' and not through faculty choices regarding their scholarship.¹⁴¹ Moreover, legal education was described as on the cusp of significant changes due to tuition deregulation. One professor suggested change in tuition policy was "the most significant change in legal education in half a century".¹⁴² The potential implications of tuition deregulation were perceived as enormous. Faculty argued it could change the landscape of legal education leading to stratification, privatization, and accreditation which would ultimately increase professional and external regulation of the law school and decrease the law school's autonomy.¹⁴³ Once again it is in the area of the law school's teaching mission, and especially tuition policy, (as opposed to law professor's scholarship), that one currently finds the most pressing evidence of the influence of the political economy at the law school.

These findings raise the question – why? Why has the culture and scholarship at the University of British Columbia's law school not exhibited all of the effects of 'academic capitalism' ¹⁴⁴ permeating higher education and certainly other law schools elsewhere in Canada. Or at least, why has it not felt the effects in the same way? The data itself offers some answers. First, unlike other law schools in Canada, this law school historically has had a cordial yet autonomous relationship with the profession. The legal profession in BC was instrumental in its opening and continues to have a pronounced involvement in teaching, fundraising and alumnae support. The profession responded when underfunding in higher education policy made the law school seek funding elsewhere. At the same time the generosity of the profession decreased the law school's de-

139 Goldsmith, *supra* note 41.

140 UBC Interview # 1

141 UBC Interview 10.

142 UBC Interview 6

143 UBC Interview 2 and 6

144 Slaughter & Leslie, *supra* note 47.

pendence on public funds. This ultimately sheltered them from the full impact of changing government higher education fiscal policy.¹⁴⁵ Conversely, being ensconced in the university enhanced the law school's autonomy allowing them to resist market-driven priorities coming from the profession. Nevertheless, the findings suggest that while the law school has moved into the university, it still lacks overall integration into the university academic culture. As a consequence there is little influence, for good or ill, on the culture of the law schools by other disciplines in the university. Moreover, the nature and degree of the influence of postsecondary policies on the law school is markedly different to other disciplines in the university. Consequently, this law school neither has felt the full influence of the universities or the profession's move towards the market.

Arthurs takes up this idea in his work "The State We're In" and he offers other explanations as to why legal education in general manages to resist the forces of neo-liberalism. He observes that law professors and law schools are oppositional in nature and slow to change. He comments that law schools house some of the fiercest critics of globalization and neo-liberalism. These comments certainly could apply to UBC's law school. A strong tradition of socio-legal and critical scholarship and a progressive academic culture has allowed this law school to anticipate and critique the policy trend and articulate another vision for legal education. Boyd suggests in a recent article that this vision is perhaps more humane, tolerant, culturally diverse, and is one that challenges the corporatist model. Perhaps certain law schools have more space to resist market pressures, Boyd suggests, and have the ability to recreate legal education in the face of corporatization, commodification and privatization.¹⁴⁶ As Arthur's reminds us, many legal scholars embrace the notion that their work is not to strengthen the State or the legal profession but to restrain, reform and transform them. In this way perhaps the legal scholars at UBC law school may have successfully subverted the market forces coming from the State and the profession.¹⁴⁷

It is important to remember in this analysis that this study clearly captures the law school at the University of British Columbia at a moment in time. Follow-up one year after data collection suggested the faculty were already experiencing changes in the academic culture of their law school including more pressure to obtain funding for their research and to increase research productivity. Consequently it may simply be that neo-liberal forces reached British Columbia's higher education later than other Canadian provinces and this suggests the need for a further longitudinal inquiry. In this respect this case study provides a useful benchmark upon which to capture change over time at the Faculty. Nevertheless the findings of this study contribute to our understanding of changes that are occurring in academic culture in the current higher education policy environment, illustrating one discipline's response to those changes. The findings of this study

145 I am indebted to Arthur's "The State We're In", *supra* note 6 at 49 for this analysis which is also taken up in "Poor Canadian Legal Education", *supra* note 3.

146 See Boyd, *supra* note 3. Note Boyd is a scholar at UBC's law school and in her article she offers some qualified explanations as to why corporatization of the legal education has not taken hold in the law school.

147 Arthurs, *supra* note 3 at p.35.

suggest that the impact of the changing political economy on academic culture varies across disciplines in universities. Issues surrounding the transformation of scholarship and academic culture associated with capital accumulation and international competitiveness manifest in ways that are specific to each discipline (and arguably to each institution), making cross-disciplinary analyses essential to a meaningful understanding of this phenomenon.