

## Cultural Relations Among States: Is a Legal Adaptation Required?

Michael Poon\*

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### Abstract

Diversity, Equity and Inclusion (DE&I) initiatives have become a priority for many organizations within Canada. In legal academia it has become both a procedural and substantive imperative, as it grapples with meaningful integration of these considerations, and appropriate adaptation to current social and technological challenges. This paper sketches selected considerations in implementing DE&I within legal education, and transplants them into Canadian Armed Forces (CAF) engagements with DE&I implementation, with a focus on the transmission of legal norms and values in a non-legal environment and teaching context, using an explicitly socio-legal orientation. Drawing from legal education literature highlighting the challenges and opportunities within the university, and key insights regarding DE&I implementation's history and current developments within the CAF derived by scholars in a themed-2020 conference, I argue that a process of translation and adaptation of legal education practices and engagement with DE&I into the CAF context will provide valuable insights into both communities of practice in particular with developing key concepts, solidifying abstract concepts and challenges, leveraging case study and simulation techniques, exploiting remote and hybrid pedagogical tools, and furthering legal education engagement outside the academy.

**Keywords:** *Legal Education, Canadian Armed Forces, Diversity, Equity and Inclusion, socio-legal studies.*

### Résumé

Les initiatives de « diversité, équité et inclusion » (DE&I) sont devenues une priorité pour de nombreuses organisations au Canada. Dans le milieu universitaire juridique, elles sont devenues un impératif tant procédural que de fond, alors que ce dernier s'efforce d'intégrer de manière significative ces problématiques et de s'adapter de manière appropriée aux défis sociaux et technologiques actuels. Cet article esquisse une sélection de considérations relatives à l'implémentation du DE&I au sein de la formation juridique, et les transpose aux engagements des forces armées canadiennes (FAC) en matière de DE&I, en mettant l'accent sur la transmission de normes et de valeurs juridiques dans un environnement et un contexte d'enseignement non-juridiques, en utilisant un angle explicitement sociojuridique. En puisant dans la littérature sur la formation juridique soulignant les défis et les opportunités au sein de l'université, et dans des enseignements majeurs de l'histoire de l'implémentation du DE&I ainsi que des développements actuels au sein des FAC tels que décrits par des universitaires lors d'une conférence de 2020, je soutiens qu'un processus de traduction et d'adaptation des pratiques et des engagements DE&I de

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\* Michael Poon, DCL Candidate (McGill). Previously submitted as coursework for the McGill Legal Education Seminar Winter 2022. The jury of the Scotiabank seminar awarded this paper the first prize.

la formation juridique vers le contexte des FAC procurera des éclairages précieux dans les deux communautés, en particulier en développant des concepts clés, en solidifiant des concepts abstraits et des défis, en tirant profit des études de cas et des techniques de simulation, en exploitant des outils pédagogiques « à distance » et hybrides, et en promouvant la formation juridique en dehors de l'université.

**Mots-clés :** *Formation juridique, forces armées canadiennes, diversité, équité et inclusion, études sociojuridiques.*

## Introduction

Diversity, Equity and Inclusion (DE&I or EDI)<sup>1</sup> has become an increasingly visible institutional imperative. The Law Society of Ontario mandates its licencees to complete three hours of required EDI hours by 2020, and one hour per year starting in 2021, measures progress in workplace settings, and requires them to uphold human rights law and not discriminate.<sup>2</sup> In academic settings, universities and law faculties are charged with implementing EDI within their operations for both their employees and students.<sup>3</sup> Beyond the legal and academic worlds, even traditionally conservative and hierarchical organizations such as the Canadian Armed Forces have begun implementation of EDI into its operations, issuing a CAF Diversity Strategy,<sup>4</sup> requiring most of its members to conduct Indigenous Awareness Training, and implementing EDI considerations into a mandatory supervisor-facilitated Conversations on Defence Ethics (CoDE) course.<sup>5</sup> While seemingly disparate, the above domains actually provide insights into EDI from the perspective of legal education, especially when considering the challenges inherent in implementing EDI into large, hierarchical and conservative organizations (such as certain legal firms and militaries). EDI, at its core, presents a challenge to any claims made by law and regulatory authorities that they are wholly dispassionate, fair and neutral state-based institutions,<sup>6</sup>

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<sup>1</sup> Various definitions exist for these terms. For the purposes of this paper they are not critical as the analysis is upon implementations and challenges, rather than necessarily the substance of EDI. See e.g. McGill University, “Equity, Diversity & Inclusion (EDI) Strategic Plan 2020-2025” (29 April 2022), online: <[https://www.mcgill.ca/equity/files/equity/mcgill\\_strategic\\_edi\\_plan\\_2020-20251.pdf](https://www.mcgill.ca/equity/files/equity/mcgill_strategic_edi_plan_2020-20251.pdf)> at 3 for example definitions. A short extract is reproduced below for a basic orientation.

<sup>2</sup> Law Society of Ontario, “Equality, Diversity and Inclusion” (24 April 2022), online: <<https://lso.ca/about-lso/initiatives/edi>>.

<sup>3</sup> See e.g. McGill University, *supra* note 1; McGill University Faculty of Law, “Diversity and Inclusion” (29 April 2022), online: <<https://www.mcgill.ca/law/about/diversity-and-inclusion>>.

<sup>4</sup> Chief of Defence Staff, *Canadian Armed Forces Diversity Strategy* (Ottawa: Directorate of Human Rights and Diversity, 2016).

<sup>5</sup> See Canada, “Conversation on Defence Ethics: a Defence Team Learning Event” (3 December 2021), online: <<https://www.canada.ca/en/department-national-defence/services/benefits-military/defence-ethics/prof-dev-day-ethics.html>>.

<sup>6</sup> See e.g. Duncan Kennedy, “Legal Education as Training for Hierarchy” in David Kairys, ed, *The Politics of Law*, 2nd ed., (New York: Pantheon Book, 1990) at 41-47; Brenna Bhandar, “Always on the Defence: The Myth of Universality

and argues that formal rules, applied uniformly to unlike populations (such as visible minorities, women, those with disabilities, the historically persecuted) can have deleterious and discriminatory impacts. This idea confronts squarely concepts such as “universal merit” and “fairness”, which have material consequences in areas like admission, promotion, funding. One could infer that these conditions exist in academic, professional legal and military workplaces. Therefore, it might not be surprising that the CAF attempted to engage academic perspectives in implementing EDI, supporting a workshop that culminated in a 2020 publication.<sup>7</sup> This could be seen as an acknowledgement that external perspectives would be useful in examining a problem set that touches upon core, systemic issues within the CAF that tend towards homogenous, conservative “tight” cultures.<sup>8</sup> It is in this interaction between the military and the academic that one can make observations more readily than looking at either area alone.

This paper sketches out selected considerations in the implementation of EDI throughout legal education, while drawing upon insights and parallels from EDI projects within the CAF. As such, this process cannot be accomplished via a strictly doctrinal method (e.g. caselaw, statute), as the challenges of teaching itself, and the extra-legal considerations inherent in EDI cannot be fully captured via doctrine. Therefore this paper relies upon academic legal articles, and personal experiences within legal academia (primarily as a student) and CAF as a general service officer. I argue that many of the abstract concepts within EDI must be appropriately translated into the appropriate context (military or legal) if teachers wish to effectively have EDI norms accepted, internalized and ultimately performed by their students. Secondly, case study and simulation techniques stand to be some of the most (if not the most) effective methods to accomplish the task of integrating EDI into legal education. Finally, technological innovations are able to facilitate this process, but must be properly tempered to avoid degrading educational outcomes based on human factors related to technology, and efficiency-only considerations. Being aware of these issues and addressing them in meaningful ways are key to ensuring the best outcomes in the legal education endeavour.

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and the Persistence of Privilege in Legal Education” (2002) 14 Can J Women L 341 (critiques of the claimed objective neutrality of law).

<sup>7</sup> Alistar D Edgar, Rupinder Mangat & Bessma Momani, eds, *Strengthening the Canadian Armed Forces Through Diversity and Inclusion* (Toronto: University of Toronto Press, 2020).

<sup>8</sup> Alan Okros, “Introspection on Diversity in the Canadian Armed Forces” in Edgar, Mangat & Momani, *ibid*, 153 at 163-165.

## On Translation and Implementation

For the purposes of this paper, EDI can be understood using the following definitions from McGill University:

**Equity**, unlike the notion of equality, is not about sameness of treatment. It denotes fairness and justice in process and in results. Equitable outcomes often require **differential treatment and resource redistribution** to achieve a level playing field among all individuals and communities.

[...]

**Diversity** describes the presence of **difference within any collection of people**. In discussions of social equity, diversity addresses differences in social group membership related, for example, to race, Indigenous identity, class, gender identity or expression, sexuality, disability, ethnicity, and religion. Discussions about diversity linked to access and equity require **knowledge and understanding of historical and contemporary experiences of oppression and exclusion**.

[...]

**Inclusion** refers to the notion of **belonging**, feeling welcome and valued, having a sense of citizenship. It also speaks to a capacity to engage and succeed in a given institution, program, or setting. Inclusion calls for **recognizing, reducing, and removing barriers to participation created by social disadvantage or oppression**, and can result in the reimagination of an institution, program, or setting. [Emphasis added.]<sup>9</sup>

EDI exhorts stakeholders to look beyond form and requirements to understand (and attempt to practice) substantive fairness and justice. Having diversity alone (e.g. visible minorities in a traditionally male workplace), with respect to the notion of inclusion above, is insufficient. The diverse viewpoints, worldviews and identities of these minorities must be meaningfully embraced by the institution. Yet at first instance, EDI can be construed as external to the “black letter” law and the training of legal practitioners. It need not be “essential” to learning, one might argue, how torts are treated by the court system, how immigration statutes are interpreted, or how to structure a legal memorandum. Kennedy argues, essentially, that such a consideration of EDI is a “feature rather than a bug” of the ideological orientation of legal training, one that prizes the rhetoric of legal reasoning as a distinct, scientific discipline that supports the rationale of the market and makes “pro forma gestures toward racial and sexual equality”.<sup>10</sup> Critiquing EDI with this lens,

<sup>9</sup> McGill University, *supra* note 1 at 3.

<sup>10</sup> *Supra* note 6 at 46-47.

the efforts of faculties of law and law societies in making EDI “mandatory” might just be window dressings and exercises in checklisting and compliance to appease the consciences of the profession and the public. One major concern raised by Esmeralda Thornhill, in remarks during her 2022 workshop to McGill University Faculty of Law was that EDI in legal education would be an excuse to continue teaching the misapplication of law (such as discussing cases without vital context such as racial dynamics), without actually changing the method of instruction to acknowledge these issues, and implementing EDI considerations into law classes.<sup>11</sup> Her critiques attacks legal instruction that prizes equal, apparently neutral modes of analysis as inherently fair and problem-free, as long as no overt instances of discrimination, or explicitly discriminatory provisions of law are in play, when systemic discrimination operates through tacit assumptions, historical legacies and standards which perpetuate inequitable relationships and systems. On the military side, a rough analogy can be drawn to the “one standard” approach (often the male one) espoused by those who believe anything else will dilute the fighting power of the armed forces.

This tension between what is “really law” and therefore worthy of attention as core to legal education (and by extension practice) strikes to the heart of the continuing debate as to the mission of law faculties. Are they to prepare technicians to adapt quickly to fulfill legal roles as seamlessly as possible, or are they meant to challenge the intellectual foundations of their students, to inspire them to take critical approaches to the law and society, act as guardians of the discipline and bring considerations of justice (for which EDI is a necessary component) into their careers? Throughout the McGill graduate seminar on Legal Education conducted in the 2022 Winter Term, it was relatively easy to find scholarly works advocating for this latter view. James Boyd White advocates for a vision of legal education that moves beyond a vacuum of professional training, and deems the student competent (with their pre-existing knowledge considered legally relevant), able to be reflective, critical and morally developed, able to resist authoritarian and status quo tendencies in and without law.<sup>12</sup> Similarly, Martha Nussbaum argues that an undergraduate legal education must cultivate ethical citizens possessed of the ability to use their imaginations<sup>13</sup>, while Francis Allen acknowledges the obligations of law schools to meet the practice demands of the profession, but also a concurrent requirement to instill humanistic (and critical) foundations in its graduates.<sup>14</sup> The literature can firmly support the position that legal education and lawyers ought to be more than

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<sup>11</sup> “Changing the Rules” (Annie Macdonald Langstaff Workshop delivered by Esmeralda Thornhill at the Faculty of Law, McGill University, 26 January 2022) [Recording available, Centre for Human Rights and Legal Pluralism].

<sup>12</sup> James Boyd White, *Expectation to Experience: Essays on Law and Legal Education* (Ann Arbor: University of Michigan Press, (1999) at 18-21.

<sup>13</sup> Martha Nussbaum, “Cultivating Humanity in Legal Education” (2003) 70:1 U Chicago L Rev 265.

<sup>14</sup> Francis A. Allen, “Humanistic Legal Education: The Quiet Crisis” in Neil Gold, ed, *Essays on Legal Education: Centre for Studies in Canadian Legal Education* (Toronto: Butterworths, 1982) 9.

“plumbers” minding the pipes of courts, firms and governments, acting as the proverbial “hired guns” for their clients to the maximum degree permitted by law and rules of professional conduct. But how effectively are legal educators doing so during undergraduate education? Are these considerations (such as EDI) integral to the course material and pedagogy, or shunted off to legal ethics courses, specialties, or mandatory online courses clicked through as a matter of compliance? When students are taught to “think like a lawyer,” does this also include considering EDI factors, or does the traditional case and Socratic method constrain them to focus on the application of legal doctrine and precedent, excluding EDI as “policy considerations” or legally irrelevant issues suited for other disciplines?

Beyond the formal, classroom aspects of legal education lies the entire socialization process shaped by peers and stakeholders beyond academia. Manderson and Turner describe the tension between the goals of legal education (typically broader, theoretical and purposive) and legal practice (technical, rule-based, client-centred) as a source of student distress, in that law students find themselves socialized as professional students (versus Students Not Actually in Law School), yet also exposed to the presence and job selection pressures of commercial law firms sponsoring Coffee Houses hosted at their law faculty.<sup>15</sup> Students are transmitting informal expectations of the law amongst themselves as peers, and are further socialized by legal actors seeking future recruits (and in the process communicating to them what “really” matters for selection and success). How relevant are EDI factors in these processes? Without answering the empirical question as to the efficacy of EDI initiatives in legal education, I wish to extend the hypothesis that it is not as effective as it could be if it does not address these informal processes. In both the classroom and the field this informal learning should be as much a subject of inquiry as the formal lessons. In doing so, I wish to consider CAF experiences with EDI and why they are analogous to the challenges facing legal education and possible solutions.

At first glance, the CAF appears distinct from the legal academy and legal profession. The CAF is a government body dedicated to the application of physical force (including lethal force) to achieve political objectives, almost exclusively outside national borders (but does conduct domestic operations to support Canadians). This institutional logic and mandate seem foreign to those of law faculties, professional regulators and commercial service providers, among other actors. Yet the challenges the CAF has encountered in implementing EDI, particularly in its educational aims, is highly instructive for legal educators and stakeholders. EDI has only been

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<sup>15</sup> Desmond Manderson & Sarah Turner, “Coffee House: Habitus and Performance among Law Students” (2006) 31:3 Law & Soc Inquiry 649.



implemented as such relatively recently, with the Chief-of-Defence Staff issuing the policy in 2016.<sup>16</sup> Since then, EDI implementation has encountered challenges, ranging from institutional confusion about its meaning, uncertainty around measuring EDI outcomes within CAF and the Department of National Defence,<sup>17</sup> evidence of leadership personnel resisting associated programs such as Operation HONOUR (a former CAF program designed to eliminate sexual misconduct)<sup>18</sup>, and subsequent critiques of Operation HONOUR and EDI generally following public scrutiny and legal sanctions against senior CAF members for violating EDI and legal principles.

Look closely at some of the aspects of institutional inculcation of values and informal transmission of norms (and their critical role in acceptance) in both military and legal formative processes, and several commonalities will emerge. James Elkins eloquently describes the upheaval his law students describe in their difficulties adjusting to the demands of undergraduate legal education, filled with emotional disruptions as they attempt to figure out what is expected of them, compete and succeed in first-year, and perform some version of the Socratic dance with instructors. Trends emerge: emotions are compartmentalized, routines established, and students focus on skill development and course grade achievement, with critical perspectives relegated to the side. Yet caring and hope can also emerge, with some students becoming committed to the ideals of law.<sup>19</sup> The CAF Basic Military Qualification, in many ways, mirrors this process (both the official and unofficial socialization *à la* the Coffee House experience above) and adds deliberate physical and emotional stressors in the name of building resilience and group cohesion. Military members are introduced to new models of behaviours and norms (many unwritten) and required to compete in tests of physical fitness. Failure to perform has unpleasant consequences (more work, less rest). Displays of emotion are discouraged where they interfere with task completion (read: sensitivity, sadness, uncertainty) and encouraged where they are consistent with military norms (such as anger and aggression). The personal self is to be compartmentalized from the military self (also associated with a rank and military occupation), and students eventually realize that at some point they will **always** be “wrong”, even if their answer and performance might meet some objective standards (but not the ones desired by their instructor). Throughout, instructors, peers and unit superiors and mentors model what behaviours and characteristics are rewarded

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<sup>16</sup> *Supra* note 4.

<sup>17</sup> See Assistant Deputy Minister (Review Services), “Evaluation of Diversity and Inclusion (Defence Team Management Program)” (National Defence, September 2020), online: <<https://www.canada.ca/content/dam/dnd-mdn/documents/reports/2019/report-1258-3-027-en.pdf>> at vi-vii.

<sup>18</sup> See e.g. House of Commons, *Improving Diversity and Inclusion in the Canadian Armed Forces: Standing Committee on National Defence* (June 2019) (Chair: Stephen Fuhr), online: <<https://www.ourcommons.ca/Content/Committee/421/NDDN/Reports/RP10573700/nddnrp17/nddnrp17-e.pdf>> at 52.

<sup>19</sup> See James Elkins, “Rites of Passage: Law Students Telling Their Lives” (1985) 35 J Leg Educ 27.

(such as physical fitness, calmness under stress, loyalty, being a team player) and which are not (critical, “overly” emotional, being “an individual,” again many unwritten and informal). The parallels between first year law and basic military training are greater than their divergences, and these similarities provide some insights for the incorporation of EDI into their instruction and reception.

The above example attempted to draw some parallels between the processes of inculcation in the legal academy and military training, to then extrapolate that the **challenges** in teaching EDI in a meaningful way would also have some similarities, as might their **mitigations**. EDI principles, to be effectively implemented in either a legal educational or military context, must become part of the “core” mandate, integrated into the fabric/unwritten norms, and not an external, “politically correct” exercise imposed upon the unwilling. In reviewing legal education journal articles (including those cited earlier), it becomes clear that during the stressful experiences of an undergraduate legal education, if something does not seem necessary for success (academically or professionally), it risks becoming some external aspiration rather than a priority. Both the Ontario Bar and CAF are attempting to address this tendency, the former in instituting EDI requirements under its Rules of Professional Conduct and requiring annual training, and the latter in mandating training, measuring EDI as part of annual performance evaluations (with implications for promotions and career decisions), and most critically, explicitly trying to change its culture by promoting EDI aspects as integral to the formal and informal characteristics of being an “ideal” CAF member (i.e. the warrior). Local efforts in the Reserve Army in the Greater Toronto and Niagara Regions in Canada will begin requiring its Commanding Officers to incorporate EDI considerations into their annual unit operations plans (including aspects of recruitment and retention), holding them accountable for implementation as a measurable deliverable. This echoes academic observations on EDI within the CAF more broadly. Christian Leuprecht makes the observation that:

The armed forces previously struggled with accepting the idea and the practice of diversity in recruitment because of what critics of diversity argued would be the negative impact on its “functional imperative”: an institution set apart from society for the particular purpose of effectively using military force when called upon by the government to defend Canada and its democratic values and the democratic way of life against external military threat.<sup>20</sup>

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<sup>20</sup> Christian Leuprecht, “Demographic Imperatives for Diversity and Inclusion” in Edgar, Mangat & Momani, *supra* note 7 15 at 19.



However, this aversion can be mitigated when EDI considerations are couched within the operating logic of the CAF, where diversity and inclusion is translated into the effective incorporation of women, and those with cultural and linguistic background increased the CAF's ability to operate in peace enforcement, stability operations, Civil-Military Cooperation, Psychological Operations, domestic operations and other complex human terrains typical of post-colonial conflict environments.<sup>21</sup> Similar imperatives around being representative of the populations they serve, expanding recruiting pools to meet CAF requirements, and overall better military performance overseas and domestically where diversity and inclusion have mitigated groupthink have made in-roads for EDI acceptance in the CAF. The unifying theme of these elements are that they relate to the core function of the CAF: mission completion. By analogy for legal education the similar ends-based and functional fit mitigations for resistance might be those related to high legal persuasiveness, ability to influence decision-makers (by adhering more closely to how individuals and organizations actually function and deal with power), sensitivity to the environment in which clients exist, credibility (i.e. not observing EDI being a professionally incompetent behaviour) and overall fidelity to reality (you will be a more effective lawyer and legal practitioner if you are aware of the dynamics suggested by EDI).

This model should be explored with respect to legal education (both within the academy and beyond). If EDI becomes part of basic legal competence (similar to the Know Your Client model found in financial institutions), where understanding historical context, the limitations of formal rules, the principles of equity, and empirically-proven benefits of diversity and inclusion in deriving innovative legal solutions become part of the “business case” of training legal professionals and scholars, the resistance<sup>22</sup> seen within students for “non-core” aspects, “soft” skills, “politically-correct theatre” compared to “hard,” “objective,” “doctrinal” law would be eroded by institutional logics (when they are seen to both profess **and** practice EDI in their operations). Ultimately, if EDI becomes the baseline of “how law is done,” transmission and reception will become as natural as learning how to cite legislation, make oral arguments or conduct basic legal analysis for a legal memorandum. Just as professors often analyze the limitations of the law, similar approaches can be used for EDI considerations in the construction of laws (what

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<sup>21</sup> *Ibid* at 27.

<sup>22</sup> See e.g. Joanne Murray, “The Hierarchy of Opposition in Legal Education: A Letter to Prof. Robert Leckey (the incoming Dean of the McGill Law Faculty)” (25 April 2016) [unpublished], online: <[https://www.mcgill.ca/law/files/law/les-paper-joanne\\_murray.pdf](https://www.mcgill.ca/law/files/law/les-paper-joanne_murray.pdf)> for anecdotal examples of this dynamic within the McGill Faculty of Law student body.

parties have inputs into their drafting), how they are implemented, and their consequent effects (both within the courts and without).

Similar dynamics can be observed in implementations of Indigenous Law within the curriculums of Canadian law schools, in line with the Truth and Reconciliation Commission of Canada's Call to Action 28 to include a mandatory course on Indigenous law. The institutions (and hopefully their students) most receptive to this overture tended to characterize the substance of the mandate (Indigenous law) as a pre-requisite to train effective lawyers.<sup>23</sup>

Overall, what is proposed here is that EDI (found in the register of social justice) has to be appropriately **translated** into the discourse of legal education and practice (in the broadest sense of the word, from being a lawyer to employing the law in other fields) for it to “take.” James Boyd White's call for legal texts and reasoning to be understood within their local cultural and historical context<sup>24</sup> holds true for attempts by law faculties and professional regulators to import/highlight EDI into legal training and practice. Just having an online course (easily clicked through, then duly ignored) is insufficient, and potentially counter-productive in its trivialization of the subject matter. What this will entail is the embedding of EDI within the very fabric of the legal curriculum, both in subject matter and instructional techniques. Just as current courses and instructors may highlight political and economic considerations in decisions, so too should they consider EDI matters as routine in legal analysis (i.e. thinking like a lawyer includes considering intersectionality, in analyzing how laws operate/malfunction). EDI identities and analysis of fact patterns must be taught and understood to be “smart problem solving” rather than irrelevant, emotional, counter-disciplinary excesses to be corrected. As the CAF EDI examples above suggest, if it is not measured and held accountable against them, and not internalized as “how business ought and is done,” EDI will ultimately not matter for students. And if this is the case, one should ask why it ought to matter for teachers and the organizations that hire them.

By itself, changing policy and programs may shift outward compliance and behaviours, but it will be insufficient to change attitudes and beliefs. By way of example, Operation HONOUR within the CAF was seen by some as a witch-hunt, a politically-motivated, civilian-imposed program that destroyed group cohesion, and distracted from CAF core mandates to destroy the enemy and

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<sup>23</sup> See especially Adrien Habermacher, "Understanding the Ongoing Dialogues on Indigenous Issues in Canadian Legal Education Through the Lens of Institutional Cultures (Case Studies at UQAM, UAlberta, and UMoncton) (2020) 57:1 Osgoode Hall LJ 37 at 82-83, and the article more generally for contradictory views on the importance of Indigenous law for lawyers-in-training.

<sup>24</sup> James Boyd White, *Justice as Translation* (Chicago: University of Chicago Press, 1990).

protect Canadians. More fundamentally, the acceptance by majorities that the “status quo” can actually be hostile towards those for whom EDI is proposed as amelioration, and therefore apparently neutral rules must be modified in substance and/or application, is much more radical than it appears.<sup>25</sup> It is not difficult to find individuals (CAF or otherwise) who critique EDI as a “Woke” project that unnecessarily divides and elevates political correctness into an attack vehicle, rather than an objective recognition that *prima facie* neutral organizations and “fair” rules have differential and systemic impacts. One could imagine that similar responses might obtain in the legal academy, where students might smile and nod, while dismissing EDI as the project of “social justice warriors” that become meaningless in the realities of corporate law or litigation in the courts. While effecting long-term cultural changes (a component of EDI initiatives) within law students and the profession is beyond the scope of this paper, changing the formal status and recognition of EDI (as in changes in mandatory legal curricula) is at least a first step in that process. The next sections of this paper consider some tools, opportunities and problems with attempts to implement EDI within legal education, again supplemented with CAF analogies with respect to the use of simulations and technology.

### **From Case Method/Case Study to Simulation/Exercise**

Critiques of the case method of legal instruction abound. As just one example, James Maxeiner notes that the case method is insufficient to fully prepare students for legal practice, or, for that matter, help them understand legal principles and when they must yield to change for their clients and the legal system overall:

Seen as a way to simulate the legal method of finding the common law applicable to an individual case, the case method is a great success. So concludes the Redlich Report. That is a limited goal. As a legal method of finding common law, the case method is not intended to deliver a complete statement of the law, both as the law is and as the law should be. It does not claim exclusivity or priority over other legal methods of lawmaking and law applying. Seen, however, as an academic pedagogy, intended to teach the whole law, the case method is inadequate.

[...]

Law students must learn to deal, as lawyers do, both with the law as it exists, as well as with the law as it should be. Minimally competent lawyers must be able to counsel their clients about what the law is. They should be able to advocate for their clients interpretations of the law, and even changes in the law, changes in the law that comport with their clients’

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<sup>25</sup> See Bhandar, *supra* note 6; Okros *supra* note 8 at 161-163 for discussions on the issue of invisible privilege in the legal academic spaces and the CAF respectively.

interests without contravening other law. Accomplished lawyers can participate fully in legal life; they do recognize deficiencies in the law, and both for their clients and otherwise, work to improve the legal system.<sup>26</sup>

Of note above is that the case method/case study, for some a large component of legal education, is not enough on its own for teaching law effectively. The second proposition that law students and lawyers ought to be able to recognize problems in the law as is, and what could be done to improve it, is an aspiration for which EDI provides many systemic insights into relatively invisible, pervasive power differentials frequently implicated in legal structures. Maxeiner continues with comparisons between medical school methods of practical instruction, and the challenges faced with importing such logics into legal education (with the major pedagogical problem being that the identity and needs of legal clients are much more diverse than those of medical patients).<sup>27</sup> Notwithstanding these concerns, practical/clinical and simulation training has much to offer legal education, and I would argue, also in making many of the abstract concepts within EDI very concrete.

Anna Carpenter extols the values of clinical education in expanding law students' appreciation of the law in real-world contexts, and recognizing the social justice impacts they and other stakeholders have in the legal domain. In particular, she notes that project-based, non-litigation advocacy strategies help students appreciate the multitude of considerations and domains they need to consider to address client needs.<sup>28</sup> This broader understanding of the role of law students, lawyers and the law within society is a perfect match for illustrating EDI principles in action. Theoretically dense concepts such as intersectionality, where multiple components of identity can compound discriminatory effects, becomes relatable (and potentially justiciable) when a living, breathing client presents at a law clinic with a landlord attempting to evict based on enumerated or analogous grounds (or maybe class-based components of identity not recognized at law). The law student could become quickly aware that legal avenues might not be sufficient (or in fact, viable) methods of assisting her client. Even where legal proceedings might help (such as an application to an administrative tribunal), EDI principles might still have to be taken account (for example, where the client cannot effectively be represented due to language, disability, and/or poverty barriers). The formal guarantees of procedural fairness and apparent theoretical neutrality

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<sup>26</sup> James Maxeiner, "Educating Lawyers Now and Then: Two Carnegie Critiques of the Common Law and the Case Method" (2007) 35:1 Intl J Leg Info 1 at 18-19.

<sup>27</sup> *Ibid* at 27-30.

<sup>28</sup> Anna Carpenter, "The Project Model of Clinical Education: Eight Principles to Maximize Student Learning and Social Justice Impact" (2013) 20:39 Clinical L Rev 39 at 58.

of the law can become quickly nullified in practice for the student, where the gaps that EDI arose to ameliorate become exposed in working with marginalized communities.

Even without clinical work, the possibilities offered by simulation, in conjunction with active learning within legal education, are well-suited for making EDI concepts graspable for and applicable by students. In his survey of the benefits of experiential learning in the law school, Lorne Sossin highlights the benefits of simulation in law school preparation for clinical work, and Practical or Professional Legal Training Courses as effective bridges between academic theory and legal practice.<sup>29</sup> These processes allow students to put themselves in the position of others, thinking through considerations that may traditionally be “non-legal” (such as dealing with vulnerable clients) and allow for the consideration of and practice with EDI in controlled, safe environments before application in the field. Collaborative, active learning, where student teams could encounter problems with EDI considerations built in, and have to work together to apply doctrine, consider context and propose answers (without being able to rely upon an authoritative “right answer” from the professor) result in better models for many legal environments. Multiple actors often must cooperate to solve legal problems, and teamwork would be a positive outcome of tackling EDI considerations. There would also be corollary benefits of better student learning, increased engagement in the classroom, and enabling those who may not wish to speak in traditional Socratic classes (themselves potentially affected by EDI considerations) to find meaningful class participation.<sup>30</sup>

Support for simulation and clinical work can be found by analogy with CAF efforts to teach EDI experientially. A consistent feature of military instruction is that of exercises, whether table top simulations or full field exercises with live ammunition, personnel and vehicles in austere environments. Practical training is held as the highest quality of educational validation possible except for actual deployments. In the most recent iteration of CoDE training,<sup>31</sup> members are asked to roleplay members confronted with ethical issues, with many fact scenarios including EDI considerations (such as gender) in realistic settings (e.g. comments from a Commanding Officer). A facilitator guides the group in discussing considerations and outcomes, with personnel encouraged to work through the problem and institutionally-possible outcomes. By presenting EDI as integral and native to the discourse of military training (group simulation, training on the ethics of the Profession of Arms), and operationally relevant (senior personnel are present,

<sup>29</sup> Lorne Sossin, “Experience the Future of Legal Education” (2014) 51:4 Alta L Rev 849 at 861 and 866.

<sup>30</sup> See generally Elizabeth A Reilly, “Deposing the ‘Tyranny of the Extroverts’: Collaborative Learning in the Traditional Classroom Format” (2000) 50:4 J Leg Educ 593.

<sup>31</sup> See Canada, *supra* note 5.

attendance is recorded and made mandatory), EDI is made functionally relevant to military members. Taking the insights from the legal scholars above, could the CAF itself draw insights in applying EDI to consider non-kinetic, traditionally “non-military” solutions to problems (whether practiced by themselves or other partners)? While this is contemplated in CAF Whole-of-Government approaches, it is typically not at the forefront of military training. Perhaps EDI can become a catalyst for observing the limits of military solutions in a complex world (as EDI considerations often do in the legal realm). In the longer term, such exercises should also stimulate internal reflections as to the personal and professional ethics of CAF members who aspire to do “the right thing.”

The above has placed emphasis on physical, in-person training (the default model for legal education as well as military training). But, as mentioned earlier in the article, not all training is in person. With the Coronavirus pandemic in 2020, legal academies and militaries have increased the use of technology in teaching. With respect to EDI, is this a boon or vice?

### **Technology: Solutions and Problems**

From the outset I adopt the position of technological ambivalence, that is that the benefits offered by new technologies are accompanied by disincentives that must be mitigated.<sup>32</sup> The legal education literature acknowledges both the possibilities and perils associated with technological use in the classroom. In his article largely focused on the success of remote learning in a South African law school (with students benefitting from asynchronous learning without needing to be physically present), Kolawole Sola Odeku acknowledges that student and teacher unfamiliarity with technology, lack of access to hardware and Internet, and socio-economic and psychological limitations are obstacles to effective legal education delivered virtually.<sup>33</sup> Nikos Harris provides a substantive critique of technology use in the legal classroom, arguing that laptops distract students, detract from the learning benefits of handwriting notes, and entice students to transcribe notes and rely on slides rather than actively engaging with course content and class discussion.<sup>34</sup> She provides the recommendation that these detrimental aspects could be ameliorated by the deployment of “flipped” classrooms (where modules with recorded substantive content are reviewed before class, with class time used to apply the material and discuss application) and

<sup>32</sup> See Penny Crofts & Honni van Rijswijk, “Stories of technology: The role of legal thinking in shaping techno-legal worlds” in *Technology: New Trajectories in Law* (New York: Routledge, 2021) 1 at 15.

<sup>33</sup> Kolawole Sola Odeku, “Conducting Law Pedagogy Using Virtual Classroom in the Era of Covid-19 Pandemic: Opportunities and Existing Obstacles” (2021) 11:1 J Educ & Soc Research 101 at 107.

<sup>34</sup> Nikos Harris, “The Risks of Technology in the Classroom: Why the Next Great Development in Legal Education Might Be Going Low-Tech” (2018) 51 UBC L Rev 773.



experiential learning,<sup>35</sup> presumably with technology as an adjunct to simulation (such as during moots in keeping a checklist or looking up facts and cases) and not distractions.

From the perspective of EDI within legal education, the socio-economic and psychological factors mentioned by Odeku can be quite insidious. Not everyone has the expertise, funds, and accommodating life circumstances where they can login outside the school without distraction, and the digital divide frequently disadvantages those most considered disadvantaged by EDI characteristics. Shifting to legal pedagogy, certain elements of human contact inherent in the law (such as being in the courtroom) are lost in virtual translation. Arguably this might be mitigated if the practice of law also moves to the virtual domain. However, the **teaching** of law remains a vulnerability. One can question the effectiveness of a lesson conveying the nuance of EDI within the law if it is a click through, “death by PowerPoint” experience. More prosaically, the move to virtual or hybrid instruction requires significant technical and institutional support. Odeku and Harris do not touch upon the significant courseware design and instructional technique adaptations required to make fully virtual or hybrid instruction effective. In my observations of hybrid instruction in the Winter 2022 term in the McGill Faculty of Law, hybrid engagement with physical and virtual students simultaneously was not always satisfactory, and would have been improved with specific techniques and equipment (such as having the instructor face a large screen and camera while also facing physical students, and having the students also see their virtual counterparts and their messages simultaneously). Perhaps the digital divide and the associated socio-economic factors of classroom technology could become a “teachable” moment for legal educators, as well as an illustration to students as to the market pressures facing professors<sup>36</sup> in the requirement to publish, lecture, and perform administration, without substantial teaching support. If success for law faculties and universities is measured in the number of students in lecture, without assessment as to how **well** students are taught, or whether EDI principles and application actually matter in assessment, there ought to be some cognitive dissonance, and for the legal academy some hard questions about the relevance of EDI in legal education, or if it is actually considering EDI principles vis-à-vis law students themselves.

As a quick aside from the perspective of CAF engagements with technology with EDI, remote learning (such as the self-paced, pre-recorded course on Indigenous Awareness) has existed for some time. Distance and asynchronous learning (such as flipped classrooms) has always been operationally necessary, as members are often posted and deployed away from physical educational

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<sup>35</sup> *Ibid* at 797-798.

<sup>36</sup> See e.g. Roderick Macdonald & Thomas McMorow, “Decolonizing Law School” (2014) 51:4 Alta L Rev 717.

grounds and subject to scheduling constraints (and most recently, required to work from home as part of pandemic public health measures). Unfortunately the same maladies that can afflict virtual and/or technologically-mediated legal education do so for CAF education. I have sat through virtual courses where CAF instructors did not see virtual questions until the end of class, or found that off-site students could not hear lecturers or in-person peers only after significant delays. Online courses are frequently filled with bugs, have access problems, or worse are exercises in rapidly clicking through slides and challenging multiple “guess” exams, with unlimited opportunities to retake the tests to pass. Little exists in the way of validation of EDI concepts, beyond not demonstrating visible EDI insensitivity in the course of duties or in the presence of other, not-like-minded military members. One insight from the legal academy that could be imported to the CAF is at least an acknowledgement of the digital divide and the shortcomings of virtual instruction (and potential mitigations). Having an institutional CAF message (implicit or otherwise) to just “figure it out,” pass the test and move on do not invest EDI (or other domains of knowledge presented remotely, for that matter) with the credibility essential in having bodies of knowledge accepted as native and important to the CAF.

## **Conclusion**

This paper presented a sketch of EDI with respect to legal education, drawing parallels to CAF EDI efforts. In no way systemically or empirically comprehensive, it proposed that for EDI to be effectively taught and practiced in law, it must be translated as “core” and native to legal discourse, or risk being relegated to becoming an irrelevant compliance exercise. Analogy was drawn for this suggestion from the experience of importing the concept of EDI into CAF operational discourses. The benefits of clinical and simulation methods of instruction for EDI in legal education and CAF contexts were framed in relation to the ability for practice to make abstract EDI principles concrete and relevant. Finally, the benefits and obstacles presented by the deployment of technologies in the classroom and implications for EDI (both in the substance of material taught, and impacts on teachers, students and institutions procedurally) were briefly highlighted, with room for improvement highlighted throughout. Looking back at the aspirations presented within the McGill Legal Education seminar, it should be unsurprising that this paper adopted a position that lawyers ought not be only “legal technicians”, just as soldiers should not be trained and socialized only as “death techs”. Professions aspire for something more from their members. In closing on this sentiment, the following challenge from David Sandomierski to legal educators (and I would extend this to CAF instructors charged with EDI dissemination) seems appropriate to bid farewell:

Truly operationalizing diverse theories about law into diverse visions of what it means to think like a lawyer – and, by extension, cultivating a vision of the lawyer as citizen – might require a more thoroughgoing introspection process. It might require instructors to ask intellectually honest questions of themselves about a series of interconnected questions: What do I believe about law? What do I believe about legal education? How do I imagine my teaching to contribute to students’ understandings of how they ought to contribute to society? Each of these questions is difficult and, with the possible exception of the first, rarely a first-order question in the contemporary social and political economy of the law school. But any possibility of actually translating theory into practice would require a full reckoning of these three questions as a prior exercise.<sup>37</sup>

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<sup>37</sup> David Sandomierski, “Transcending Langdell” in *Aspiration and Reality in Legal Education* (Toronto: University of Toronto Press, (2020) 327 at 331.