

The Future for Canadian Law Schools

LEE STUESSER *

I. INTRODUCTION

I have been asked to write an essay on the future for Canadian Law Schools. I won't do that for two reasons. First, looking into the future invites failure. Prognostications are invariably wrong. Second, law schools are very resilient to change, so for good or ill, in all likelihood the future for Canadian law schools may well mirror the present.

Rather than trying to predict the future, I will present an opinion piece on what I think Canadian law schools should do in the future. Whether they do so is entirely another matter.

In my view, law schools do need to change; they need to re-embrace their professional roots. What has occurred over the past 50 years is that Canadian law schools have drifted away from the profession and have become increasingly academic-oriented. This is both good and bad. Law schools do need to maintain a critical academic perspective, but too much academia is not good. The legal education pendulum, which once swung too much in favour of professional training, needs to swing back to a middle course. Law is both an academic and a professional discipline. In an ideal world, a law student should be educated both in the law and how to use that law in professional practice. I advocate for balance. Educational balance is desirable where practical skill training complements, reinforces, and enriches the study of law - where law schools teach law and lawyering. This is not a new or

* LL.B (Manitoba), LL.M (Harvard). The Founding Dean of the Faculty of Law, Lakehead University, Professor Stuesser is also the author of two texts on advocacy: *An Advocacy Primer*, 3d ed (Toronto: Carswell, 2005) and *Introduction to Advocacy*, 2d ed (Australia: Thompson Reuters, 2011). In addition, he is the co-author with Justice David Paciocco of *The Law of Evidence*, 6th ed (Toronto: Irwin Law, 2011).

revolutionary idea, and leading studies on legal education consistently say the same thing – less law and more lawyering.¹

The fundamental reality is that the vast majority of law students want to, and do, go on to practice law in its various forms at least for a time. For over 25 years I have asked the same question of my first year students in their first class: “How many of you are here because you want to practice law?” Virtually all raise their hand. Hardly an accurate poll of intent, but it is an indicator of a desire. If this is what the students want, how are Canadian law schools preparing them for the practice of law? The answer is – not well. They can do better.

The argument advanced by some is that a law school is not there to train lawyers; it exists to educate students in the law. They rely on the fact that not all law students go into legal practice. True, some students do not. However, this misses the point. The true value of a law degree is not in the law, but in the skills of lawyering that we develop in our students. These skills will serve students well inside and outside of legal practice. Nor should programs of study be based on what a few don’t want, which creates law programs, quite frankly, where the tail wags the dog.

Another reality is the rising cost of legal education. With the University of Toronto on track to break the \$30,000 tuition barrier, other law schools will gladly follow raising tuition not because it is justified, but because they can.² The result is increased student debt, which it is assumed will be paid for through professional salaries. Students will ask for, if not demand, more accountability. They will not be satisfied with an expensive liberal arts law degree, but look for strong skills to help them succeed in the work force. Students are pragmatic, and they want value for their tuition buck.

As a starting point law schools need to acknowledge that for all intents and purposes they are the gatekeepers of the profession. Few students fail law school these days; fewer still fail the bar admission examinations or programs.³ Unless and until the bar admission process becomes more rigorous, law schools are it.

¹ See Carnegie Foundation, *Educating Lawyers: Preparation for the Practice of Law* (San Francisco: Jossey-Bass, John Wiley & Sons, 2007) [Carnegie Report]; American Bar Association, *The Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, (Chicago: American Bar Association, 1992) [MacCrate Report].

² For a critique of the high cost of legal education in the United States, see Brian Z Tamanaha, *Failing Law Schools* (Chicago: University of Chicago Press, 2012).

³ David Tanovich, “Learning to Act Like a Lawyer: A Model Code of Professional

In this essay I will deal with two key questions, 1) Why the need to change? and, 2) What change?

II. WHY A NEED FOR CHANGE?

Any argument advocating change must start with what is wrong with the existing status quo. A snapshot of Canadian law schools shows that they are the envy of the common law world. The schools are, in relative terms, small. They have their own buildings, own classrooms and some have charge over their law libraries. Professors are well paid, expected to teach less than in other faculties, and generally are well supported. The picture sketched looks good.

The problem is Canadian law schools for too long have had it too good. Over the last 50 years there has been little or no oversight of their programs. They have a captive market; students will come regardless as to the quality of the program of study. Application numbers may fluctuate, but when there are ten applicants for every spot it matters little if that goes down to eight applicants per spot. Law schools in Canada essentially could do much as they pleased and they have done just that. Complacency is a dangerous thing.

During this period of *laissez-faire* legal education the law schools slowly divorced themselves from the profession. There were a number of contributing factors. First there is geography. Legal education, which had once been the preserve of the profession, was passed to the university law schools. Law schools moved away from the courts. The argument was that law needed to be more critical, more academic, and more independent; therefore, it was prudent to break the apprenticeship mold where students were constantly drawn back to working in law firms whilst studying.

Geography matters, as long distance relationships are hard to sustain. So it was that Osgoode Hall Law School moved to York University and away from the courts of Osgoode Hall. In Manitoba, legal education moved from the downtown courts to the University of Manitoba campus. Maintaining contact with the profession became more difficult; it required a bit of travel and it required work.

Secondly, there is neighbourhood. Law schools were new to the university block. In some respects they are not a good fit, especially with the non-

professional, arts and science faculties. The law school has guaranteed student demand; other faculties struggle for students. Law is a practical discipline; other faculties are more theoretical. Further, law is largely a second degree, as most applicants have already completed a true undergraduate degree. This means that law schools often do not fit well within the undergraduate/graduate divide. However, once in the neighbourhood the pressure to conform grows, especially as university administrations like centralized uniformity. What is particularly important is the university input on tenure and promotion; pressure grows to have law faculties conduct research like the other faculties – theory prevailing over practice – and for law faculties to have the university PhD credential. And, as expected, university law faculties developed more contacts with the other faculties on campus as opposed to the profession downtown. You change neighbourhoods and your friends change; old friends are replaced by new.

Thirdly, there is the law professoriate. Thus far, I have been referring to law school change. Law schools of course do not effect change – people do. Law professors are responsible. The professoriate in law schools changed. Initially the elder, experienced, practitioners held sway. They then were replaced. The new professoriate is different. They are far more academically oriented; they are more comfortable speaking with fellow academics as opposed to lawyers and judges. For some schools the prerequisite for a full time tenured appointment is a PhD. Education is prized over experience.

Law professors are individuals all, but I will group them into three broad categories: 1) the social sciences and humanities researcher, who pursues interdisciplinary research and whose audience is primarily other academics; 2) the doctrine scholar, who writes texts, case notes and comments, whose audience is primarily the judiciary and legal profession; and 3) the clinical practitioners, who examine skill education and practice issues, whose audience is primarily other clinical instructors, educators and the legal profession. Instead of embracing diversity and recognizing the strength that the various groups bring to the whole, group infighting occurs. Instead of fighting for diversity, intolerance prevails. The greater good is sacrificed to support a particular vision for a law school. Clinical faculty, in particular, are the most vulnerable and the most marginalized.

The net result is that the new cadre of law professors started molding law schools in their own images. Programs emphasize choice over doctrine. Interdisciplinary “Law and ... courses” grow. Structured programs gave way to complete course freedom after the first year. Research essays became the core

writing exercise. Professor Doug Ferguson, a leading clinical law instructor at the University of Western Ontario, in conversation put it well: “Law schools are preparing professors not lawyers.”⁴

A. The Winds of Change

Recently, however, change has been foisted on the law schools. The impetus for change came from the Law Societies. First, in 2007 new Canadian law schools sought to be established.⁵ Up until then the last law school in Canada was founded in 1980 and for almost thirty years the Law Societies across Canada had essentially done nothing with respect to regulation or professional oversight of law schools.⁶ New schools presented a dilemma for the Law Societies, because it forced them to ask what it meant to be a law school. What criteria should be in place before a law school is accredited?

The second development was the influx of foreign trained Canadians, who for the most part were not able to get into Canadian law schools, and who instead went overseas to the United Kingdom or Australia to obtain a law degree. The numbers of foreign legally trained Canadians steadily grew and most wanted to return to practice law in Canada. Their qualifications were assessed individually by the National Committee on Accreditation (NCA). It was required that they have a legal education equivalent to a Canadian law degree. What does this mean? What are the standards for a Canadian law degree?

The problem was that there really were no set standards. What was demanded of the foreign trained law graduates amounted to a complete crapshoot. I say this from experience. For a number of years I taught at Bond University, which has established a Canadian law program. At any one time there were between 150 and 200 Canadians studying at Bond – most intent on returning to Canada. Upon graduating, they would present their credentials to the NCA and, prior to 2007, they often would have between six and eight subjects to make-up either through NCA examinations or by

⁴ For an excellent discussion of changes in legal education see Graham Lilly, “Law Schools Without Lawyers? Winds of Change in Legal Education” (1995) 81 *Va L Rev* 1421.

⁵ These schools included Thompson Rivers University (Kamloops, BC) and Lakehead University (Thunder Bay, ON).

⁶ For a review of legal education in Canada see Harry Arthurs, “‘Valour Rather Than Prudence’: Hard Times and Hard Choices for Canada’s Legal Academy” (2013) 76 *Sask L Rev* 73.

studying at a Canadian law school. The subjects varied, but often included tax or family law. Herein lies the rub: the NCA was imposing standards not required of most Canadian law students, who could graduate without taking administrative law, trusts, evidence, tax, family law or many other NCA mandated subjects.⁷ A strong case could be made that the Law Societies through the NCA were setting arbitrary barriers for foreign trained law graduates.

Where was the transparency? Where were the objective standards set for accreditation? The law societies, as self-regulating bodies, needed to justify their accreditation processes and ensure fair access to the legal profession. Such was mandated by legislation in certain provinces.⁸ So it was that in 2008 a Task Force on the Canadian Common Law Degree was struck by the Federation of Law Societies of Canada to examine the Canadian common law degree. Flowing from the Task Force Report accreditation criteria were established.⁹ The Law Societies' hands-off approach to the law schools became hands-on. Canadian law schools are now required to report to the Federation annually, outlining not only their programs of study, but staffing, resources and support.

Ironically, at the same time as the Law Societies are becoming more engaged in law school education they are at once providing less and less professional education for law graduates. The Bar Admission course in Ontario is no more. Other law societies are moving away from in-person instruction to online. And in the recent debate over articling in Ontario a minority report in the Articling Task Force advocated abolishing articling entirely.¹⁰ What we see, therefore, is an offloading of lawyer training by the Law Societies. This then increases the gap between universities and the

⁷ Some law schools maintain extensive mandatory requirements however; for example, Robson Hall at the University of Manitoba requires Administrative, Tax, Family, Evidence, Corporations, Civil Procedure, and the Law of Trusts in addition to their typical black-letter law first year course requirements.

⁸ See e.g. *Fair Access to Regulated Professions Act*, SO 2006, c 31 (Ontario); *The Fair Registration Practices in Regulated Professions Act*, SM 2002, c 21 (Manitoba).

⁹ See Federation of Law Societies of Canada, *Task Force On The Canadian Common Law Degree, Final Report* (Ottawa: Federation of Law Societies of Canada, 2009).

¹⁰ The Law Society of Upper Canada, *Articling Task Force: Final Report, Pathways to the Profession: A Roadmap for the Reform of Lawyer Licensing in Ontario* (Toronto: LSUC, 2012) [LSUC Report].

practice of law. In the absence of law societies filling the gap law schools will need to do so.

III. WHAT CHANGES?

Harry Arthurs, long a leading legal educationist in Canada, in a recent article argues that law schools should fight back.¹¹ He advocates resistance. He is concerned about what he regards as “legal fundamentalism” and urges “anti-fundamentalism”. What he is really arguing for is the status quo and I disagree.

Let’s change the labeling: “legal fundamentalism” to “professionalism” and “anti-fundamentalism” to “anti-professionalism”. Rather than fighting the Law Societies, I think that the best and most positive course for the law schools is to work with the Law Societies and, call me a “fundamentalist”, I do think our law schools need to become more “professional”.

In this portion of the essay, I intend to outline certain propositions that reflect my vision for a “professional” law school. Throughout I will refer specifically to what we are doing at Lakehead University to illustrate. The Faculty of Law at Lakehead University is Ontario’s newest law school and will open its doors to its inaugural class in September 2013. As Founding Dean I have a unique opportunity to build a law school from the ground up and I was hired with a mandate for change.

A. Proposition 1: Law Schools Can Do More in Their Three Years

There is a saying about legal education:

“In first year we scare the students to death;
In second year we work them to death; and
In third year we bore them to death.”

There is much truth in this saying. Certainly the learning curve for students is highest in first year and the third year often is a filler year. Could we do a law program in two years? Probably.

For example, in Australia a JD degree requires 24 three credit courses, a total of 72 credit hours of instruction. This could be achieved in two years by having students take six courses per semester. In Canada the minimum

¹¹ Harry Arthurs, *supra* note 6.

number of hours mandated by the Federation of Law Societies is 90 credit hours.

So it is that the three year Canadian law degree is leisurely undertaken. In a pedagogically questionable way we tend to have the first year set at 32-36 hours and then we reduce the course load in upper years. Yet presumably upper year students, experienced in reading law, should be able to handle more.

This contradictory educational weighting, at least in Ontario, may well be the result of government funding. The Ontario government only funds for 15 credit hours of instruction per semester. Of course, the Ontario funding allocation is only approximately \$5,000 per student; students are now paying far more in differential fees. Should they not be getting more bang for their buck? Yes.

At Lakehead we intend to have 36 credit hours of instruction per year of study. This totals 108 credit hours over the three years, which means almost a full semester more of instruction over the course of the program than for other law schools.

B. Proposition 2: Fuse Theory With Practice

Students will learn and understand legal theory far better if they use that theory in practice. We tend to isolate and at times marginalize skill courses to their separate solitudes. For example, most law schools have a stand-alone first year legal writing course. This then means the other first year courses can ignore writing and proceed on the basis of examinations and often with no other interim assessment. Integrating skills into substantive courses makes sound pedagogical sense.

This idea is not new. I stole it from the Faculty of Law at Bond University in Australia. A distinguishing feature of Bond's program is integrating skills into its core courses. Bond's skill program is a real success and it has the added benefit of involving the substantive law professors in skills.

In the first year program at Lakehead all the core courses will have assigned skill exercises. The following table shows the allocation of skills.

Skill Allocation by Course	
Course	Skill Component
Constitutional Law	Written and oral argument
Contracts	Drafting and negotiation

Skill Allocation by Course	
Criminal Law	Oral submissions in court
Foundations of Law	Legal research
Native Canadian World View and Law	Written communication
Property	Tri-party negotiation
Torts	Legal brief writing

Instructors will have to incorporate into their courses skill instruction and, of course, mark or oversee all exercises. They will have assistance. Local practitioners have been appointed tutors, in part, to assist with the delivery of the skills.

Each skill set complements the substantive law. Consider contracts. When I studied contracts we read case after case, but never an actual contract did I see. In the first year contracts course at Lakehead the students will negotiate the terms and draft a contract.

C. Proposition 3: Law Schools Need More Practitioner-Scholars

Faculties of law need to respect the strength of diversity in staffing and I recommend the hiring of more practitioner-scholars. As a professional faculty law schools need the freedom to hire professionals. At present, many individuals who are interested in skill education are hired on term contracts or on adjunct appointments. Simply put - they are marginalized. That is wrong. They deserve equal treatment and that means full time tenure track appointments. Faculties of law within the university community need to assert their professional independence. Other faculties in the university may look at a PhD as being a fixed requirement for tenure track appointment. Law schools should not. Law schools need lawyers as well as doctors.

In hiring at Lakehead we are fortunate in that the governing collective agreement between the academic staff and the university recognizes scholarship in a variety of forms and we, as a new faculty, could establish our own benchmarks. We opted for a broad search statement seeking excellent candidates by way of academic record or experience. In the end, for the first year hiring we have two staff who have PhDs and two without. One staff member comes to us with extensive practice experience, and all of the new staff have some practical experience. All are willing and interested in integrating skills into their courses.

D. Proposition 4: Skills Require Progression

Skill education takes time. One-off exercises or courses do not make for a quality skills program; nor do a smattering of ad hoc elective clinical options. Skills should be incorporated into the whole program where skills build upon each other. Educationalists like to use the term “scaffolding”.

At Lakehead our program begins with identified integrated skills in year one. These can be mapped and coordinated throughout the term. In second year there is a mandatory full year civil practice course. In this course students will take a raw fact situation, craft it into a cause of action, move it through the civil process on to trial and then on to appeal. It is an ambitious course, and it builds on the skills identified in year one. In year three students have further skill courses in specific subject areas, and will have an opportunity to work in placements outside of the law school or within a student legal aid clinic. Their “live client” experiences, in turn, build upon the skills developed in the year two civil practice course. Our skill program is mandatory and available to all of our 55 students.

E. Proposition 5: Skill Teaching Need Not Be Expensive

There is a fallacy that skill education has to be expensive. Quality skills education can be provided economically. At the high end in terms of costs is the law school clinic; however, low end simulation exercises using practitioner instructors are not that costly.

For example, at Lakehead we are introducing tutorials in first year. Each tutorial will be capped at no more than 10 students. Practitioners will lead the tutorials, with each receiving a \$1000 honorarium. They are doing this not for the money, but to support the law school’s program. In second year, the civil practice course will be taught by one full time member of faculty and he will be assisted by six practitioner adjuncts. They will act as senior partners in a firm, acting as mentors to the 8-10 students assigned to the firm. Each adjunct is paid as a sessional instructor. The net cost for the civil practice course will be approximately \$40,000.

IV. PUTTING IT ALL TOGETHER

In 2007, the Carnegie Foundation Report, *Educating Lawyers*, recommended a more professionally focused law program, where practical

skill training would be integrated with learning the law.¹² The Report favoured a medical education model, with hands on practical training.

The Law Society of Upper Canada, in its recent Articling Task Force Report, was much influenced by the Carnegie model.¹³ The Task Force on Articling was formed in response to the so-called “articling crisis” in Ontario. In simple terms, the demand for articling places exceeds the available places (primarily in the Greater Toronto Area). Qualified law graduates are being denied an opportunity to practice law because they cannot get an articling position – at least in Toronto. The solution, according to the Task Force majority is to create an alternative pathway to practice. The solution for the minority in the Report is to abolish articling entirely.

The majority position was accepted by the Law Society of Upper Canada. Accordingly, the Law Society of Upper Canada is moving forward with a pilot Law Practice Program (LPP), which is comprised of two components: a training course and a co-operative work placement.¹⁴ Both components would be for approximately four months duration and would be taken by law graduates after completing their degree. The Law Society has put a call out for proposals by prospective providers.

However, in the Articling Task Force Report, the door was left open to the law schools to become involved. After all, the Carnegie Report was about law school education. Paragraph 120 of the Task Force Report reads as follows:

Although the pilot project the Task Force is recommending will take place after law school, the Task Force is of the view that this would not and should not preclude a law school that wishes to propose a Carnegie-like law degree from seeking approval from the Federation’s Common Law Approval Committee and exploring with the Law Society whether its practical component could satisfy part or all of the transitional training requirements. In the Task Force’s view there is nothing to preclude such a proposal, properly framed so that it meet the goals of transitional training, and approved, from operating alongside the pilot project.¹⁵

The Faculty of Law at Lakehead University is prepared to work with the Law Society and it has proposed an integrated LPP, which will be achieved

¹² Carnegie Report, *supra* note 1.

¹³ LSUC Report, *supra* note 10.

¹⁴ The Law Society of Upper Canada, *Request for Proposal for Law Practice Program* (1 February 2013) online: LSUC <<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147491646>>.

¹⁵ LSUC Report, *supra* note 10 at para 120.

over its three year JD and will include a semester placement. Lakehead is doing Carnegie.

The proposal to incorporate LPP and placement into the JD program furthers the mission of the Faculty of Law at Lakehead University to serve Northern Ontario and to provide better access to justice in rural Canada. Integrating LPP into the JD degree allows students to remain in the North for their legal education, professional training, and for placement. Placements will be sought within Northern Ontario and in smaller centres; areas where today articling positions are not plentiful, but where the need for new lawyers is high.

The proposal is innovative but not without precedent. Flinders University School of Law in Australia provides a combined LLB and Legal Practice program. Students who complete the Flinders program are accredited by the Law Society of South Australia.

Most importantly, the Lakehead proposal will not cost the students additional fees or time. The existing JD tuition will include the LPP training and placement. We are able to do this because of our increased course load. We are packing more into the three years of study, which will save students time and money.

What we are proposing – and it has not yet been accepted by the Law Society of Upper Canada – is the right thing for Lakehead and for our communities in the North. We are also able to do it because of our small size. Other law schools may follow suit; they may not. It is important to recognize that there is no one way to teach the law and there is richness in diversity. Different schools can and should have different strengths. There is room for niche schools; there is room for regional schools; and there is certainly room for more professional schools.