

The State of Experiential Education in Canadian Law Schools*

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I. INTRODUCTION

Thank you very much for inviting me to speak to you today. It is indeed an honour to be here.

My topic today is the state of experiential legal education in Canada. I will begin my talk with a review of the current state of experiential education in Canada's law schools, with some references to the US experience.

I will then suggest a goal for experiential legal education, and to conclude, I will make some suggestions on how we can achieve an expansion of experiential education in our law schools.

I have grouped experiential education into four types:

1. Clinics
2. Pro Bono Students Canada
3. Placements or Externships
4. Simulations in class

I have broken down clinics in turn into four subgroups:

1. Representational
2. Information
3. Advocacy
4. Placement.

* This article is the text of a speech presented to the Association for Canadian Clinical Legal Education conference held at Robson Hall, Faculty of Law at the University of Manitoba on 19 October 2012

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The best known and most common type of clinic is what I call the representational clinics that were created here in Canada in the early 1970s. Law students represent low income clients in the courts and before tribunals where students are allowed to appear.

Their funding varies. The strongest funding is in Ontario where the clinics are funded by Legal Aid Ontario and by student fees, with little direct funding from faculties.

Students are supervised by in-house lawyers. Almost all supervising lawyers are not members of faculty (in the US about half of them are). This affects their status within the faculties in a negative way.

The most important common denominator among the student clinics is that students can handle all aspects of a file, just as in private practice – client interviews, drafting pleadings, research, opinion letters, conducting trials. They do so under close supervision of the clinic lawyers, and they get much more attention and one-on-one instruction than most articling students would.

Almost all clinics handle criminal, landlord and tenant, and small claims court. They all handle other areas of law depending on local need.

For example, my clinic at Western also handles public legal education, mediations, wills and powers of attorney, immigration, and intellectual property. Most have credits attached to clinic work.

I have broken down representational clinics into three kinds:

1. Intensive clinics, where a small number of students spend an entire semester working in the clinic, handling dozens of files. The Parkdale clinic at Osgoode Hall is one such clinic. They receive credits equal to 4-5 courses.
2. Course driven clinics, where a larger number of students take one clinic course along with other courses, handling 5-10 files. The credits received are usually the equivalent of one course.
3. Volunteer clinics, where no course credits are offered.

Representational clinics offer many advantages to law students. They are in an environment very similar to a law firm. They handle all aspect of a case from beginning to end. They docket their time. They appear in court. They draft documents.

This not only gives them an advantage in getting an articling job, but it gives them a leg up when they start articling, as other non-clinical students will not necessarily know how to manage a file.

There is an altruistic side as well. By working with low income clients, some develop an interest in working in the legal aid system, and have an appreciation of the importance of pro bono work.

Aside from the representational clinics, there are informational clinics that simply dispense legal information, such as McGill's legal information clinic.

There are also a number of advocacy clinics, such as Victoria's environmental law clinic, and Ottawa's Canadian Internet Policy and Public Interest Clinic. These clinics advocate for a cause or raise issues of public policy.

Finally there are a few placement clinics, such as Osgoode's Intensive Program in Aboriginal Lands, Resources & Governments. In these clinics students are placed in government or an NGO to work on legal issues.

The advocacy and placement clinics do valuable work, but they are somewhat limited in scope, and usually have a small volume of students.¹

Leaving the clinical scene, the next type of experiential education is through Pro Bono Students Canada (PBSC).² PBSC has chapters in every Canadian law school, and has 1,600 students per year volunteering.

This is a strictly volunteer program with no course credits. One of their most successful programs is the Family Law Project, where students assist self-represented litigants fill out their family court forms. At Western we are doing that plus a Small Claims Court project of the same kind.

PBSC also work with NGOs to provide legal education, some placements for students, and information on legal issues under the supervision of a member of the bar.

PBSC does not offer representation. Its activities are organized by law students under the supervision of a faculty member, law faculty staff person, or a member of the private bar.

The next kind of experiential learning is placements or externships. This is huge in the US, with staff members hired by faculties to run their externship programs. There are regular national conferences in the US on externships; the last one was in Boston in 2012.

¹ There are no representational clinics in Quebec as students are not allowed to appear in court in that province. Note also, that there are no clinics in New Brunswick. My understanding is that this is a funding issue.

² See Pro Bono Students Canada, *PBSC Chapters*, Online: PBSC <<http://www.probonostudents.ca>>.

In Canada, externships are not as common. As I mentioned earlier, some clinics do placements, as does PBSC. Overall, externships are spotty, and there is a variance as to the amount of time the students spend on or on the kind of work they do.

Generally externships are with NGOs, government, or the judiciary.³

The final category of experiential learning is simulations done in class. I define this as doing in class what one would normally do for a client in private practice. For example, drafting a will, or drafting pleadings.

There are no statistics and no research on what is happening in the classrooms in Canadian law schools. This would be a useful area for further research.

II. SO WHERE IS LEGAL EDUCATION HEADED IN THE 21ST CENTURY?

There are big changes afoot. Legal education started as an apprenticeship where one worked for a practising lawyer for a number of years, and eventually learned enough to be called to the Bar.

The legal education of our first prime minister, Sir John A. Macdonald, took this form in the early 19th century. You learned by doing, without much guidance or academic training in your education.

In the late 19th century, Langdell and the Harvard method took over. Legal education became academic, achieved through the university system. They created the case method, which provided analytical tools to lawyers. This was well and good, but it was limited to just one thing: case analysis. Other skills were not part of the equation. This model is over 100 year old, and is the legal education that most of us in this room received.

Now, with the advent in the US of the MacCrate Report in the early 1990s⁴ and the Carnegie Report in 2007,⁵ legal education there is headed to

³ The University of Manitoba offers externships in the form of judicial Clerkships at the Queen's Bench and Court of Appeal levels, as well as in Corporate Clinical Internships and one offered through the local Legal Help Centre.

⁴ American Bar Association, *The Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, (Chicago: American Bar Association, 1992).

⁵ See Carnegie Foundation, *Educating Lawyers: Preparation for the Practice of Law* (San Francisco: Jossey-Bass, John Wiley & Sons, 2007).

the Carnegie model where practical skills and ethics are integrated into the theory taught under the Harvard model.

Big changes are under way in the US law curriculum to implement the Carnegie model. For example, Washington and Lee law school in Virginia has implemented an experiential learning curriculum for third year. Northeastern now has a co-op program with three months in class followed by three months in a placement. Harvard Law School now has a first year course in problem solving.

What about Canada? We have not progressed very far. Change has been very piecemeal.

I believe that experiential learning in law schools will better prepare law students for the practice of law, and will provide the profession and our clients with better, more competent lawyers.

Osgoode Hall has taken the lead by implementing a requirement for an experiential course in order to graduate, although it only requires one such course.

The biggest obstacle is from university law faculties. Some have expressed a fear that law school would be considered a “trade school.” I find that comment interesting as Canadian medical schools have a third year that is entirely clinical. I don’t recall anyone referring to medical schools as trade schools.

Some law faculty members feel that teaching practical skills is not a university’s role, or is somehow less important than substantive law.

Another issue is that most law professors have little or no experience in private practice and therefore may not be in a position to teach practical skills.

Before going further, I want to point out that I am not being critical of law faculty members in Canada. The academic system for our law schools has been set up so that there is no reward or recognition for professors who integrate practical skills or add in-class simulations. What is rewarded is research. Faculty members have to play ball with the system if they are going to achieve tenure and recognition.

I don’t believe law schools will reform their curriculum on their own. There is no incentive for them to do so.

They still receive thousands of applications, and they can still fill their seats many times over. And that is part of the problem in Ontario – they have been increasing the number of seats, which is one of the reasons for the

articling crisis (the other reason being increased demand from international students or lawyers).

I believe that only pressure from external forces will result in curriculum reform. I see three “pillars” of external forces that can be brought to bear on law schools.

The first pillar is the Federation of Law Societies of Canada, which has recently set national standards for the call to the bar.⁶ They are in a position to set significant standards for experiential learning in order to be called to the bar, just as the American Bar Association sets standards for US law schools.

The second pillar consists of organizations representing the profession, such as the Canadian Bar Association and its provincial branches, who can make their position known to law schools.

The third pillar is the articling crisis in Ontario.⁷ The high rate of unemployment among law school graduates will, I believe, result in pressures (perhaps from the students themselves) to provide more practical skills training that can assist students in being hired.

I am making two recommendations today. First, we need a national debate on legal education.

We need to ask ourselves the basic question: what is the purpose of legal education? Is it to produce graduates with law degrees? Or is it to produce lawyers?

When was the last time that all the stakeholders got together and talked about it? I suspect it was more than 50 years ago. This lack of contact between law schools and other stakeholders in the justice system has created silos where the law schools operate with little discussion with the profession about the changes in the practice of law and the skills graduates need. I suggest that law schools, law societies, the CBA and other lawyer-driven organizations, the

⁶ See Federation of Law Societies of Canada, *NCA Resources FAQ*, online: FLSC <<http://www.flsc.ca/en/nca/nca-resources/faqs/>>.

⁷ See e.g. Heather Gardiner, “On the cusp of change”, *Canadian Lawyer 4Students* (February 2013) online: *Canadian Lawyer Magazine 4Students* <<http://www.canadianlawyer.com/4538/on-the-cusp-of-change.html>>; Jeff Gray, “Law profession faces an ‘articling crisis’”, *The Globe and Mail* (1 November 2011) online: *The Globe and Mail* <<http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/law-profession-faces-an-articling-crisis/article4250405/>>.

judiciary, law students, and the provincial governments should play a role in this important and long overdue debate.

Second, there has been little research done in Canada into law school education in the context of its contribution to competencies needed in practice. We need facts and figures in order to determine where we are and where we need to go. Perhaps the provincial law foundations and law societies could fund these efforts.

I want to make one last point in concluding. We will need to think about the costs of curriculum reform.

To expand clinical offerings would be very expensive. Clinics would need more supervising lawyers, more space, and other associated costs. On the positive side, expanded clinics could serve more clients not covered by legal aid.

Simulations and externships would have minimal costs and would have the added benefit of ensuring closer contact between law schools and the profession.

But who pays?

It could be done through higher tuition, but tuition is already extraordinarily high for law students. Another option is higher fees for the call to the bar, which also hits the students. In this time of austerity, it is unlikely that the provincial governments would be prepared to contribute. The only other source is the profession itself. A debate on the future of legal education should include the difficult issue of the cost of reforms.

This is an exciting time to be involved in legal education. The practice of law is changing rapidly and law schools need to adapt to these changes. The outcomes of the debates we are about to undertake will have a huge impact on the legal profession of the 21st century. Let us begin the debates now.

Thank you.

